SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

People v. Martinez[1]

(decided April 17, 2008)

After his conviction for first-degree rape pursuant to a plea agreement,[2] David Martinez appealed, arguing that the "John Doe" indictment that identified him by his DNA markers violated his constitutional right to notification of the charges against him pursuant to the United States Constitution[3] and the New York Constitution.[4] In this case of first impression, the Appellate Division, First Department affirmed the trial court, holding that it is not a violation of the right to notice when the defendant is identified in an indictment by only his DNA markers.[5] The court reasoned that although the indictment only referred to the defendant by his unique DNA markers, it was sufficient because it alleged every element of the charged crimes and that the defendant committed them.[6]

On October 31, 1996, a young woman was robbed and sexually assaulted in a New York City subway station.[7] Her assailant forced her at gunpoint to hand over her money and pull down her

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[1] 855 N.Y.S.2d 522 (App. Div. 1st Dep't 2008).

[2] *Id.* at 524.

[3] U.S. CONST. amend. VI, states, in pertinent part: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation. . . ."

[4] N.Y. CONST. art. I, §6, states, in pertinent part: "[T]he party accused . . . shall be informed of the nature and cause of the accusation . . . ."

[5] *Martinez*, 855 N.Y.S.2d at 523.

[6] *Id.* at 524.

[7] *Id.* at 523.

pants.[8] He fondled her, and after unsuccessfully attempting penetration, ejaculated in her hand.[9] A semen sample was collected and preserved, but the investigation that ensued produced no suspects.[10]

Three years later, the sample was entered into a multi-jurisdictional DNA database.[11] Although there was no match, a New York County grand jury indicted "John Doe" as identified by his particular DNA profile in 2001.[12] Meanwhile, Martinez, who had been serving time for a drug conviction in New Jersey, returned to New York in 2004 under a parole violation for a nineteen-year-old robbery conviction.[13] His DNA profile was entered into the databank and produced a match for the 2001 "John Doe" rape and robbery indictment.[14] Martinez was arrested and arraigned, and the indictment was amended to name Martinez as the accused instead of "John Doe."[15]

In December 2004, Martinez moved to dismiss the indictment on two theories: 1) that the DNA profile which identified him in the indictment did not "adequately describe" him thereby depriving him of his constitutional right to notice, and 2) that he had been deprived of his constitutional right to a speedy trial because the statute of limitations had expired.[16] In January 2005, his motion was denied because the trial court found that although the crime occurred eight years earlier, the 2001 indictment tolled the statute of limitations;

[8] *Id.*
[9] *Id.*
[10] *Martinez*, 855 N.Y.S.2d at 523.
[11] *Id.* at 523-24.
[12] *Id.* at 524.
[13] *Id.*
[14] *Id.*
[15] *Martinez*, 855 N.Y.S.2d at 524.
[16] *Id.*

however, the trial court did not rule on the issue of notice.[17] Ultimately, Martinez pled guilty and was convicted of first-degree attempted rape.[18] Martinez appealed, arguing that the indictment was defective because the identifying DNA markers did not provide sufficient notice since only a trained technician could read them.[19]

On appeal, the appellate division noted that although the defendant waived his right-to-notice claim by pleading guilty, his right to challenge the indictment could survive a guilty plea if it was determined to be insufficient for either failing to accuse Martinez of the acts constituting a crime, or failing to allege every element of the crime charged and that he committed it.[20] After deciding that the indictment was properly amended, the court addressed his claims on the merits.[21]

Martinez asserted that the "John Doe" indictment implicated his constitutional right to notice of the charges against him and hence his ability to mount a defense.[22] An indictment serves as notice when it: 1) alleges all of the material elements of the crime, and 2) asserts that the defendant committed them.[23] Whether the indictment against Martinez properly alleged the material elements of the crimes with which he was charged was not in dispute.[24] Martinez' claim instead focused on the character of the DNA markers that identified him in

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Martinez*, 855 N.Y.S.2d at 524 (citing People v. Konieczny, 2 N.Y.3d 569, 575 (App. Div. 1st Dep't. 2004)).
[21] *Id.* at 525.
[22] *Id.*; *see also* People v. Iannone, 384 N.E.2d 656, 660 (N.Y. 1978).
[23] *Martinez*, 855 N.Y.S.2d at 525.
[24] *Id.* at 524.

the indictment.

Under New York law, Martinez' right to notice, as well as his right to counsel, did not attach until arraignment.[25] Additionally, although Martinez claimed insufficiency on the grounds that only a trained technician is able to decipher DNA markers,[26] the court explained that a defendant's subjective capacity to understand the indictment is not required as illustrated by cases where an illiterate defendant's indictment is not insufficient merely because he is unable to read it.[27] The court also noted that New York does not limit the form of identification in an indictment by requiring that the defendant be identified by name or in any particular manner,[28] and that an amendment at arraignment substituting the defendant's name does not render the indictment defective.[29] Under Section 200.70(1) of the New York Criminal Procedure Law ("CPL"), amending an indictment is proper when "the amendment [does] 'not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits.' "[30] Accordingly, having concluded that the

[25] *Id.* at 525; *see also* N.Y. CRIM. PROC. LAW § 210.15(1), (2) (McKinney 2008) ("Upon the defendant's arraignment before a superior court upon an indictment, the court must immediately inform him, or cause him to be informed in its presence, of the charge or charges against him, and the district attorney must cause him to be furnished with a copy of the indictment.").

[26] *Martinez*, 855 N.Y.S.2d at 524.

[27] *Id.* at 526 ("To accept defendant's broadside attack on indictment by DNA would lead to anomalous results. [D]efendant's . . . right to fair notice of the crime of which he is accused is not dependent on the subjective capacity . . . to understand it.").

[28] *Id.* at 525; *see generally* N.Y. CRIM. PROC. LAW §200.50 (McKinney 2008) (describing the form and content of an indictment).

[29] *Martinez*, 855 N.Y.S.2d at 525.

[30] *Id.* (quoting Tirado v. Senkowski, 367 F. Supp. 2d 477, 491 (W.D.N.Y. 2005) (noting that "the amendment conformed to the proof before the grand jury")); *see also* N.Y. CRIM. PROC. LAW §200.70 (McKinney 2008).

indictment identifying Martinez by DNA markers provided proper notice of identification and was appropriately amended, the court ultimately affirmed, holding that the indictment served the traditional purposes of providing fair notice of the accusations, ensuring that the crimes charged in the indictment were the ones for which Martinez was to be tried, and protecting him from double jeopardy.[31]

The court addressed the attachment of the right to notice, the breadth of the statutory limits, the traditional purposes of indictment,[32] and the treatment of DNA and "John Doe" indictments under federal law and in other contexts and jurisdictions.[33]

Under federal precedent, the right of the accused to be informed of the charges against her under the Sixth Amendment attaches when the "government has committed itself to prosecution."[34] Although various courts have determined this point to occur at different stages of the prosecutorial process, there is no definitive point that has been determined by the Supreme Court that prompts the activation of the Sixth Amendment right to notice.[35] However, regardless of the point at which a defendant becomes entitled to notice under the

[31] *Martinez*, 855 N.Y.S.2d at 525-26.

[32] *Id.*

[33] *Id.*

[34] Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (also noting that commencement of criminal prosecution "to which alone the explicit guarantees of the Sixth Amendment are applicable," begins when "a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law"); Jones v. City of Jackson, 203 F.3d 875, 880 (5th Cir. 2000) (finding that a bench warrant underlying a detainer indicated that the government was committed to prosecution); United States *ex rel* Hall v. Lane, 804 F.2d 79, 82 (7th Cir. 1986) (determining that "five specific 'adversary judicial criminal procedures'—a formal charge, preliminary hearing, indictment, information, or arraignment—are always starting points"); *cf.* Kladis v. Brezek, 823 F.2d 1014, 1018 (7th Cir. 1987) (holding that the state is not committed to prosecution during brief period of custody).

[35] *Hall*, 804 F.2d at 82.

Sixth Amendment, an exception has been carved out in the case of DNA indictments that provides for the statute of limitations to begin running and provisions under Title 18, chapter 208[36] to become effective when the individual is arrested or served with a summons in connection with the charges contained in the indictment.[37]

Title 18, Section 3282 of the United States Code states that a defendant cannot be prosecuted for any non-capital offense "unless the indictment is found . . . within five years next after such offense shall have been committed."[38] It then specifies that the identity of the accused may be described by DNA profile: "In any indictment for an offense under chapter 109A[39] for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile."[40] Furthermore, under Section 3282, provided that the DNA indictment is returned within five years of the commission of the offense, it will not be subject to the provisions of chapter 208[41] until "the individual is arrested or served with a summons in connection with the charges contained in the indictment"[42] essentially tolling the statute of limitations until the DNA profile has been matched with the defendant.

The admission of DNA evidence in criminal and civil trials is

[36] 18 U.S.C.A. §§ 3161-3174 (West 2008) (protecting a defendant's right to a speedy trial by setting time limitations in criminal proceedings).

[37] 18 U.S.C. § 3282(b)(2) (Supp. V 2006); 18 U.S.C.A. § 3161(b) (West 2008).

[38] 18 U.S.C. § 3282(a) (Supp. V 2006).

[39] 18 U.S.C.A. §§ 2241-2248 (Supp. 2008) (describing various levels of sexual abuse crimes in addition to offenses that end in death, repeat offenders, and restitution).

[40] 18 U.S.C. § 3282(b)(1) (Supp. V 2006).

[41] 18 U.S.C.A. § 3161 (West 2008).

[42] 18 U.S.C. § 3282(b)(2)(B) (Supp. V 2006).

virtually undisputed since the United States Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[43] An amendment to Section 3282, which included a tolling provision and authorization of "John Doe" indictments, acknowledged the efficacy of DNA evidence and formalized congressional intent to respond to the "[p]rofound injustice . . . done to rape victims when delayed DNA testing leads to a 'cold hit' after the statute of limitations has expired" by expanding the use of DNA as an identifier in sexual crimes.[44] The rationale in formalizing the use of DNA indictments was expounded by Senator Joseph Biden in his Senate introduction of the DNA Sexual Assault Justice Act of 2002: "Ten years ago forensic scientists needed blood the size of a bottle cap, now DNA testing can be done on a sample the size of a pinhead. The changes in DNA technology are remarkable, and mark a sea change in how we can fight crime, particularly sexual assault crimes."[45]

In addition to referencing the federal statute, the *Martinez* Court cited *Tirado v. Senkowski*[46] to support its conclusion that the amendment to the "John Doe" indictment naming Martinez was proper. In *Tirado*, the plaintiff filed a petition for writ of habeas corpus, challenging a second-degree murder conviction on several theories, one of which was ineffective assistance of counsel.[47] Michael Tirado was convicted of the shooting death of a youth based partially

[43] 509 U.S. 579 (1985) (establishing the standard for admission of scientific evidence).

[44] 148 Cong. Rec. 4331, S. 2513, 107th Cong. (2002) (enacted) (introducing the DNA Sexual Assault Justice Act of 2002).

[45] *Id.*

[46] 367 F. Supp. 2d 477 (W.D.N.Y. 2005).

[47] *Id.* at 479, 490-91.

on eyewitness descriptions identifying him by his race and clothing, and also on the jailhouse testimony of a fellow gang member serving time for a separate crime.[48] Tirado's indictment originally named him as "John Doe" to protect his anonymity, but it was subsequently amended at the prosecution's request.[49] Among the issues raised on appeal, Tirado argued that he was prejudiced by Brady violations, prosecutorial misconduct, and the ineffectiveness of his own counsel.[50] Tirado faulted his counsel for failing to move for dismissal of the indictment and consenting to the amendment.[51] The court disagreed, noting that the prosecution was entitled to amend the indictment, and that because defense counsel had no colorable basis on which to object, he was not ineffective for failing to move for dismissal.[52] The court ruled that the prosecution's amendment of the indictment to Tirado's proper name upon its unsealing at arraignment "conformed to the proof before the grand jury and did not prejudice the defendant."[53]

In its discussion of New York's treatment of amendments to indictments, the *Martinez* Court cited two cases to support its conclusion that the amendment of the indictment was reasonable[54] and that the indictment served its traditional purpose by notifying Martinez of the crime with which he was charged.[55]

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[48] *Id.* at 479-81.
[49] *Id.* at 491.
[50] *Id.* at 484, 488, 490.
[51] *Tirado*, 367 F. Supp. 2d at 490-91.
[52] *Id.* at 491.
[53] *Id.* at 491.
[54] *Martinez*, 855 N.Y.S.2d at 525.
[55] *Id.* at 525-26.

In *People v. Ganett*,[56] Sabu Gary was convicted for the criminal sale of a controlled substance.[57] Sabu Gary was indicted under the name "Sabu Ganett," as a result of erroneous identifying testimony by a witness to whom he sold heroin.[58] This was the sole testimony before the grand jury, and neither the grand jury minutes nor the indictment identified him by any other description.[59] On appeal, Gary argued that the indictment which incorrectly named him as "Sabu Gannet" was essentially a "blank authorization" for the police to arrest anyone they chose,[60] and that as a result he was deprived of the right to an indictment by a grand jury on a felony charge.[61] Referencing Section 190.65 of New York Criminal Procedure Law, Gary asserted that there was not enough evidence before the grand jury to identify him as the person charged with the crime.[62] The issue of his identity was resolved by the jury at trial and the indictment was subsequently amended to name "Sabu Gary."[63] The Appellate Division, Fourth Department concluded that Gary was not prejudiced by the amendment of the indictment to his proper name since the grand jury clearly intended to indict a specific person and that person was Gary.[64]

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[56] 416 N.Y.S.2d 914 (App. Div. 4th Dep't. 1979).
[57] *Id.* at 915.
[58] *Id.* at 917.
[59] *Gannet*, 416 N.Y.S.2d at 916.
[60] *Id.* at 917.
[61] *Id.* at 916.
[62] *Id.* at 915-916; *see also* N.Y. CRIM. PROC. LAW §190.65 (McKinney 2008) (stating that a grand jury may indict when "the evidence before it is legally sufficient to establish that such person committed such offense").
[63] *Gannet*, 416 N.Y.S.2d at 916 n.2.
[64] *Id.* at 915-19.

Additionally, in *People v. Iannone*,[65] the defendant moved to dismiss his indictment, not because it failed to identify him, but because it failed to set forth the facts of the crime.[66] Iannone was indicted for the crimes of conspiracy and criminal usury for charging interest on a loan at a rate of over twenty-five percent per year.[67] Although he pled guilty to one count of criminal usury, during sentencing Iannone motioned for the first time to dismiss the indictment for failure to sufficiently allege the facts constituting the crime.[68] The Court of Appeals described the notice function of the indictment as charging all of the elements of the crime and that Iannone committed the acts comprising those elements in order to ensure that the defendant is tried for the crimes with which he was indicted, to allow him to adequately prepare a defense, and to avoid subsequent attempts to prosecute him for the same crime.[69] Iannone argued that the indictment was defective because it used overly broad statutory language to describe the facts constituting the crime thereby depriving him of these protections.[70] The court concluded that the indictment, while lacking some detail, charged every element of criminal usury and presented enough facts so as to provide the defendant with information of the charges against him.[71]

The primary distinction between federal and New York treatment of DNA indictments is that New York has no corollary to Sec-

[65] 384 N.E.2d 656 (N.Y. 1978).
[66] *Id.* at 659.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 660.
[70] *Iannone*, 384 N.E.2d at 659 n.1.
[71] *Id.* at 663-64.

tion 3282 of the U.S. Code, codifying the use of "John Doe" DNA indictments. New York tolls the statute of limitations for five years when "(i) the defendant was continuously outside [the] state or (ii) the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence."[72] This tolling limitation of only five years and the increased burden on law enforcement of exercising reasonable diligence effectively grants the accused greater protection than Section 3282 of the U.S. Code which tolls the statute of limitations indefinitely.

A second distinction between federal and New York law concerns where in the stages of prosecution the right to notice attaches. Although this distinction is not particularly germane to the *Martinez* case, it is worth noting that when considering DNA indictments in federal cases, the right to notice attaches when the accused is arrested or served with a summons, whereas in New York it attaches at arraignment.[73] Since arraignment occurs after arrest, the fact that the right to notice in New York attaches at a later point than arrest, indicates, however slight and non-prejudicial, a greater limitation on a defendant's rights.

Interestingly, the court in *Martinez* made short work of the defendant's trial claim that tolling the statute of limitations in his "John Doe" DNA indictment deprived him of his right to a speedy trial guaranteed under both the United States Constitution and the

[72] N.Y. CRIM. PROC. LAW § 30.10(4)(a) (McKinney 2008).

[73] 18 U.S.C. § 3282(b)(2)(B) (Supp. V 2006); N.Y. CRIM. PROC. LAW § 210.15(1) & (2) (McKinney 2008).

New York Constitution.[74] Instead, it succinctly concluded that in this case "no other constitutional rights were implicated" and that "these problems [for example, the defense's potential inability to conduct its own DNA testing on the crime scene sample due to the passage of time] can be dealt with on a case by case basis."[75] The court pointed to Section 30.10(4)(a)(ii) of New York Criminal Procedure Law, which provides a five year period when the "defendant's whereabouts remain unknown and unascertainable through the exercise of reasonable diligence,"[76] and explained that this legislation represents a balance between avoiding litigation of stale cases against the policy of providing law enforcement officers with sufficient time to apprehend suspected criminals.[77] Not surprisingly, this particular aspect of DNA indictments has been the subject of much scholarly debate.

The *Martinez* Court acknowledged the national trend of acceptance of DNA indictments in its discussion of the treatment of DNA evidence and the use of DNA markers for identification in other jurisdictions and its implications in constitutional claim contexts.[78] The court contemplated Section 3282, state statutes that codify DNA indictments, prior case law that upheld DNA indictments, and secondary sources to illustrate the growing acceptance of "John

[74] U.S. CONST. amend. VI; N.Y. CONST. art. I, §6; *see also* N.Y. CIV. RIGHTS LAW § 12 (McKinney 2008).

[75] *Martinez*, 855 N.Y.S.2d at 526, 527. The court stated as examples that the rights to indictment by a grand jury and the protection from double jeopardy, and the right of confrontation were not implicated. *Id.* at 526.

[76] *Id.* at 527 n.1; *see* People v. Seda, 93 N.Y.2d 307, 311 (1999).

[77] *Martinez*, 855 N.Y.S.2d at 527 n.1.

[78] *Id.* at 525 (citing generally Scott Akehurst-Moore, Note, *An Appropriate Balance?—A Survey and Critique of State and Federal DNA Indictment and Tolling Statutes*, 6 J. HIGH TECH. L. 213 (2006)).

Doe" DNA indictments and the bases upon which they are challenged to support its ruling.[79] Similar to the federal government, the states of Arkansas, Delaware, Michigan, and New Hampshire have enacted legislation permitting DNA indictments.[80] Additionally, Wisconsin and Massachusetts have both upheld DNA indictments in common-law decisions.[81]

In *State v. Dabney*,[82] the seminal case establishing DNA as an identifier, the Wisconsin Court of Appeals held as a matter of first impression that the identification of the defendant as "John Doe" with a specific DNA profile in a complaint and arrest warrant was sufficient to meet the statutory "particularity" and "reasonable certainty" requirements.[83] In *Dabney*, a fifteen-year-old girl was sexually assaulted.[84] A DNA profile was developed based on semen found in her saliva, and six years later the defendant was charged with kidnapping and first-degree sexual assault.[85] The complaint included the DNA profile in the caption and was later amended substituting the

[79] *Id.* at 525-26.

[80] *Martinez*, 855 N.Y.S.2d at 526. Federal law permits DNA profile indictments and tolls the 5-year statute of limitations for enumerated offenses until the accused has been arrested. 18 U.S.C.A. § 3282. Arkansas' statute states in relevant part that an indictment containing genetic information of an unknown person valid, and the statute of limitations for rape prosecution based on DNA is extended to fifteen years. ARK. CODE ANN. § 5-1-109(b)(1)(B), (i), (j) (West 2009). In Delaware an indictment for a crime identifying the accused by a particular DNA profile is sufficient identification. DEL. CODE ANN. tit. 11, § 3107(a) (2009). Michigan allows DNA indictment and the ten-year statute of limitations doesn't begin to run until the individual is matched with his DNA. MICH. COMP. LAWS ANN. § 767.24(2)(b) (West 2008). New Hampshire permits description of the accused by fingerprint or DNA profile and tolls the statute of limitations for specifically enumerated offenses. N.H. REV. STAT. ANN. § 592-A:7(II) (2008).

[81] *Martinez*, 855 N.Y.S.2d at 525-26.

[82] 663 N.W.2d 366 (Wis. 2003).

[83] *Id.* at 369, 371.

[84] *Id.* at 369.

[85] *Id.*

defendant's name.[86] In a comprehensive discussion concerning the viability and precision of DNA profiles and the intent of Wisconsin's then newly enacted statute extending the statute of limitations in DNA cases, the court concluded that use of the DNA profile as identification of the defendant in the complaint and warrant was proper because it identified a "particular person."[87]

Similarly, in 2004, Massachusetts began indicting "John Does" described by DNA profiles in rape cases.[88] Further, many states that do not yet have statutory provisions specifically for DNA indictments, nonetheless do have statutes permitting "John Doe" warrants and indictments by allowing descriptors other than an accurate name to identify the accused.[89] Still others have authorized these types of indictments and warrants in precedential case law.[90] At least eight other states have charged or indicted genetic profiles, including California, Kansas, Illinois, Oklahoma, Pennsylvania, North Dakota, Texas, and Utah.[91]

The *Martinez* opinion clearly reflects the New York judici-

[86] *Id.* at 369-70.

[87] *Dabney*, 663 N.W.2d at 372.

[88] *Martinez*, 855 N.Y.S.2d at 526.

[89] *See, e.g.*, CAL. PENAL CODE § 815 (West 2008) ("A warrant of arrest shall specify the name of the defendant or, if it is unknown . . . the defendant may be designated therein by any name."); MASS. GEN. LAWS ANN. ch. 277, § 19 (West 2009) ("If the name of an accused person is unknown . . . he may be described by a fictitious name or by any other practicable description . . . .").

[90] *Martinez*, 855 N.Y.S.2d at 526 (citing Thomas J. Moyer & Stephen P. Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 22 BERKELEY TECH. L.J. 671, 688 (2007).

[91] *Id.* at 526 (citing Moyer & Anway, *supra* note 90, at 688, 689 n.95 (2007)); Andrew C. Bernasconi, Comment, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants' Constitutional and Statutory Rights*, 50 AM. U. L. REV. 979, 981-82 n.12 (2001) (listing California, Kansas, Illinois, Oklahoma, Pennsylvania, Wisconsin, Utah, Texas, and North Dakota as states that have indicted, issued a warrant or filed criminal charges against a DNA profile).

ary's appreciation of DNA as a criminal justice tool, noting that "a DNA indictment is an appropriate method to prosecute perpetrators of some of the most heinous criminal acts" and that "[t]he chance that a positive DNA match does not belong to the same person may be less than one in 500 million."[92] Other state court decisions have echoed these sentiments. For example, the Court of Appeals of Wisconsin in *Dabney* concluded that "for purposes of identifying 'a particular person' as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible."[93] Norman Gahn, the prosecutor in *Dabney*, restated the court's finding that while it is relatively easy to change things such as a name, address or physical appearance, no description can be more reasonably certain than DNA so identification by genetic code is legally sufficient.[94]

Despite the distinctions between federal and New York treatment of DNA indictments, both evince a similar intent: a desire to utilize the extraordinary capabilities of DNA profiling as a criminal justice tool in order for justice to be served, whether to exonerate or prosecute, especially in sexually-oriented crimes. In his discussion in "Advancing Justice Through DNA Technology," President Bush expressed the belief that "we must do more to realize the full potential of DNA technology to solve crime and protect the innocent."[95] Leg-

[92] *Martinez*, 855 N.Y.S.2d at 526.

[93] *Dabney*, 663 N.W.2d at 372.

[94] NORMAN GAHN & SUSAN BIEBER KENNEDY, AM. PROSECUTORS RES. INST., FROM JOHN DOE TO KNOWN OFFENDER: DNA PROFILE ARREST WARRANTS, SILENT WITNESS (2002), http://www.ndaa.org/publications/newsleters/silent_witness_volume_7_number_1_2002.html.

[95] The White House, News & Policies, Policies in Focus, Advancing Justice Through

islators concur. In her remarks in support of reauthorizing the Debbie Smith Act of 2004, Congresswoman Carolyn Maloney noted, "DNA is remarkable evidence. It doesn't forget, it can't be confused, it can't be intimidated and it doesn't lie. While an eyewitness can easily get mixed up about height, weight, hair color – DNA never changes its story."[96] Former Attorney General Janet Reno iterated, "[t]hrough the use of DNA evidence, prosecutors are often able to conclusively establish the guilt of a defendant. Moreover, as some of the commentaries suggest, DNA evidence—like fingerprint evidence – offers prosecutors important new tools for the identification and apprehension of some of the most violent perpetrators, particularly in cases of sexual assault."[97] The U.S. Department of Justice calls DNA evidence "a powerful tool in the search for truth."[98] Some have even referred to DNA evidence as " 'the finger of God.' "[99] This confidence in DNA evidence is echoed throughout the country in various jurisdictions including New York. Former New York City Mayor, Rudolph Guigliani stated that "DNA will prove to be the most effec-

DNA Technology, http:// www.whitehouse.gov/infocus/justice (last visited Sept. 29, 2008).

[96] Cong. Rec. E1483, H.R. 5057, 110th Cong. (2008) (enacted).

[97] Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996), *available at* http://www.ncjrs.gov/txtfiles/dnaevid.txt (original on file with the authors of this report who are staff members of the Institute for Law and Justice, Alexandria,Virginia).

[98] Kathrine M. Turman, *Understanding DNA Evidence: A Guide for Victim Service Providers*, OVC Bulletin (2001), *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/dna_4_2001/NCJ185690.pdf (on file with author at U.S. Department of Justice, Office of Justice Program, Office for Victims of Crime).

[99] Lindsy A. Elkins, *Five Foot Two With Eyes of Blue: Physical Profiling and the Prospect of a Genetics-Based Criminal Justice System*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 269 (2003) (citing Aaron P. Stevens, Note, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 922 (2001) (quoting *DNA Links Convict to 21-Year-Old Slaying; Evidence Likened to 'The Finger of God'*, RECORD (N.J.), Mar. 14, 2000, at A5 (quoting Jeanine Pirro, Westchester District Attorney)).

tive tool our civilization has devised to protect the innocent, convict the guilty, and even prevent many crimes from occurring."[100]

In New York, legislative response to the widely acknowledged viability of DNA testing has prompted the introduction of two bills. One bill currently under consideration in the New York State Assembly "[e]nacts the 'sexual assault forensic act' " which, among other provisions, would amend the New York Penal Law to eliminate a statue of limitations for prosecution of specific types of sexual assault cases based on DNA evidence.[101] The State Assembly's recognition of the value of DNA in sexual assault cases is clearly reflected in the bill's summary which states, in relevant part: "prompt testing of rape kits [leads] to DNA evidence [which when] cross-checked with existing DNA databases . . . has [led] to the arrest of serial rapists and the continued incarceration of other sexual predators."[102] Assembly Bill No. A03687 which was "referred to codes" in January 2008, specifically authorizes DNA "John Doe" indictments.[103] This proposed legislation indicates that New York's goal is to enact law substantially similar to the U.S. Code with regard to DNA indictments in sexual assault crimes.

The extraordinary advances made in DNA research since the Human Genome project began in 1986 have revolutionized the criminal justice system in its ability to identify both perpetrators of

[100] Rudolph W. Guigliani, *DNA Testing Aids the Search for the Truth*, 223 N.Y. L.J. 83 (2000).

[101] Assem. 5349, 2007-2008 Reg. Sess. (N.Y. Feb. 15, 2007), *available at* http://assembly.state.ny.us/leg/?bn= A05349&sh=t (on file with author).

[102] *Id*.

[103] Assem. 3687, 2007-2008 Reg. Sess. (N.Y. Jan. 26, 2007), *available at* http://assembly.state.ny.us/leg/?bn= A03687&sh=t (on file with author).

crimes and their victims.[104] The heartbreaking accounts of perpetrators of sexual abuse, kidnapping or murder of women and children at long last brought to justice, the discovery of missing children and other persons, and the identification of remains at the World Trade Center site demonstrate the humanitarian aspects of the use of DNA evidence.[105] Newspapers, periodicals, and books relate stories of how DNA evidence provided closure for victims and their families or rather freed the falsely imprisoned. For example, in the infamous murder case of six-year-old beauty queen JonBenet Ramsey, DNA testing has finally eliminated her parents as possible suspects.[106] The at-large killer's DNA has been entered into the National DNA Databank with the hope that one day there will be a match,[107] putting the mystery that has fascinated the public for over a decade to rest. Shortly after Virginia Governor Mark R. Warner approved additional testing, a Toronto DNA lab confirmed the guilt of Roger Keith Coleman who, despite vehemently protesting his innocence, was put to death in 2002 for the brutal rape and murder of his nineteen-year-old sister-in-law.[108] In a case that polarized the country around the death penalty debate, the DNA tests showed conclusively that Coleman was guilty.[109] A recent Dallas news story reported that Patrick

[104] *See* Elkins *supra* note 99, at 271.

[105] *See* Elkins *supra* note 99, at 283.

[106] *DNA Backlog May Hamper JonBenet Case: It Could Take Years to Enter Genetic Samples Already* Collected, Associated Press, July 10, 2008) http://www.msnbc.msn.com/id/25629128/.

[107] *Id.*

[108] *DNA Tests Confirm Executed Man's Guilt: Va. Man Went to His Death in 1992 Proclaiming His Innocence in* Murder, Associated Press, Jan. 12, 2006, http://www.msnbc.msn.com/id/10823771/.

[109] *Id.*

Waller, wrongly convicted and imprisoned for fifteen years, was released in July of this year.[110] During the hearing that freed him, "[h]is sobs were the only sound in an otherwise silent court room."[111] Despite confessing in front of a grand jury, the man whose guilt was confirmed by DNA cannot be prosecuted, because the statute of limitations expired.[112] But while these sensational stories generate headlines, scholars have made much of the constitutional rights implicated by use of DNA technology in evidence.[113] Litigation and writings on the rights to privacy, speedy trial, and other constitutional rights have proliferated. Although it did not specifically rule on these issues, the *Martinez* Court referenced one of these writings in its discussion of the right to speedy trial.[114] Concerning the passage of time between commission of the offense and prosecution, the court quoted an article acknowledging that a DNA prosecution many years after the crime would result in evidentiary issues that severely limit a defendant's ability to rebut DNA identification.[115] This reference invokes

[110] *Dallas Man Freed By DNA After 15 Years In Prison*, 5HD nbc5i News, Dallas/Ft. Worth, July 3, 2008, http://www.nbc5i.com/news/16783299/detail.html.

[111] *Id.*

[112] *Id.*

[113] *See* Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 128 (2008).

> [B]ecause the rule ignores the interests that criminal statutes of limitations are thought to protect, the John Doe indictment exception has proved quite controversial. Although heralded by the public as "a necessary innovation to prevent criminals from running out the clock under the statute of limitations," commentators have observed that "DNA indictments disregard the very purpose for which statutes of limitations were enacted: to provide repose and preclude defendants from being held to answer stale charges so outdated they presumptively impede defendants' abilities to marshal potential exculpatory evidence."

Id. (citations omitted).

[114] *Martinez*, 855 N.Y.S.2d at 527.

[115] *Id.* (quoting Frank B. Ulmer, *Using DNA Profiles to Obtain "John Doe" Arrest War-*

the "speedy trial" right's underlying intention to prevent prejudice to the defendant as a result of stale litigation and his inability to mount a defense. As a result of tolling provisions, "John Doe" DNA indictments may be abused as an end-run around the protection afforded by statutes of limitations.[116]

As with many legal issues, it boils down to a balancing of rights. Certainly, in *Martinez*, the court appropriately held that none of Martinez' constitutional rights were violated.[117] As the court pointed out, the New York legislature, in imposing a five-year statute of limitations and a reasonable diligence requirement, conducted a balancing between the competing interests of bringing criminals to justice and preventing prejudice through stale litigation.[118] The court's reticence in discussing the statute of limitations problems posed by DNA indictments may reflect the judiciary's reluctance to trod on the legislature's territory,[119] or, more likely, the court is well aware of the pending legislation concerning DNA indictments and simply chose not to include commentary that will be rendered moot by the imminent enactment of law.[120]

Insufficient notice, stale litigation, and other prejudices associated with DNA indictments will surely continue to call into question the extent of a defendant's rights under both the United States Constitution and the New York Constitution. However hard these

rants and Indictments, WASH. & LEE L. REV. 1585, 1616 (2001)).

[116] *See supra* note 113 and accompanying text.

[117] *Martinez*, 855 N.Y.S.2d at 526.

[118] *Id.* at 527.

[119] John Caher, *Watching the Court Evolve*, 231 N.Y. L.J. S2 (2004).

[120] *See supra* notes 101-103 and accompanying text on proposed New York State Assembly bills.

battles are fought, these eloquent words from Governor Pataki in his plea to eliminate the statute of limitations for rape in New York articulate perhaps the strongest response to these types of constitutional claims:

> There is no statute of limitations on anguish. There is no statute of limitations on pain . . . . Heinous and violent crimes, such as rape, leave the survivors with severe and long-lasting physical and emotional scars. Because the trauma suffered by victims can often last a lifetime, there should be no arbitrary time limit on seeking justice.[121]
>
> *Jean K. Delisle*

[121] James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1225-26 (2004) (citation omitted).