AN UPDATE ON JOHN DOE DNA PROFILE ARREST WARRANTS

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Over the past 12 years, there has been a dramatic increase in the use of DNA testing in criminal litigation throughout the United States. DNA technologies continue to evolve with the development of more advanced scientific testing methods and the variety of biological types of DNA able to produce results for the courtroom continues to expand. These advancements in DNA technology require law enforcement to re-examine the effectiveness of present forensic investigative techniques. The development of STRs has added new dimensions for police in investigating crime and for prosecutors in the utilization of DNA evidence in the courtroom. The development of convicted offender databases has also generated new legal and practical issues when a "cold hit" is obtained. The uniqueness of today's DNA profiles developed from unsolved, non-suspect sexual assault cases allows the prosecutor to issue criminal complaints and warrants for arrest based upon an unnamed assailant's genetic code. This DNA technology is the moving force behind changes to or exceptions to statutes of limitations involving sexual assaults around the country.

In September of 1999, the Office of the District Attorney for Milwaukee County issued a warrant for the arrest of "John Doe" who was only identified by a genetic code. The warrant for the arrest of "John Doe" was issued a few weeks before the expiration of the statute of limitations. Since the issuance of that first "John Doe" warrant, Milwaukee County has issued 15 warrants for arrest in sexual assault cases based solely on the assailant's genetic code.

By complaint filed December 4, 2000, in Milwaukee County case no. 00CF5987, the State charged "John Doe #12" with one count of kidnapping, contrary to Wis. Stat. sec. 940.31(1)(a) (1993-1994), and four counts of first degree sexual assault, contrary to Wis. Stat. sec. 940.225(1)(b) (1993-1994). On the same day, a circuit court judge found probable cause in the criminal complaint and issued an arrest warrant for "John Doe #12." The criminal complaint alleged that on December 7, 1994, an unknown male accosted a 15-year old female at a bus stop in Milwaukee and forced her at gunpoint to a nearby car lot. There, the assailant tied the victim's hands behind her back and covered her eyes with her ear warmers and knit cap, then led her to a car, pushing her inside. After driving a short distance, the assailant stopped the car, untied the victim's hands, removed her coat and dress and forced the victim to perform fellatio on him. The victim was subsequently transported to the Sexual Assault Treatment Center in Milwaukee where oral swabs were taken from the victim. State Crime Lab testing on March 30, 1995, revealed the presence of semen on the evidentiary samples. Subsequent DNA analysis, using the polymerase chain reaction ("PCR") method was performed on the semen, developing a DNA profile that was foreign to the victim at 13 genetic locations. This DNA profile was included in the captions of the criminal complaint and arrest warrant to identify the unnamed defendant. On February 27, 2001, the State Crime Lab made a "cold hit" and determined that John Doe #12's DNA profile matched the DNA profile of one Bobby R. Dabney contained in the known offender databank. This was reconfirmed by the State Crime Lab on March 7, 2001. On March 12, 2001, the State filed an amended criminal complaint substituting the name of defendant Bobby R. Dabney for "John Doe #12" in the original criminal complaint. Dabney was subsequently bound over for trial at a preliminary hearing on April 12, 2001. On June 22, 2001, the defense attorney for Bobby Dabney filed a motion to dismiss on grounds that the original complaint based on the defendant's DNA profile was insufficient and should not toll the six-year statute of limitations, which otherwise would have expired three days after the complaint was filed. Dabney also argued that the State's delay in commencing the prosecution violated his right to due process of law.

On July 16, 2001, the Milwaukee County District Attorney's Office responded to the motion to dismiss basically maintaining that DNA is the most reliable and accurate identifier today and that

John Doe DNA profile warrants satisfy the statutory requirement. According to Wis. Stat. sec. 968.04(3)(a) 4, an arrest warrant based on complaint must "[s]tate the name of the person to be arrested, if known, or if not known, designate the person to be arrested *by any description by which the person to be arrested can be identified with reasonable certainty*." Consequently, a charging document or arrest warrant naming an unnamed defendant as "John Doe" is sufficient if the description of the defendant is detailed enough to enable the defendant to "be identified with reasonable certainty." Under Wis. Stat. sec. 939.74(1), prosecution for a felony "must be commenced within six years." Under this provision, "a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed." Thus, if the complaint and arrest warrant based upon a genetic profile are sound, then they are not time-barred under Wis. Stat. sec. 939.74(1). By decision and order of August 31, 2001, Milwaukee County Circuit Court Judge Jeffrey R. Wagner denied the motion of the defense to dismiss ruling that a person's DNA profile is unique. The trial court noted that a person can readily change his or her name, address and physical appearance, so that such identifying information in a criminal complaint may be of limited value to law enforcement authorities in locating a charged defendant in a particular case. The trial court ruled that there is no description more reasonably certain than DNA, that the law must catch up with the advances in science, that the identification by genetic code was legally sufficient, and that prosecution was commenced within time limitations. The defense for Bobby Dabney subsequently filed a petition for review with the appellate court in the State of Wisconsin.

Post hoc support for the proposition that a DNA profile is sufficient to commence a prosecution may be found in the Wisconsin Legislature's recent amendment of Wis. Stat. sec.939.74, governing the statute of limitations for criminal prosecution. Newly enacted Wis. Stat. sec. 939.74(2d) (b) provides:

> If before the time limitation under sub. (1) expired [the six-year period for felonies], the State collected biological material that is evidence of the identity of the person who committed a violation of s. 940.225(1) or (2), the State identified a [DNA] profile from the biological material, and comparisons of that [DNA] profile to [DNA] profiles of known persons did not result in a probable identification of the person who is the source of the biological material, the State may commence prosecution of the person who is the source of the biological material for violation of s. 940.225(1) or (2) within 12 months after comparison of the [DNA] profile relating to the violation results in a probable identification of the person.

This new legislation creates an exception to the time limits for prosecuting sexual assault cases in certain circumstances if the State has DNA evidence related to the crime. The State may commence prosecution of the person who is the source of the biological material within 12 months after comparison of the DNA profile relating to the sexual assault results in a probable identification of the person. These statutory changes were effective September 1, 2001. In effect, although this legislation plainly does not apply to Dabney's case, it reflects legislative recognition that DNA profiles are a sufficient means of identifying sexual assault offenders.