

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

CASE NO.: 00CF005987

BOBBY DABNEY,

Defendant.

STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

PROCEDURAL HISTORY

In the early morning hours of December 7, 1994, the victim was waiting for a bus when she was approached by an unknown male individual with a handgun who forced her into a car and subsequently sexually assaulted her. Although the victim immediately reported the sexual assault and was transported to the Sexual Assault Treatment Center for the gathering of evidence relating to the attack, the assailant was not immediately identified.

On December 4, 2000, shortly before the expiration of the six year statute of limitations, the Milwaukee County District Attorney filed case no. 00CF005987 against John Doe #12, unknown male, with matching deoxyribonucleic acid (DNA) profile listing the 13 genetic locations pertinent to the matching identification. John Doe was charged with one count of kidnapping (Wisconsin Statute sec.940.31(1)(a)) and four counts of first degree sexual assault (Wisconsin Statute sec.

940.225(1)(b)). Upon the filing of the complaint and a finding of probable cause, a circuit court judge issued an arrest warrant for John Doe #12, who was described by his DNA profile. The criminal complaint stated that the probability of selecting an unrelated individual who would have a DNA profile matching the 13 specified genetic locations was approximately 1 in 75,000,000 in the Caucasian population, 1 in 630,000,000 in the black population, and 1 in 1.5 billion in the Hispanic population. In accordance with Wisconsin Statute 968.04(3) subsections 7 and 8, the criminal complaint was attached to the warrant.

On February 27, 2001, the Wisconsin State Crime Laboratory reported a "cold hit" out of the Wisconsin DNA Databank between convicted offender Bobby Dabney and the DNA profile from the evidence described in the criminal complaint charging John Doe #12 with the above-mentioned offenses. On March 14, 2001, the State of Wisconsin filed an amended complaint in which defendant Bobby Dabney's name was substituted for that of John Doe #12.

STATEMENT OF FACTS

The Statement of Facts is taken from the sworn criminal complaint of City of Milwaukee Police Detective Lori Gaglione, dated December 4, 2000, and the sworn amended criminal complaint of Detective Gaglione, dated March 14, 2001.

In the criminal complaint dated December 4, 2000, Detective Gaglione described the assault upon the victim, which occurred on December 7, 1994. According to the criminal complaint, the victim was at a bus shelter when she was approached by an unknown

male individual who had a gun, grabbed her, hit her with his fists in the head, told her to "shut up," forced her down the street, tied her hands behind her back with her scarf, placed her ear warmers over her eyes and pulled her cap down over the ear warmers and then forced her into a car telling her "don't put your hat up on your head cause I'll shoot." The victim related that this unknown individual drove the car around for a while, but then stopped the car and began undressing her and fondling her breasts. The victim related how this unknown male individual pulled out his penis and forced his penis into her mouth and that he ejaculated in her mouth. The victim stated that this unknown male individual then drove around for another short period of time, but eventually stopped the car and again exposed his penis and forced it into her mouth and again ejaculated in her mouth. The victim related that she was then dropped off on a street corner and that she ran into a store. The victim stated that she was 15 years old at the time of the assaults and that she told her mother what happened and that her mother called the police. According to the criminal complaint, the victim was taken to the Sexual Assault Treatment Center where a sexual assault nurse examiner obtained oral swabs and saliva samples from her and secured those items as evidence. The criminal complaint goes on to relate how those evidentiary items were transported to the Wisconsin State Crime Laboratory for analysis. According to reports filed by the Wisconsin State Crime Laboratory, semen was detected on the saliva standard taken by the nurse at the Sexual

Assault Treatment Center and that subsequent DNA testing on that semen developed a DNA profile that was different from the victim and that this foreign DNA profile was developed at 13 separate genetic locations. The criminal complaint further described the 13 separate genetic locations and gave the probability of randomly selecting an unrelated individual who would have a DNA profile that matched those 13 genetic locations. The criminal complaint further described the operation of the DNA Databank system at the Wisconsin State Crime Laboratory in Milwaukee. The criminal complaint described the DNA database case index and the DNA databank convicted offender index and how they intermesh. The criminal complaint further stated that the DNA profile from the semen from the saliva standard from the victim was run against the convicted offender index of the Wisconsin DNA databank and that no match to that profile from known offenders was obtained. The criminal complaint further stated that the unknown person involved in the sexual assault of the victim would be expected to have a profile that matched the foreign DNA profile from the semen recovered from the saliva standard of the victim. The criminal complaint further stated that the foreign DNA profile developed from the saliva standard of the victim would be run against the convicted offender databank on a monthly basis as well as uploading that profile into the National Indexing System operated by the FBI.

On March 14, 2001, Detective Lori Gaglione swore to an amended criminal complaint in which the name Bobby R. Dabney was

substituted for that of John Doe #12. Basically, this criminal complaint repeated what was contained in the criminal complaint dated December 4, 2000, but added a lengthy description of how the Wisconsin DNA Databank System operates and how it is maintained. This criminal complaint also described the procedures that are in place when a "cold hit" is obtained from the convicted offender databank and all of the safeguards that are put in place to assure the accuracy and validity of the match. The criminal complaint further described the extensive controls and cross-checks that are implemented to ensure that the "cold hit" matching the DNA from the semen from the saliva standard of the victim to the DNA of convicted offender Bobby Dabney is accurate and reliable. The criminal complaint further described the procedures that are put in place by the Wisconsin State Crime Laboratory to then further confirm the DNA match through fingerprints on file with the Wisconsin Department of Justice. The criminal complaint described how on February 27, 2001, the DNA profile described in the criminal complaint and arrest warrant from December 4, 2000 was determined to be that of defendant Bobby Dabney by virtue of a "cold hit" between the evidence sample taken from the victim and Dabney's convicted offender sample in the Wisconsin DNA Databank. Among other convictions, the defendant, Bobby R. Dabney, has two other convictions for sexual assault.

ARGUMENT

I.

The statute of limitations does not bar prosecution.

The defendant, Bobby Dabney, moves to dismiss on grounds that the criminal complaint and warrant, which were issued with a DNA description only were insufficient. The defendant also argues that the filing of the DNA warrant and complaint could not expand the statute of limitations. Additionally, the defendant argues that the issuance of the DNA warrant to expand the statute of limitations violates his due process rights.

The State contends that by using the John Doe complaint and arrest warrant, they employed statutory procedure in existence for well over 100 years. Contrary to defendant's argument, law enforcement can use that statutory procedure to prevent a person from escaping criminal liability when it does not know the defendant's true name. As long as the defendant is adequately described in the complaint and warrant, a defendant's true name may be substituted in place of John Doe after the statute of limitations has run. This practice does not entail conflicting statutes, nor does it offend state or federal constitutional principles.

A. Neither the United States constitution nor the Wisconsin constitution prohibits the filing of a John Doe complaint and warrant.

It is undisputed that at the time the complaint and arrest warrant were filed, the statute of limitations for the crimes

charged herein was six years. (Wis. Stat. sec. 939.74(1) ["Prosecution for a felony must be commenced within 6 years...after the commission thereof"].) Accordingly, the State of Wisconsin had until December 6, 2000 to commence prosecution.

The fourth amendment of the United States Constitution provides, among other things, that no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized. The Constitution indicates nothing further in reference to the particularity with which a Joe Doe warrant should describe the person subject to arrest on that warrant. Rule 4(C)(1) of the Federal Rules of Criminal Procedure indicates that arrest warrants must contain the name of the defendant or if the name is unknown, any name or description by which the person can be identified with reasonable certainty.

Article 1, Section 11 of the Wisconsin Constitution requires the same particularity of description as is required by the United States Constitution.

B. Relevant statutory authority permits the filing of a John Doe complaint and warrant.

Wisconsin Statute sec. 939.74(1) provides that "a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed." Wis. Statute 939.74(3) goes on to state that "a prosecution is pending when a warrant or a summons has been issued, an indictment has been found, or an information has been filed." Circuit Court case no. 00CF005987,

naming John Doe, an unknown male with a matching deoxyribonucleic acid profile at 13 genetic locations, was filed on December 4, 2000. A Circuit Court judge issued an arrest warrant that same day based upon probable cause found in the criminal complaint. Wisconsin Statute sec. 968.04(1) provides "if it appears from the complaint...that there is probable cause to believe that an offense has been committed and that the accused has committed it, the judge shall issue a warrant for the arrest of the defendant..." As such, on December 4, 2000, the Circuit Court Judge examining the criminal complaint found probable cause to believe that John Doe #12 committed the offense described within the four corners of the criminal complaint and issued a warrant for the arrest of John Doe #12, unknown male, with a matching deoxyribonucleic acid profile at 13 genetic locations.

Pursuant to statute, arrest warrants must contain 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. Wis. Stats. sec. 968.04(3)(a).

The Wisconsin Supreme Court has addressed itself to the issue regarding the particularity of description required in a John Doe warrant on only one occasion. In Scheer and Wife vs. Keown, 29 Wis.586 (1872), the court held that a warrant should contain the name of the person to be arrested; but, if that was not possible, the warrant should contain "the best description of the person prosecuted which the nature of the case would allow."

The issue has also been addressed by several courts in other jurisdictions holding that the warrant should contain sufficient information to identify the suspect with reasonable certainty. See West v. Cabell 153 U.S.78, 14 S.Ct.752, 38 L.Ed. 643 (1894); United States v. Doe (N.D.Cal., 1904) 127 F.982; United States v. \$1,058.00 in U.S. currency, (W.D.Pa., 1962) 210 F.Supp. 45; United States v. Doe (E.D. Wis., 1975) 401 F.Supp. 63.)

In People v. Montoya, 255 Cal.App.2nd 137, 142-143 (1967), the court found, for fourth amendment purposes, that a warrant's description of the defendant as "John Doe, white male adult, 30-35 years, 5'10", 175 lbs, dark hair, medium build" was insufficient to describe the defendant with reasonable particularity because it could be applied to a great number of persons. The court recommended the inclusion of such identifying characteristics as John Doe's occupation, his personal appearance, peculiarities, place of residence or other means of identification.

In light of Montoya, defendant's claim that he was inadequately described in the warrant is without merit. In the instant case, the prosecution did not know defendant's true name, residence, occupation and the like, but had his DNA profile and a detailed account of the crime.

The State contends that no description could better identify with reasonable certainty the person whose arrest is ordered than his or her DNA profile. The defendant does not dispute that the DNA profile detailed in the warrant and criminal complaint for

his arrest is in fact his. The United States Congress, as well as numerous authorities, has found DNA profiles to be the most reliable form of identification currently available.

On December 11, 2000, the United States Congress passed the DNA Analysis Backlog Elimination Act of 2000, H.R. 4640, which states in Section 11, Subdivision (a)(1), that "over the past decade, deoxyribonucleic acid testing (referred to in this section as "DNA testing") has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene."

The defendant, in his brief at page 7, refers to pending legislation in Wisconsin to allow prosecution in specified sexual assault cases beyond the six-year statute of limitations. The defendant's position that this pending legislation somehow undermines the issuance of John Doe warrants is flawed and misplaced. Last year, the Wisconsin legislature proposed a change to the statute of limitations involving sexual assault where DNA evidence is available. The proposed legislation basically carved out an exception for a databank "cold hit" and would allow the prosecution of "cold hits" cases despite the passage of the statute of limitations. This legislation recently passed the State Assembly, is currently in the 2001-03 budget bill, and has wide bipartisan support in the State Senate. (See AB291 and SB55, Statute of Limitations Legislation - extending statute of limitation when DNA evidence is available). Contrary to the defendant's position in his brief, this legislation

basically codifies the John Doe warrant procedure. The writer of this brief has worked closely with members of the State Legislature and knows that the issuance of John Doe warrants to commence prosecution is the driving force behind legislation to carve out exceptions to the Statute of Limitations for specified sexual assaults. Other states have already enacted such legislation and many have pending legislation. (See, AB 1742, California; HB 1216, Colorado; HB 5903, Connecticut; SB329, Delaware; HB 2688, Minnesota; HB 656, Texas; HB 1423, Arizona; SB 80, Indiana; SB I, Michigan).

Like the United States Congress, the Wisconsin Legislature has determined that DNA analysis is so probative of identity that it justifies extending the statute of limitations well beyond the current 6 years in specified cases of sexual assault in which the perpetrator is identified through a DNA profile. The Wisconsin Legislature is also considering the passage of a DNA post-conviction motion statute which would provide convicted offenders the opportunity to have DNA testing done under specified conditions to prove their innocence, thus further demonstrating the legislature's belief in the strength of such evidence to establish identity as it relates to guilt or innocence.

Numerous courts have also found DNA evidence highly probative of identity. The court in United States v. Jakobetz (2nd Circuit. 1992) 955 Fed.2d 786, 789, found that a DNA match, with the probability the semen came from someone other than the defendant calculated at one chance in 300,000,000, was "virtually

dispositive on the question of identity." In Roberson v. State of Texas (Tex.Ct.App.2000) 16 S.W.3rd 156, the court rejected the defendant's claim that DNA evidence alone was insufficient to prove his identity as the perpetrator of aggravated sexual assault. (Id. at pp.166-171.) Other convictions in which the only evidence of identity came from DNA testing similarly have been affirmed. (See, e.g., People v. Soto (1999) 21 Cal.4th 512 [Victim could not identify assailant; DNA match between semen stain on victim's bedspread and defendant's blood constituted sufficient evidence of identity]; People v. Rush (N.Y. Sup. Ct. 1995) 630 N.Y.S.2d 631, aff'd(1998) 672 N.Y.S.2d 363 [victim could not identify assailant at trial; DNA match between victim's anal and vaginal swabs and defendant's blood constituted sufficient evidence of identity]; Springfield v. State (Wyo. 1993) 860 P.2d 435 [victim unable to identify assailant in court; DNA match between semen on victim's panties and in her anus and defendant's blood constituted sufficient evidence of identity].)

Finally, the DNA loci used to specifically identify defendant herein are those designated by CODIS (the FBI's combined DNA index system), a national DNA database which allows DNA laboratories nationwide to compare results for the identification of offenders. (See, e.g., NIJ website: <http://www.ncjrs.org/pdffiles1/nij/s1413apb.pdf> referencing National DNA Index System (NDIS) Standards for Acceptance of DNA Data (January 11, 2000), pg.9, table 4; USA Today, "FBI activates 50-State DNA Database Tuesday," 1998 WL 5738654.) The Wisconsin

State Crime Laboratory is a CODIS participant.

As the above authorities show, a DNA profile that matches a defendant to charged crimes is sufficient to prove identity for purposes of conviction. The United States Congress and the Wisconsin Legislature have unequivocally confirmed the use of DNA with respect to proving identity on the issue of guilt or innocence. The Wisconsin Legislature specifically is on the threshold of passing legislation which would allow criminal charges to be brought after the passage of the statute of limitations when there is a "cold hit" out of the databank.

Accordingly, the complaint and arrest warrant that describe defendant by his DNA profile was more than adequate to identify him with reasonable certainty under Wisconsin Statute sec.968.04(3)(a) and related authorities. Indeed, that the DNA profile did, in fact, specifically identify defendant, and only defendant, attests to the legal sufficiency of the DNA profile as a method which reasonably identifies the subject to be arrested.

Furthermore, the State agrees that the issuance of a John Doe warrant based upon a genetic profile is, indeed, a novel theory. The State believes, however, that laws evolve due to the advancement of scientific technology. The State believes that the term "reasonable certainty" is an evolving concept that today is different from the concept in 1872 when the Wisconsin Supreme Court held that when the name of the person against whom a criminal complaint is to be made is unknown, that the best description of that person which the nature of the case will

permit should be given (Keown, supra, 29 Wis.586). As stated above, the best description in the instant case is the DNA profile of the assailant. From the above-described criminal complaints, the victim of the sexual assault suffered penis to mouth sexual intercourse wherein her unknown male assailant ejaculated in her mouth. The nurse at the Sexual Assault Treatment Center obtained oral swabbings and a saliva sample from the victim of the offense and subsequent DNA testing developed a DNA profile at 13 specific genetic locations. That 13 genetic location DNA profile was run through the Wisconsin DNA databank indexing system and was matched to the defendant, Bobby Dabney. The State maintains that there was no other way in which the assailant of the victim would ever have been captured. The instant case is not a case involving fingerprints or other type of forensic evidence, but identifying information from a DNA profile recovered from the mouth of the victim of an oral sexual assault. Fingerprints are innocuous and it would be a rare occasion when someone could state with certainty that a fingerprint was left at a crime by only the perpetrator. No one has any doubt that the semen recovered from the mouth of the victim in the instant case came from her assailant. Through the many advances of DNA technology, it is possible to match those DNA profiles against convicted offender indices throughout the country. It should be noted that the DNA profiles obtained from evidence, such as the semen recovered from the mouth of the victim, are run against convicted offender profiles. In other

words, the match will occur with someone who is within the prison system. That person, by electing to commit other crimes which have placed him in the prison system, has removed himself from the public view and any chance of identifying him by any other means would be remote, if not impossible. This should not inure to the benefit of a criminal defendant. Based upon the advancements in DNA technology, law enforcement is able to identify individuals who are hidden away behind bars, out of the public view, and basically hiding out and shielding themselves from identification for other crimes. Back in 1872 when the Wisconsin Supreme Court addressed the particularity issue of warrants for arrest, there was no such thing as driver's licenses, social security numbers, credit cards, telephone numbers, or the like. Since 1872, there are many things, besides your name, that can identify a person. Basically, we have many numbers that identify us. However, we know that given today's numerous crimes of identity theft, numbers like driver's licenses, social security numbers, credit card numbers, and the like, can all be stolen and can be changed and given to another person. In other words, these are not true identifying numbers anymore in our society. Given today's mobile society, addresses can change and people can have multiple addresses or multiple places of residences. Additionally, there are many cosmetic surgery choices today that can change the body shape and facial structure. Hair can be dyed, beards can be grown or shaved off, and hair can be grown to any length or shortened to any length.

It is difficult to imagine today if there is a true physical identifier or number identifier for a person. But based upon the authority cited above, it certainly appears that DNA is unalterable and it appears to be the best identifier of a person that we have. As stated above, perhaps the law or our interpretation of case law must catch up with the advances in scientific technology. The identification of John Doe #12 with a matching DNA profile as Bobby Dabney certainly described Bobby Dabney with "reasonable certainty" and also satisfied the evolving and expanding concept of particularity first described in 1872 by the Wisconsin Supreme Court as giving the best description which the nature of the case will permit. The victim of the sexual assault was dragged off the street by an unknown male assailant, forced at gunpoint to a car, had her eyes covered, threatened, viscously sexually assaulted and taken to the Sexual Assault Treatment Center for the gathering of evidence. That evidence developed a DNA profile that eventually matched the DNA profile of Bobby Dabney. At the time of the issuance of the warrant for his arrest, although his name was not known, his genetic code was known and therefore, in effect, the person of Bobby Dabney was known to the State. The best description which the nature of the case could permit was given in the warrant and that description was the genetic code of Bobby Dabney that no one else in the world could possibly have. That genetic profile, which identified Bobby Dabney beyond a reasonable doubt, was utilized to commence criminal proceedings

in this case prior to the expiration of the statute of limitations.

C. Defendant received adequate notice of the charges herein.

The defendant contends that he should have been given notice that the charges had been filed against him, and that a Doe complaint and arrest warrant were inadequate to provide such notice. The State contends that the only notice to which the defendant is entitled is notice of the charges, not notice that a complaint has been filed or an arrest warrant issued.

In order to meet due process requirements, a charging document must meet certain standards. "Procedural due process requires that a defendant have notice of the specific charge and an opportunity to address the specific issues raised by the charge at trial." Randolph v. State, 83 Wis.2d 630, 644, 266 N.W.2d 334, 340 (1978). Furthermore, the adequacy of a criminal complaint "is restricted by due process and by article 1, section 7 of the Wisconsin Constitution and the 6th Amendment to the United States Constitution which guarantees to an accused the right to be informed of 'the nature and cause of the accusation.'" State v. George, 69 Wis.2d 92, 97, 230 N.W.2d 253, 256 (1975). Simply stated, the complaint is a written statement of the essential facts constituting the offense charged, Wis.Stat.sec.968.01(2).

In contrast to the requirement of notice of the offenses charged, no statutory provision or other authority requires notice to the defendant that a complaint or an arrest warrant has

been issued in his name. At the time the warrant was actually executed, defendant had notice that he was being charged, and the nature of those charges. He is entitled to nothing more.

Federal law is consistent on the question whether a criminal defendant is entitled to notice that he is being charged before he is arrested. Rule 6 (e)(4) of the Federal Rules of Criminal Procedure permits a district court to order that a timely filed indictment be sealed until the defendant is in custody. (United States v. Muse (2nd Cir. Court. 1980) 633 Fed.2d 1041, 1043 (en banc). As the Muse court stated, "[t]he obvious purpose of this provision is to prevent the requirement of an indictment from serving as a public notice that would enable the defendant to avoid arrest." (Ibid.) Further, the "sealed indictment is timely even though the defendant is not apprehended and the indictment is not made public until after the end of the statutory limitations period. [Citations.]" (Id. at pg.1041) A defendant is thereby prevented "from securing an unwarranted benefit from the statute of limitations by continuing to avoid arrest until the limitations period has run." (Id.at pg.1043.)

The Muse court went on to further find that the defendant's interest in avoiding an overly stale prosecution, generally protected by the statute of limitations, is adequately protected in the circumstances by permitting him to secure dismissal only on a showing of prejudice occurring during the period the indictment was sealed, or perhaps only during the post limitation period the indictment was sealed. (Ibid.) The court found it

unnecessary to determine which period was applicable, given the lack of any basis for claiming prejudice (*id.* at pgs. 1042-1043), but noted, "there is a general presumption against regarding elapsed time during the limitations period as prejudicial to the defendant. [Citation.]" (*Id.* at pg.1044.) (Accord, United States v. Richard (First Circuit 1991) 943 Fed.2d 115, 118-120; United States v. Ramey (Fourth Circuit 1986) 791 Fed.2d 317, 320-322; United States v. Greer (D.Vt.1998) 178 F.R.D. 418, 429.) Plainly, Rule 6 (e)(4), permitting the sealing of an indictment so as to prevent a defendant from discovering its existence before he is in custody, would be unconstitutional were due process to require that a defendant be notified of the existence of charges pending against him before his actual arrest.

In light of the Federal statutory rules that effectively preclude notification to a defendant that charges are pending against him, defendant's claim that he was entitled to such notice is without merit. The filing of a John Doe complaint or arrest warrant does not violate any entitlement with respect to notice.

D. The John Doe warrant was properly used to satisfy the statute of limitations.

Contrary to defendant's argument, issuance of the John Doe arrest warrant satisfies the statute of limitations. Section 939.74(1) of the Wisconsin Statutes specifically provides that a prosecution may be commenced by the issuance of an arrest warrant. Once prosecution has commenced, the statute of

limitations is met. Basically, defendant argues that the statute of limitations was not "tolled" because the John Doe warrant should not have been used to circumvent the statute of limitations. He is incorrect. As the state contends, there was in fact no "tolling" of the statute in this case. Rather, the case was filed within the statute of limitations thereby commencing the prosecution.

Furthermore, there are constitutional protections against the institution of overly stale claims. A defendant alleging prejudicial pre-accusation delay may argue a violation of his right to due process. (United States v. Marion, (1971) 404 US 307, 324. Once a felony complaint has been filed, a defendant may argue a denial of his right to a speedy trial. In either case, defendant is required to affirmatively demonstrate that the challenged delay has prejudiced his ability to defend against the charges. The defendant maintains that the State intentionally delayed the issuance of charges in order to gain a tactical advantage over him. In this case, the felony complaint and arrest warrant were filed on December 4, 2000. By February 27, 2001, the defendant's true name had been discovered and the defendant was arrested and an amended criminal complaint was filed on March 14, 2001. The defendant alleges no prejudice arising during the period between the filing of the complaint and his arrest, nor could he. As stated above, the Wisconsin Legislature is on the threshold of passing laws that would allow the issuance of criminal charges at any time when the defendant's

identity is discovered from a DNA profile. The legislature's proposed extension of the statute of limitations in sex offense cases reflects recognition that DNA technology now enables law enforcement to identify and prosecute offenders who previously may have escaped prosecution. All 50 states now have DNA databank logs and collect biological samples from specified offenders. On December 11, 2000, in enacting the DNA Analysis Backlog Elimination Act of 2000, Congress provided that certain federal offenders also would be required to provide biological samples for inclusion in the combined DNA index system of the Federal Bureau of Investigation (CODIS), to which the states already contribute. Through the State and Federal databank laws and utilization of CODIS, law enforcement now has the ability to search extensive databases in an effort to identify perpetrators of crime and effect their prosecution. Defendant's prosecution is well within the time period the Wisconsin legislature is proposing and is, therefore, presumptively non-prejudicial. Although the new pending statute of limitations for sexual assault offenses does not apply to the defendant, the legislative determination is relevant to assessing any claim of prejudice. In any event, the 101 days beyond the six-year limitations period does not give rise to a showing of prejudice. Furthermore, defendant's claim of prejudice due to pre-accusation delay is mere conjecture and speculation. The defendant has also failed to show any intentional delay by the State. In either event, it seems premature, at this juncture, to raise a motion dealing with

these issues. In United States v. MacDonald, 435 U.S. 850, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978), the United States Supreme Court held, in relation to the motion charging a denial of the right to a speedy trial, that in most instances the motion should be heard after the trial due to the fact that to determine prejudice prior to trial is extremely difficult. Since prejudice is the main issue in a preaccusation delay motion, it would seem that the reasoning of the court in MacDonald, supra, is persuasive also as to a motion dealing with preaccusation delay.

Conclusion

Based upon the above, the State contends that the John Doe #12 arrest warrant was timely issued, it satisfied the statute of limitations, and the defendant's name was properly substituted once it was known. This procedure violated no statutory provision, nor any State or Federal constitutional protection. The State maintains that had defendant's true name been known on December 4, 2000, and a felony arrest warrant issued in his name, the defendant could not have argued that prosecution was not commenced within the proper statutory time limit. The State contends that when it issued the John Doe arrest warrant on December 4, 2000, the State knew who Bobby Dabney was, but just did not know his true name. The State maintains that it knew this because they had the genetic code of the assailant and just needed a name to go along with the identification. On February 27, 2001, the Wisconsin State Crime Laboratory attached the identifying genetic code of the assailant, John Doe #12, with the

name of Bobby Dabney. Although the State knew who the assailant was on December 4, 2000, it was not until February 27, 2001, that the state had a name to go along with the assailant. Defendant's motion to dismiss should be denied.

Dated at Milwaukee, Wisconsin, this 16th day of July, 2001.

Respectfully submitted,

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