People v. Robinson: Developments and Problems in the Use of “John Doe” DNA Arrest Warrants

Micah Sucherman*

Last year, the California Supreme Court decided People v. Robinson, a case in which the defendant was convicted of rape for an incident that occurred in 1994. DNA evidence gathered at the scene provided extraordinarily persuasive evidence that he was the perpetrator. Despite this evidence, the case was unusual for an important reason: authorities did not locate Robinson until after the six-year statute of limitations had run on the crime. The arrest warrant had issued just days before the statute had run, but it did not contain Robinson’s name or a physical description. Rather, it contained only a DNA profile created by the California Department of Justice. Robinson was not located by traditional police procedure; he was found after a computer matched the DNA profile from the arrest warrant with DNA collected after Robinson had been arrested for a second crime.

This Note examines the history of courts’ treatment of these so-called “John Doe” DNA arrest warrants, their constitutionality, and their statutory validity in California. It then examines the California Supreme Court’s decision in People v. Robinson, ultimately arguing that the decision—while correct—overreaches with respect to the exclusionary rule and the statute of limitations.

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* J.D. Candidate, University of California, Berkeley, 2011. The author would like to thank Professors Charles Weisselberg and Erin Murphy for their helpful comments and guidance. Thanks also to Lala Wu and the staff of the California Law Review for their excellent edits and suggestions. Any mistakes are, of course, my own.
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INTRODUCTION

In People v. Robinson,1 the California Supreme Court affirmed the conviction of Paul Eugene Robinson on five counts of sexual assault.2 The charges stemmed from allegations made by Deborah L.—a woman who awoke on August 25, 1994, to find a stranger in her bedroom.3 The stranger held a knife to her throat, raped her, threatened to kill her, and fled from her apartment.4 Deborah called 911 and was taken to the hospital, where a rape kit was prepared and semen was collected in order to create a genetic profile of the assailant.5 Six years later, police apprehended Robinson and charged him with the assault.6 At trial, an expert witness for the prosecution testified that, based on the genetic profile created from the collected semen, Robinson's DNA

1. 222 P.3d 55 (Cal. 2010).
2. Id. at 60–61.
3. Id. at 61.
4. Id.
5. Id.
6. Id. at 61–62.
matched that of the perpetrator "at all 13 loci." The witness further testified that the

[P]robability that two people would share identical DNA patterns at each of the 13 loci tested is one in 650 quadrillion . . . in the African-American population, one in six sextillion . . . in the Caucasian population, and one in 33 sextillion . . . in the Hispanic population.

Robinson’s conviction was thus unremarkable, at least in the sense that the evidence against him was extraordinarily persuasive. But three facts make the conviction and the court’s affirmation particularly noteworthy: first, an arrest warrant for the perpetrator was issued just days before the six-year statute of limitations had run on the crime, but police did not capture Robinson until after the statutory period had run; second, the arrest warrant did not bear Robinson’s name or even his physical description but instead referenced only a yet-unidentified DNA profile as created and indexed by the California Department of Justice (DOJ); and third, the California DOJ collected a blood sample from Robinson in violation of a state law authorizing the collection of DNA only from individuals convicted of a qualifying offense. Cumulatively, these facts called into question the statutory and constitutional validity of Robinson’s arrest and formed the basis of the court’s review.

Criminal justice officials began using so-called “John Doe” DNA arrest warrants in the 1990s to preserve sexual assault cases where the statute of limitations threatened to run and the perpetrator had yet to be found, but where DNA evidence collected at the scene could be used to identify the assailant. Several states have employed this process, and appellate courts have weighed in largely to confirm that the procedure is statutorily and constitutionally valid. Similarly, the issues arising from the use of “John Doe” DNA arrest

7. Id. at 62–63.
8. Id.
9. Id.
10. Id. at 61–62.
11. Id. at 62–63; DNA and Forensic Identification Database and Data Bank Act of 1998, CAL. PENAL CODE § 296 (Deering 1998). This law has since been amended several times, and the definition of a qualifying offense has changed. See CAL. PENAL CODE § 296 (Deering 2010).
14. See People v. Martinez, 855 N.Y.S.2d 522 (App. Div. 2008) (affirming that an indictment identifying the defendant by only his DNA profile satisfied his right to notice); State v. Danley, 853 N.E.2d 1224 (Ohio Ct. C.P. 2006) (denying motion to dismiss charges following a DNA-based indictment filed after the statute of limitations had run); State v. Davis, 698 N.W.2d 823 (Wis. Ct. App. 2005) (holding that the conversion from one type of DNA analysis to another following the expiration of the statute of limitations did not violate it); State v. Dabney, 663 N.W.2d 366 (Wis. Ct. App. 2003) (upholding the validity of an arrest warrant and complaint using DNA); cf. State v. Belt, 179 P.3d 443, 447, 450 (Kan. 2008) (approving the use of DNA warrants “in the abstract” but affirming dismissal of the charges because the arrest warrant in question only included DNA information “shared by every human being”).
warrants have been well mined in criminal justice literature. The California Supreme Court’s decision in Robinson provides a new opportunity to address the potential consequences of the use of these warrants and a first opportunity to address events that have occurred since earlier cases were decided and earlier commentary was published.

This Note will examine the state of the law following People v. Robinson, focusing primarily on the decision itself to raise questions about its possible consequences. The Note will proceed in two parts. Part I will explain the current legal framework surrounding the use of “John Doe” DNA arrest warrants and survey the landscape of cases in jurisdictions outside of California. Part II will examine the more controversial holdings in People v. Robinson. It argues that the court’s decision was correct, but its opinion was overbroad with respect to: (1) the privacy interests of individuals arrested but not convicted of a crime and its application of the exclusionary rule where DNA is collected unlawfully, (2) the development of relatively new exclusionary rule doctrine, and (3) the purposes of the statute of limitations. Collectively, these issues do not call into question the validity of the outcome of Robinson, but they do present potential future problems for courts dealing with these issues.

I. “JOHN DOE” DNA ARREST WARRANTS: THE STATE OF THE LAW

The outcome in Robinson rests in part on a growing statutory emphasis on the value of DNA evidence in criminal trials, and in part on Fourth Amendment law as it pertains both to the reasonableness of DNA collection and to the amendment’s “particularity” requirement. This Part begins by describing the background of DNA collection and analysis at the federal level and in California, and then proceeds to discuss the constitutional and privacy implications of DNA collection. Next, it describes the framework surrounding the statute of limitations and relevant Fourth Amendment case law. Finally, it discusses the ways in which other jurisdictions have handled cases similar to Robinson.

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16. U.S. CONST. amend. IV.
A. DNA Databases

It is useful to begin with a very cursory review of the means by which criminal investigators process evidence containing DNA into usable forensic evidence. DNA profiles are derived from discarded or extracted human material—blood, hair, skin cells, etc.—containing genetic information. Technicians look at specific areas of this genetic information, commonly referred to as loci, where repetitions are known to take place, then assign numbers to them that are representative of the number of repetitions. Focusing on thirteen loci, technicians use these numbers to create a profile that is virtually unique to the person to whom the DNA belongs. Because DNA profiles are unique, they prove to be extraordinary crime-solving tools when available and, when encoded, they are well suited for collection in databases.

1. Statutory Framework

The creation and implementation of DNA databases began in 1989 when Virginia became the first jurisdiction in the United States to systematically collect, analyze, and store DNA information in a database, and the federal government and every other state followed suit over the next decade. The federal government took the lead in developing database collection and technology with the passage of the DNA Identification Act of 1994, which was

19. Id.
20. ANNA C. HENNING, CONG. RESEARCH SERV., R 40077, COMPULSORY DNA COLLECTION: A FOURTH AMENDMENT ANALYSIS (2009). The use of DNA for these purposes is, of course, not without controversy. Specifically, argument has ensued over the proper means of statistical analysis for determining how persuasive DNA evidence is where DNA lifted from a crime scene is matched against a DNA profile logged in a database. See, e.g., David H. Kaye, Rounding up the Usual Suspects: A Legal and Logical Analysis of DNA Trawling Cases, 87 N.C. L. REV. 425 (2009). Others argue that DNA analysis itself is subject to discretionary choices that call into question its validity. See Murphy, supra note 18, at 501–08 (describing various stages in DNA typing that require subjective choices on the part of the laboratory technician). And there are documented examples of mismanaged crime laboratories that call into question the validity of their findings. See Erin Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 CALIF. L. REV. 721, 754–56 (2007). This discussion is all well beyond the scope of this Note. But suffice it to say that the problems inherent in accurately describing the statistical probability of DNA database matches to judges and juries have implications for the use of “John Doe” DNA arrest warrants insofar as they dispute the accuracy of describing criminal suspects with sufficient particularity to commence a prosecution against them.
22. Hibbert, supra note 21, at 775.
designed to facilitate collection and information sharing among criminal justice jurisdictions through the Combined DNA Indexing System (CODIS). More than 170 law enforcement agencies use CODIS, enabling them to share forensic DNA information for criminal investigations. Congress has updated CODIS several times in order to provide funding to states that develop and upgrade their DNA collection systems, to extend compulsory DNA collection from certain offenses to all felonies, and to authorize the United States Attorney General to require compulsory collection from individuals charged with or detained in connection with—but not convicted of—certain crimes.

California was a full participant in the proliferation of DNA databases and in 1998 passed into law its first cut at requiring collection of DNA evidence from convicted criminals. The law, codified at California Penal Code section 296, first required only that the California DOJ collect DNA samples from individuals who were convicted of, pled guilty or no contest to, or were found innocent by reason of insanity of certain felony offenses. It was subsequently amended several times, and the amendments generally expanded the reach and breadth of the DNA collection requirements. The most significant amendment to section 296 came at the initiative of Bruce Harrington, an attorney and real estate developer from Newport Beach whose brother and sister-in-law were killed in 1980 in an unsolved crime. Harrington sponsored Proposition 69, which passed with overwhelming support in 1994. The new law required the state to collect DNA samples from individuals convicted of, pled guilty to, or found innocent of certain felonies.

29. Id. at art. 2.
30. 1999 Cal. Adv. Legis. Serv. 475 (LexisNexis) (codified as amended at CAL. PENAL CODE § 296 (Deering 2009)) (amending the Act, among other things, to include lower degrees of murder and to require compulsory collection from individuals committed to an institution or state hospital as a mentally disordered sex offender); 2000 Cal. Adv. Legis. Serv. 2814 (LexisNexis) (codified as amended at CAL. PENAL CODE § 296 (Deering 2009)) (amending the statute to, among other things, reach individuals convicted of crimes in non-California courts); 2001 Cal. Legis. Serv. 906 (West) (codified as amended at CAL. PENAL CODE § 296 (Deering 2009)) (amending the statute to, among other things, include individuals convicted of "burglary, robbery, arson, or carjacking, or an attempt to commit these offenses" among those from whom DNA would be collected); 2002 Cal. Legis. Serv. 160 (West) (codified as amended at CAL. PENAL CODE § 296 (Deering 2009)) (amending the statute to, among other things, include "persons convicted of terrorist activity" among those from whom DNA would be collected).
31. David Rosenzweig, On The Law; Taking State's DNA Law to Rest of Nation; A
which passed in 2004 and expanded the class of individuals from whom the California DOJ is compelled to collect DNA to: (1) juveniles convicted of felonies or misdemeanor sex offenses; (2) all individuals who are in prison, on probation or parole, and who have been convicted of a felony; and (3) all adults arrested for murder or rape. The proposition also provided that, five years following passage of the act, any person arrested for a felony offense would be subject to compulsory DNA collection. This expansion marked a serious focus by the state of California on DNA evidence both for proving guilt and for enhancing the ability of criminal investigators to locate suspects, and critics have bemoaned its breadth. This is important because, as Part II argues, the California Supreme Court’s decision in Robinson appeared to accept the expansion of DNA collection without close analysis of what may be different privacy interests between convicted criminals and individuals arrested but not convicted.

2. Constitutional Implications

Because compulsory blood collection and analysis constitutes a search, the practice implicates the Fourth Amendment to the Constitution. The U.S. Supreme Court has held, however, that the intrusion occasioned by a blood test is not significant, since such "tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." The Court has further held that the privacy interests of an individual are informed by that person’s status as a convicted criminal, and that this status is a factor that may diminish the person’s expectation of privacy.

Under this framework, California courts have never held that a compulsory DNA collection statute violates an individual’s Fourth Amendment

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33. CAL. PENAL CODE § 296(a)(2)(C) (Deering 2009).
34. See Tania Simoncelli & Barry Steinhardt, California’s Proposition 69: A Dangerous Precedent for Criminal DNA Databases, 33 J.L. MED. & ETHICS 279, 280 (2005) (calling Proposition 69 “a radical expansion of California’s law governing criminal DNA databases” and asserting that the number of people covered by the proposition was “staggering.”); see also Robert Berlet, Comment, A Step Too Far: Due Process and DNA Collection in California After Proposition 69, 40 U.C. DAVIS L. REV. 1481 (2007).
36. U.S. CONST. amend. IV.
Thus, no Fourth Amendment challenge to section 296, even as expanded by Proposition 69, has succeeded. Federal courts have almost uniformly held just as the California courts have held, and the Supreme Court has yet to entertain the issue. Remaining for the courts is the issue of whether arrestees have a more cognizable Fourth Amendment claim than convicts. If one's privacy interests are reduced by virtue of being imprisoned or under probation on the theory that they are subject to close monitoring by the state, then it might be the case that arrestees have greater privacy interests because adjudication has not subjected them to the same treatment. As Part II.A.1 discusses, this is an issue that could arise in unusual terms as a result of Robinson.

3. Privacy Implications

One other area of concern may have bearing on the wisdom of using “John Doe” DNA arrest warrants: its privacy implications. Academics have questioned whether there is something different about DNA—something that makes its compulsory collection more disturbing than that of, say, fingerprints. One concern is that privacy interests represented by DNA evidence are not commensurate with the level of intrusion upon the human body that collection requires. First, DNA can be—and often is—collected from discarded bodily material. Second, as noted above, the Supreme Court has held that blood tests do not introduce a violation of the Fourth Amendment.

But this analysis ignores another concern here: the amount of information that can be obtained from DNA. Professor Joh argues that because the Supreme Court’s Fourth Amendment jurisprudence “is grounded in physical boundaries,” it fails to adequately protect the information the DNA contains. The problem is that the Fourth Amendment protects against searches but not the items to be searched. For example, police who collect DNA evidence from a discarded cup would assuredly be within the bounds of California v. Greenwood, a case in which the Supreme Court held that no reasonable

39. In re Calvin S., 58 Cal. Rptr. 3d 559, 563 (Ct. App. 2007) (holding that a juvenile’s interests in privacy does not outweigh “the legitimate government interest in DNA testing as an aid to law enforcement.”); People v. Travis, 44 Cal. Rptr. 3d 177, 192 (Ct. App. 2006) (“[W]e are not persuaded that the governmental interest furthered by [section 296] is thereby diminished to an extent that it offends Fourth Amendment principles under the balancing test.”); People v. Johnson, 43 Cal. Rptr. 3d 587, 612 (Ct. App. 2006); Alfaro v. Terhune, 120 Cal. Rptr. 2d 197, 207–08 (Ct. App. 2002); People v. King, 99 Cal. Rptr. 2d 220, 230 (Ct. App. 2000).

40. See Henning, supra note 20, at 9 n.66.


expectation of privacy exists in discarded garbage, and therefore its search does not implicate the Fourth Amendment.\textsuperscript{44} Though the cup holds information of a somewhat personal nature to the person who discarded it—information that requires laboratory analysis to be useful—he has discarded his privacy interests along with the cup itself.

So what of the information contained within DNA? Does the breadth of information revealed by DNA require a different level of scrutiny for cases in which it implicates the Fourth Amendment? Dissenters in \textit{United States v. Kincade}, a Ninth Circuit case involving compulsory DNA collection, argued that looming expansion of DNA collection threatens to capture information about people that most would just as soon have kept private, such as race, sex, or genetic disorders.\textsuperscript{45} Where a fingerprint is, at best, only a way to determine identification, a DNA profile can tell a much fuller story. Discarding one's DNA on a plastic cup, then, is less like leaving behind a signature in the form of a fingerprint, and more like leaving behind a biological diary containing information that some might prefer to keep private.

\textbf{B. The Statute of Limitations}

The use and collection of DNA evidence forms the basis of one concern about the use of “John Doe” DNA arrest warrants. What makes \textit{Robinson} unique, though, is that it also addresses the purposes and effects of the statute of limitations, an area of the law not often the subject of modern legal debate. This Section discusses the framework of the statute of limitations and how it fits into the debate about the use of “John Doe” DNA arrest warrants.

\textit{1. Statutory Framework}

The basic statute of limitations in California is similar to statutes of limitations in most jurisdictions.\textsuperscript{46} There is no statute of limitations for any crime punishable by life imprisonment without parole or death, or for embezzlement of public money.\textsuperscript{47} Prosecution for crimes punishable by eight years or more in prison must be commenced within six years of the offense,\textsuperscript{48} while prosecution of all other crimes punishable by imprisonment in state prison must commence within three years of commission of the offense.\textsuperscript{49}

\begin{itemize}
  \item \textsuperscript{44} 486 U.S. 35, 40 (1988).
  \item \textsuperscript{45} 379 F.3d 813, 849–51 (9th Cir. 2004) (Reinhardt, J., dissenting) (describing the amount of information included in so-called “junk DNA”); \textit{id.} at 871–75 (Kozinski, J., dissenting) (“If we have no legitimate expectation of privacy in such bodily material, what possible impediment can there be to having the government collect what we leave behind, extract its DNA signature and enhance CODIS to include everyone?”).
  \item \textsuperscript{46} \textit{See, e.g., MODEL PENAL CODE} § 1.06 (Proposed Official Draft 1962).
  \item \textsuperscript{47} \textit{CAL. PENAL CODE} § 799 (Deering 2009).
  \item \textsuperscript{48} \textit{Id.} § 800.
  \item \textsuperscript{49} \textit{Id.} § 801.
\end{itemize}
Complicating matters is the meaning of “commence,” an issue of importance in Robinson. Section 804 provides, among other options, that a prosecution can be deemed to have commenced when “[a]n arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.”\(^\text{50}\) Importantly, the California Law Revision Commission weighed in on this issue,\(^\text{51}\) advising that

[j]issuance of a “Doe” warrant does not reasonably inform a person that he or she is being prosecuted and therefore does not satisfy the statute of limitations. If the name specified in the warrant is not the precise name of the defendant, it is sufficient that the name identifies the defendant with reasonable certainty.\(^\text{52}\)

The Commission cites two cases for this proposition: \textit{People v. McCrae}\(^\text{53}\) and \textit{People v. Erving}.

\(^{54}\) In \textit{Erving}, the court held that a “Jane Doe” indictment including the defendant’s first name and an apparently erroneous weight and skin color was sufficient to confer jurisdiction on the court.\(^{55}\) In \textit{McCrae}, the court relied on \textit{Erving} to similarly hold that a “John Doe” indictment sufficiently described the defendant to confer jurisdiction, despite not including his name.\(^\text{56}\) Neither case, however, speaks directly to the degree of particularity necessary in an arrest warrant to satisfy the statute of limitations.

Far from clarifying the standards under which a “John Doe” DNA arrest warrant may be used to commence the prosecution of a defendant for the purposes of the statute of limitations, the statutory framework provides an ambiguous set of requirements.

2. Constitutional Implications

Because California’s statute of limitations allows an arrest warrant to commence an action, “John Doe” DNA warrants implicate the Fourth Amendment. Specifically, the Fourth Amendment requires that a warrant

\(^{50}\) Id. § 804(d).

\(^{51}\) The Commission’s purpose is in part to “[r]ecommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state into harmony with modern conditions.” CAL. GOV’T CODE § 8289(d) (West 1984). The California Supreme Court has held that “[b]ecause the official comments of the California Law Revision Commission ‘are declarative of the intent not only of the draftsman of the code but also of the legislators who subsequently enacted it,’ . . . the comments are persuasive, albeit not conclusive, evidence of that intent.” Dep’t of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd., 145 P.3d 462, 469 n.9 (Cal. 2006) (quoting Bonanno v. Cen. Contra Costa Transit Auth. 65 P.3d 807 (Cal. 2003)).


\(^{53}\) 32 Cal. Rptr. 500 (Ct. App. 1963).

\(^{54}\) 11 Cal. Rptr. 203 (Ct. App. 1961).

\(^{55}\) Id. at 207.

\(^{56}\) \textit{McCrae}, 32 Cal. Rptr. at 503–04.
“particularly describ[e] . . . the persons or things to be seized.” While the scope of search warrants has been well litigated in Fourth Amendment jurisprudence and the textual requirements of the doctrine have been relaxed in some respects, there is little case law on the particularity requirement as it applies to arrest warrants.

In one case, West v. Cabell, the Supreme Court discussed the level of specificity required to sustain the constitutionality of an arrest warrant. There, Vandy M. West brought an unlawful imprisonment action against a U.S. Marshall and his deputies, one of whom had arrested West on a warrant for “James West” for murder. Vandy West had protested the arrest vigorously, as one would expect, but the deputy did not allow him to prove his identity and instead opted to take him, “against his will, in a hack and in irons, sixty miles to” jail. When the affiant upon whose information the warrant relied arrived—also from sixty miles away and after a delay from illness—he confirmed that the Deputy Marshall had arrested the wrong man. At trial, the judge refused to instruct the jury that the warrant was invalid. The Court reversed and remanded, affirming that the common law and the Fourth Amendment guarantee “a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him.”

On the basis of this holding, a California Court of Appeal held in People v. Montoya that “a John Doe warrant describing defendant as a ‘white male adult, 30 to 35 years 5’10”, 175 lbs. dark hair, medium build’ was not sufficiently particular for the purposes of the Fourth Amendment. The court further held that “[w]here a name that would reasonably identify the subject to be arrested cannot be provided, then some other means reasonable to the circumstances must be used to assist in the identification of the subject of the warrant.” While this may be an unsurprising outcome, Montoya fails to state a guiding principle for the requirement, and the case law on this issue tends to focus on what indicia are required for a warrant to be sufficiently particular, rather than on an overarching principle upon which these decisions should be based.

Some jurisdictions provide more particularized guidance. In Powe v. Chicago, for example, the Seventh Circuit set out a principle of some use in

57. U.S. Const. amend IV.
58. See, e.g., Horton v. California, 496 U.S. 128 (1990) (holding that the “plain view” doctrine does not require inadvertent discovery of incriminating items and, therefore, that the police did not err in seizing items that were not included in the search warrant).
59. 153 U.S. 78 (1894).
60. Id. at 85.
61. Id. at 79.
62. Id.
63. Id. at 81.
64. Id. at 85.
65. People v. Montoya, 63 Cal. Rptr. 73, 75, 77 (Ct. App. 1967).
66. Id. at 77 (citing United States v. Swanner, 237 F. Supp. 69, 71 (E.D. Tenn. 1964)).
analyzing “John Doe” warrants of all stripes.\textsuperscript{67} In that case the plaintiff was robbed of his identification, which the perpetrator used when pleading guilty to another crime.\textsuperscript{68} Powe was thus on the hook for the perpetrator’s later violation of probation, and an arrest warrant was issued for “Andrew Powe, a/k/a Ernest Brooks.”\textsuperscript{69} Powe was later arrested twice at traffic stops under the arrest warrant.\textsuperscript{70} The court held the warrant invalid—a requirement to sustain Powe’s suit against the city of Chicago—because it was insufficiently particular.\textsuperscript{71} In doing so, the court stated that:

\begin{quote}
[t]he inclusion of names that might be incorrect, combined with the omission of a specific description of the person sought, create a substantial risk, not simply that an innocent person will be arrested, \textit{but that a person to whom not the least suspicion has attached will be arrested}. This risk cannot be tolerated under the fourth amendment.\textsuperscript{72}
\end{quote}

Powe’s construction of the Fourth Amendment’s particularity requirement, while not cited in Robinson, shed light on the way that courts or critics could think about the potential dangers of “John Doe” DNA arrest warrants.

Consider an example. Imagine a case in which DNA evidence demonstrates that a suspect was at the scene of a crime—say, an armed robbery. That same DNA evidence, while functionally conclusive for the purposes of identification, sheds no light on the criminal conduct itself. Was the suspect holding the gun, or was he merely an unlucky bystander in the event? DNA offers no evidence either way, but is sufficient to sustain an arrest. This hypothetical does not always reach to sexual assault cases in which DNA left at the crime scene is evidence both of identity and of the assault itself. But what happens in a case where consent is disputed? DNA evidence provides the means of determining identity, but fails to shed light on the actual events that took place. In this manner, suspicion attaches, but there is a failure to establish the most important elements of the crime. Where the alleged crime is fresh, we can leave determinations of consent to the courtroom and the defendant’s ability to convince the jury of his innocence, but the problem compounds where the crime is old—a likely event in a “John Doe” DNA arrest warrant case—as memories fade and events become difficult to describe. Suspicion attaches on the basis of DNA, while the persuasiveness of DNA evidence overwhelms other pertinent facts.

\begin{flushright}
67. 664 F.2d 639 (7th Cir. 1981).
68. \textit{Id.} at 642.
69. \textit{Id.} at 643. Ernest Brooks was another name used by the perpetrator. \textit{Id.} at 642 n.2.
70. \textit{Id.} at 642.
71. \textit{Id.} at 648.
72. \textit{Id.} (emphasis added).
\end{flushright}
C. "John Doe" DNA Arrest Warrants in the Courts

Several state courts have had an opportunity to review the use of "John Doe" DNA arrest warrants.\(^73\) This section will survey these cases to provide a foundation for discussion in Part II.

1. Wisconsin\(^{74}\)

In \textit{State v. Dabney}, the Wisconsin Court of Appeals heard the first appeal in the United States in which a criminal defendant had been arrested on a "John Doe" DNA arrest warrant issued prior to the running of the statute of limitations.\(^75\) In that case, the victim was kidnapped, sexually assaulted, and released, whereupon she was taken to a sexual assault treatment center and the semen of the assailant was found in her saliva.\(^76\) The assault took place on December 7, 1994, but police did not obtain a "John Doe" DNA arrest warrant until December 5, 2000—two days before the statute of limitations was to run.\(^77\) On February 7, 2001, the DNA profile was run against other DNA profiles in Wisconsin's database, and a match was found.\(^78\) The complaint was amended to include Dabney's name and he was charged with the assault.\(^79\)

Dabney challenged the validity of the arrest warrant by arguing that the DNA profile included in lieu of a name or physical description did not describe him with sufficient particularity.\(^80\) The court addressed two important features of the particularity requirement—albeit briefly—that are helpful in understanding the policies that underlie the statute of limitations. First, the court noted that "a DNA profile is arguably the most discrete, exclusive means of personal identification possible."\(^81\) Second, the court recognized that "although the DNA profile satisfies the particularity requirements in identifying a suspect whose name is not known, it would be helpful, for notice purposes, to also include any known physical appearance characteristics."\(^82\)

There are two significant points to be gleaned from this analysis. First, the court did not accept the argument that a DNA profile does not actually
“describe” anyone, which is an argument prominently featured in the dissent in Robinson.\textsuperscript{83} Second, the court tipped its hat to the notion that the particularity requirement for an arrest warrant is, in part, designed to fulfill a notice function for the defendant in a criminal action.\textsuperscript{84} To the degree that a DNA profile is inscrutable to most people and that the arrest warrant incorporates reference numbers to a database held by the state, the likelihood of an accused individual obtaining notice of the allegations against him seems low.

The court also addressed Dabney’s arguments that the practice of obtaining “John Doe” DNA arrest warrants violated the statute of limitations.\textsuperscript{85} Here, the court simply rebuffed the defendant by stating that “[w]e have already concluded that the complaint and warrant in this case were sufficient to commence the prosecution. Thus, the case was timely filed.”\textsuperscript{86} In supporting its position, the court noted that the rights associated with the statute of limitations were purely statutory—not “fundamental”—and that the Wisconsin legislature had since addressed the issue by updating its statutory code.\textsuperscript{87} It is noteworthy that the court did not directly address the purposes of the statute of limitations, circling back to its holding that the statute of limitations had not been violated.\textsuperscript{88}

2. Ohio

In State v. Danley, the Ohio Court of Common Pleas queried whether a “John Doe” DNA arrest warrant could withstand a statutory and constitutional challenge in a motion to dismiss.\textsuperscript{89} The court followed Dabney closely on the statutory question,\textsuperscript{90} but went on to discuss whether the delay in prosecution between issuance of the arrest warrant and actual prosecution—thirty-two months—violated the defendant’s right to a speedy trial.\textsuperscript{91} The court looked to the Supreme Court’s limited jurisprudence on the Sixth Amendment right to a speedy trial and held that, in determining whether this constitutional right had been violated,

it is necessary to balance and weigh the conduct of the prosecution and the defendant by examining four factors: (1) the length of delay, (2) the reason for the delay, (3) the defendant’s assertion of speedy-trial rights, and (4) the prejudice to the defendant as a result of the delay.\textsuperscript{92}

\begin{footnotes}
\item[83] People v. Robinson, 224 P.3d 55, 62 (Cal. 2010).
\item[84] See Bieber, supra note 13, at 1086; Ulmer, supra note 15, at 1610–11.
\item[86] Id. at 373.
\item[87] Id.
\item[88] Id.
\item[89] 853 N.E.2d 1224 (Ohio Ct. C.P. 2006).
\item[90] See id. at 1226–28 (citing Dabney, 663 N.W.2d 366).
\item[92] Id. at 1228 (citing Doggett v. United States, 505 U.S. 647 (1992); Barker v. Wingo, 407 U.S. 514 (1972)).
\end{footnotes}
Weighing these four factors, the court found that the time delay, while substantial, did not appear to disrupt the defendant's life and, further, that trouble locating the defendant contributed to the delay. As to prejudice, the court held that the defendant's failure to argue or demonstrate any specific prejudice, along with the finding that the prosecution had not proceeded negligently, weighed against the defendant's claim. The motion to dismiss the charges was thus denied.

3. New York

In People v. Martinez, the Appellate Division of the Supreme Court of New York considered a case in which the defendant was charged on a “John Doe” DNA indictment arising from a sexual assault that took place on October 31, 1996. A grand jury issued the indictment in 2001. In December 2004, following a completed stint in New Jersey state prison, Martinez returned to New York as a parole violator; upon his arrival, the state collected his blood and his DNA profile was entered into New York’s DNA database. On October 12, 2004, almost eight years after the sexual assault, the database revealed a “cold hit,” demonstrating that the DNA profile in the indictment matched that of the defendant. He later pleaded guilty to rape and subsequently appealed.

Martinez challenged the DNA identification as insufficient to fulfill the “notice” requirement for indictments. The court held that the defendant’s right to notice “attached at his arraignment” and that unsealing the indictment in his presence provided him with sufficient notice as to the charges against him. The fact that the indictment had not been amended to include his name was not fatal; rather, the court concluded that the growing use of DNA in criminal prosecutions was persuasive evidence that the procedure was sufficient. The court did not address the issue whether a speedy trial right had been violated. The conviction was thus affirmed.

93. Id.
94. Id. at 1228–29.
95. Id. at 1229.
97. Id. at 524.
98. Id.
99. Id.
100. Id.
101. Id. at 525.
102. Id.
103. Id. at 526.
104. Id. at 528.
4. Kansas

Kansas's high court was the first state supreme court to consider a challenge to the use of "John Doe" DNA arrest warrants. In State v. Belt, the defendant was charged with seven different sexual assaults between 1989 and 1994, all of which involved home invasions. DNA evidence was collected at the scene of each incident and DNA profiles were collected. The original complaints and arrest warrants varied in scope, but none described the assailant with a full DNA profile—the most thorough complaint gave a DNA profile at two loci. Police later apprehended Belt for another crime and compared his DNA profile to the DNA collected from the sexual assault cases, whereupon he was charged. Belt moved to dismiss the charges and introduced expert testimony at one hearing to demonstrate that the two loci listed on the warrants were common to all humans and that a "description of [DNA] information at only two loci would be unique . . . to 1 in 500 persons." The motions were heard in two separate trial courts, and the courts held differently on the validity of the warrants.

On appeal, the Kansas Supreme Court held that the warrants contained "insufficient identifying information," a point that the state conceded. The state argued, however, that this defect was cured by the fact that full profiles existed in the supporting affidavits. Looking to the Dabney decision and the Robinson decision at the appellate court level, the court held that, while it agreed "in the abstract" with the proposition "that a warrant identifying the person to be arrested for a sexual offense by description of the person's unique DNA profile, or incorporating by reference an affidavit containing such a unique profile, can satisfy constitutional and statutory particularity requirements," the warrants in this case failed to sufficiently set forth identifying information particular to the defendant. The court thus dismissed the charges.

106. Id.
107. Id. at 447-48.
108. Id. A bit of explanation is required here. Belt was an early suspect in the first sexual assaults, and his DNA was collected and compared with the collected DNA from the sexual assaults via CODIS. Id. A lab mistake, however, prevented him from being identified as the rapist. Id. Belt was later apprehended and convicted of the murder of Lucille Gallegos. Jurors Seek Death in Decapitation Case, LAWRENCE JOURNAL-WORLD, Nov. 4, 2004, at B5.
109. Belt, 179 P.3d at 448. The trial courts differed on whether the warrants described Belt with sufficient particularity. Id.
110. Id. at 447-48.
111. Id. at 449.
112. Id. at 450.
113. Id. (citing People v. Robinson, 67 Cal. Rptr. 3d 392 (Ct. App. 2007); State v. Dabney, 663 N.W.2d 366, 366 (Wis. Ct. App. 2003)).
114. Id. at 451.
5. Summary

These state cases decided prior to *Robinson* illustrate several points. First, courts appear very willing to accept "John Doe" DNA arrest warrants as sufficiently particular to satisfy the demands of the statute of limitations and the Fourth Amendment.115 Second, the courts do not seem particularly concerned with "speedy trial" issues that may arise from the use of "John Doe" DNA arrest warrants.116 Finally, the "notice" function served by arrest warrants and other means of commencing a prosecution has not proven to be a barrier to the use of these types of warrants.117 With these points in mind, this Note will now discuss *Robinson*—and the potential problems with the holding—in more detail.

II. *PEOPLE v. ROBINSON: AN ANALYSIS OF THE HOLDING*

The facts in *Robinson* set it apart from the decisions discussed in Part I such that it deserves special scrutiny for its implications. In this section I will analyze the California Supreme Court's *Robinson* holdings in detail, arguing that, while the outcome of *Robinson* is sound, some statements and holdings within the opinion potentially carry considerable consequences for future cases.118

First, in discussing the privacy interests of arrestees, the court used language that could be used to undermine those interests without fully considering them. Second, the court's treatment of the exclusionary rule was correct in many ways, but reached too far in considering relatively new exclusionary rule doctrine where it is both unnecessary and not wholly applicable. Third, the court paid little attention to the manner in which "John Doe" DNA arrest warrants interact with the purpose of the statute of limitations; specifically, they may hinder the ability of a defendant to raise an adequate defense where the alleged crime took place in the distant past. It also disregarded the possibility that, insofar as "John Doe" DNA arrest warrants render the statute of limitations moot, law enforcement officials may lack incentive to quickly and diligently pursue crimes where such warrants can be used. Thus, the court's holding in *Robinson*—while legally supportable—is overly broad in some ways, to potentially deleterious effect.

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117. See *Martinez*, 855 N.Y.S.2d 522; *Dabney*, 663 N.W.2d at 372–73.
118. Some issues decided in *Robinson* did not come up in other state holdings, and thus the decision is noteworthy beyond the discrete issues in the cases discussed in Part I.
A. Unlawful Collection of DNA Evidence

When prison officials collected Robinson’s blood for DNA analysis on March 2, 1999, they did so unlawfully.119 As discussed in Part I, the relevant DNA collection statute at the time provided that only individuals convicted of certain offenses were subject to DNA collection and entry into the state database managed by the California DOJ.120 A prison official mistook Robinson, transitively incarcerated based on parole revocation from an earlier felony burglary offense, for a convicted criminal who had been charged with spousal abuse.121 While administrators resolved this particular mistake, a different mistake in Robinson’s rap sheet led DOJ officials to conclude erroneously that a prior offense qualified Robinson for DNA collection.122

Before trial, Robinson moved to suppress the collected DNA evidence pursuant to California Penal Code section 1538.5.123 The trial court denied this motion,124 and the California Supreme Court undertook an analysis to determine “what remedy exists, if any, for the unlawful collection of genetic material under the 1998 version of the [DNA and Forensic Identification Data Base and Data Bank] Act.”125 The court engaged in two separate inquiries as to this question and as to the applicability of the federal exclusionary rule, which I will discuss in turn.126

1. The Lawfulness of Compulsory DNA Collection

Prior to Robinson, the California Supreme Court had not ruled on the lawfulness of compulsory DNA collection, and its treatment of the issue was largely unremarkable. As noted in Part I.A.2, supra, the courts have almost uniformly held against Fourth Amendment challenges to compulsory collection statutes.127 The reasoning is that compulsory blood collection for DNA analysis and identification, while implicating Fourth Amendment interests, is minimally invasive and that those convicted of crimes have a reduced expectation of privacy.128 The California Supreme Court followed this approach, citing federal precedent for the Fourth Amendment interests at stake and earlier California Court of Appeal holdings on the relevant California statutes.129

120. DNA and Forensic Identification Data Base and Data Bank Act of 1998, ch. 6, § 296(a) (Deering 1998) (current version at CAL. PENAL CODE § 296 (Deering 2009)).
121. Robinson, 224 P.3d at 64 & n.15.
122. Id. at 64 & n.17.
123. Id. at 64.
124. Id.
125. Id. at 61.
126. See id. at 62–71.
127. For a thorough survey of the courts' response to these challenges, see Henning, supra note 20, at 9–10. Henning points out a single exception to this trend in a Ninth Circuit panel decision that was later overturned en banc. Id. at 9 n.66.
128. See supra notes 35–39 and accompanying text.
129. Robinson, 224 P.3d at 64–66; see also supra note 39.
One element of the court’s analysis remains controversial despite its considerable supporting authority. When discussing the reduced privacy interests of convicted persons, the court stated that “[w]ith regard to any privacy interest in identifying information, it is established that individuals in lawful custody cannot claim privacy in their identification.” The court went on to describe the reduced privacy expectations held by “persons incarcerated after conviction.” However, the court never explained how its description of privacy interests applies to those arrestees who are not yet convicted, but who nevertheless are subject to compulsory DNA collection under the terms of Proposition 69. Are arrestees’ expectations of privacy reduced in the same way as convicted persons?

Recall that all adults arrested for felonies are subject to compulsory DNA collection as a result of Proposition 69; specifically, California Penal Code section 296(a)(2)(C) authorized this expansion as of January 1, 2009. Critics of the expansion have been concerned with the effect of equating the privacy interests of arrestees with the privacy interests of convicts. Further, critics argue that Proposition 69’s expansion provision might incentivize law enforcement officials to instigate improper investigatory detentions. The fruits of such an investigatory detention would no longer be limited to those items of evidence found on the detainee’s person or utterances made during the encounter. Rather, investigatory detentions would allow police to obtain DNA evidence for the state’s growing DNA database.

Additionally, there is reason to think that routine collection of DNA is unconstitutional because the process lacks particularized suspicion of wrongdoing as required by the Fourth Amendment. Current case law suggests that it is an open question whether compulsory arrestee DNA collection is sufficiently different from that of convicted persons to warrant a Fourth Amendment violation. Courts have employed two methods of analysis to determine whether compulsory collection of the DNA of arrestees is unconstitutional.

One method is the “special needs” exception to the warrant requirement of the Fourth Amendment. This exception is couched in the justification that “where a Fourth Amendment intrusion serves special governmental needs,
beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.\(^{136}\) In City of Indianapolis v. Edmonds,\(^{137}\) the U.S. Supreme Court held that a "narcotics checkpoint" intended to stop cars and search them for evidence of drug crimes did not fit into the "special needs" exception to the Fourth Amendment warrant requirement.\(^{138}\) Because the "primary purpose of the Indianapolis narcotics checkpoint program [was] to uncover evidence of ordinary criminal wrongdoing," the program violated the Fourth Amendment.\(^{139}\) Under this analysis, at least one court has held that, because the compulsory collection of DNA from arrestees primarily serves law enforcement purposes, the practice is unconstitutional.\(^{140}\)

The second method of analysis involves an examination of the "totality of the circumstances," which reflects a balancing test between the interests of government and the privacy interests of the individual. In cases where the petitioner is a parolee or probationer, some courts have held that the privacy interests of the individual are reduced such that DNA collection is a lawful intrusion.\(^{141}\) When applied to arrestees, courts have split as to whether the arrestee's privacy interests are different enough from those of the parolee to hold such a compulsory search unconstitutional.\(^{142}\)

Therefore, both the constitutionality of compulsory DNA collection and the correct test under which courts should analyze the constitutionality of compulsory DNA collection are open questions. But the California Supreme

\(^{136}\) Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989) (emphasis added). Von Raab, a case in which the Supreme Court held that U.S. Customs Service employees could be subjected to mandatory drug screening, is one example of a governmental special need.

\(^{137}\) 531 U.S. 32 (2000).

\(^{138}\) Id. at 42. Cf. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (affirming the constitutionality of a drunk-driving checkpoint where the state had an interest in "preventing drunken driving.").

\(^{139}\) Edmonds, 531 U.S. at 42.

\(^{140}\) United States v. Mitchell, 681 F. Supp. 2d 597, 610 (W.D. Penn. 2009) (holding that the federal DNA statute was unconstitutional as to this question).

\(^{141}\) Henning, supra note 20, at 12-14 (citing Banks v. United States, 490 F.3d 1178, 1184 (10th Cir. 2007)).

\(^{142}\) Compare Haskell v. Brown, 677 F. Supp. 2d 1187, 1203 (N.D. Cal. 2009) (applying "totality of the circumstances" test to California compulsory DNA collection statute and finding it constitutional), and United States v. Pool, 645 F. Supp. 2d 903, 907-15 (E.D. Cal. 2009) (rejecting the "special needs" test and finding that the compulsory collection was constitutional under the "totality of the circumstances" test), and Anderson v. Commonwealth, 650 S.E.2d 702, 704-07 (Va. 2007) (holding that compulsory DNA collection of an arrestee is analogous to fingerprinting and thus is constitutional), with In re Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006) (holding compulsory collection of the DNA of a juvenile to be unconstitutional under the "totality of the circumstances" test); see also United States v. Davis, 657 F. Supp. 2d 630, 666 (D. Md. 2009) (holding retention of DNA profile in a database was unconstitutional where the defendant's clothes were recovered from a hospital and he had never been convicted of a felony, but declining to employ the exclusionary rule because the deterrent value was low).
Court’s statement that any person “in lawful custody” has a reduced expectation of privacy in their identification goes beyond the language required for the Robinson holding and, at the very least, provides precedential language for a debatable issue yet to be thoroughly considered by the court. The problem is not necessarily that the California Supreme Court has decided the issue for itself in advance of being presented with the question, though having the language in place perhaps provides authority for the argument. The larger problem is that the California Courts of Appeal—which decide a great many questions of law—now have a foundation for holding that an arrestee’s privacy interests are minimal without fully considering whether there are important differences between the interests of arrestees and convicts.

2. The Exclusionary Rule

Because the collection of Robinson’s DNA was unlawful under statute, the court also considered whether the proper remedy for the violation was exclusion of the DNA evidence from trial. The court held that the exclusionary rule was not an appropriate remedy despite the unlawful collection. Though this result is surely correct, the court’s expansive analysis created unnecessary precedential language that law enforcement officials may use to avoid future Fourth Amendment violations.

The court first looked to the U.S. Supreme Court’s decision in Virginia v. Moore, where the defendant was arrested for driving with a suspended license despite state law dictating that, absent certain factors, arrest was unlawful and citation was the appropriate action. The question was whether an arrest made with probable cause but in violation of state law was a violation of the Fourth Amendment. Looking to the history and the purposes of the Fourth Amendment, the U.S. Supreme Court held that “whether state law authorized the search was irrelevant.” Virginia’s laws went beyond the protections of the Fourth Amendment, and thus Fourth Amendment protections did not attach to violations of this state law. The Court affirmed the constitutionality of the search.

In Robinson, the California Supreme Court looked to Moore and, to a lesser extent, Samson v. California, to hold that “a lawfully convicted and

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143. People v. Robinson, 224 P.3d 55, 64 (Cal. 2010).
144. Id. at 65.
146. Id. at 167.
147. Id. at 167–68.
148. Id. at 171.
149. Id. at 174.
150. Id. at 176.
151. 547 U.S. 843, 855 (2006) (“That some States and the Federal Government require a level of individualized suspicion is of little relevance to our determination whether California’s supervisory system is drawn to meet its needs and is reasonable, taking into account a parolee’s
incarcerated felon, such as defendant, does not have a Fourth Amendment right to prevent state authorities from collecting a blood sample for DNA profiling. This holding was surely correct. Moore stood for the clear proposition that the Fourth Amendment did not reach statutory violations by law enforcement officials. Therefore, the federal exclusionary rule did not apply in Robinson because Robinson’s DNA was collected in violation of state law and not, as the California Supreme Court had already decided, in violation of the Fourth Amendment itself.

The court did not stop here, but went on to bolster its holding on the basis of a relatively new federal exclusionary rule doctrine. Rather than rely upon the U.S. Supreme Court’s well-established holding in Moore, the California Supreme Court used a broader exclusionary rule doctrine, newly established in Herring v. United States, as an additional basis for its holding.

In Herring, police arrested the petitioner-defendant on a warrant that had been recalled but, due to a clerical error, made its way to the police. Upon a search incident to arrest, police recovered drugs from Herring’s person and a pistol from his car. Herring moved to suppress the evidence, but the motion was denied, and the Eleventh Circuit upheld the conviction. The U.S. Supreme Court agreed with the prior rulings that executing the warrant violated the Fourth Amendment, and held that

\[\text{[t]}\text{o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.}\]

The Court thus affirmed the conviction.

In applying Herring to the facts of Robinson, the California Supreme Court looked primarily to the process employed by the California DOJ in implementing the recently enacted DNA collection statute. Relying on testimony at the hearing on the motion to suppress, the court noted that the law enforcement personnel charged with implementing the statute “occasionally expressed ‘confusion in terms of how to implement’ the Act because ‘[i]t was a substantially diminished expectation of privacy.”

152. People v. Robinson, 224 P.3d 55, 67 (Cal. 2010).
153. See supra Part II.A.
155. Id. at 698–99.
156. Id. at 698.
157. Id. at 699.
158. Id. at 702.
159. Id. at 704.
very difficult law to understand." 161 The court further noted the DOJ’s apparent faithful dedication to applying the DNA collection statute, despite how complex it was, finding that the DOJ proceeded “conscientiously” and with an eye toward making “accurate determinations regarding whether an individual had a qualifying offense . . . .” 162 The court thus found that, under Herring, the exclusionary rule was not the required remedy for the violation.

But why did the court feel compelled to engage in a Herring analysis? As noted above, Moore appeared to close the question of whether the exclusionary rule was the appropriate remedy for a violation of state law. In applying Herring, the California Supreme Court created unnecessary—and insufficiently considered—precedential language that could be used in future cases to excuse Fourth Amendment violations that arise out of errors in DNA collection and analysis, despite the conscientious efforts of technicians.

For example, the court suggests that the complexity of DNA collection statutes is a factor in determining the applicability of the exclusionary rule; yet, this is troubling given the complexity inherent in forensic analysis. Professor Murphy has argued, for example, that there are several stages in the creation of DNA profiles that require subjective determinations by laboratory technicians. 163 Will the court’s emphasis on the conscientiousness of DOJ officials in Robinson be stretched to apply to those technicians and officials who make mistakes at various stages of DNA analysis? Perhaps not; it may be that Robinson only reaches statutory violations where the initial collection of DNA is at issue. And certainly the recent expansion of the classes of individuals subject to compulsory DNA collection will make mistakes less likely as it becomes more likely that individuals suspected or accused of a crime will fall within the reach of California’s DNA collection statutes. 164 But in applying Herring to Robinson, the California Supreme Court suggested that the misadministration of complex statutory or regulatory schemes provides a basis for doing away with the exclusionary rule. It would be unsurprising to see future cases in which laboratory technicians or administrators—perhaps facing a complex statute and limited resources for its application—make significant mistakes that do not rise to the level of triggering the exclusionary rule.

B. The Statute of Limitations

Perhaps the most controversial issue in Robinson—and the only issue to draw a dissenting opinion 165 —was whether the use of a “John Doe” arrest

161. Id. at 69 (internal citations omitted).
162. Id. at 71.
163. Murphy, supra note 18, at 501–08.
164. See supra Part II.A.1. This argument assumes, of course, that errors made at the collection phase will be harmless if an individual is likely to have his DNA collected under a different provision of the statute.
165. Robinson, 224 P.3d at 81–86 (Moreno, J., concurring and dissenting).
warrant successfully commenced a prosecution for the purposes of the statute of limitations. If the warrant was valid, then by the terms of the statute it clearly sufficed to commence the prosecution.\textsuperscript{166} The issue, however, runs deeper than this textual analysis. It calls into question the purposes of the statute of limitations itself and, ultimately, whether those purposes make sense in a case where the probative value of DNA evidence essentially provides a conclusive answer to the question of guilt.

1. The Particularity Rule

As discussed at Part I.B.2, supra, the statute of limitations in California reflects constitutional concerns with the level of particularity required for an arrest warrant.\textsuperscript{167} In \textit{Robinson}, the court referred to U.S. Supreme Court discussion concerning the purposes of the warrant requirement in the Fourth Amendment, specifically the Framers' concern with the use of general warrants that "placed 'the liberty of every man in the hands of every petty officer.'"\textsuperscript{168} Particularity, the Court said, is designed to "ensure[] that the search . . . will not take on the character of the wide-ranging exploratory searches [or seizures] the Framers intended to prohibit."\textsuperscript{169} At bottom, particularity is designed to reduce the scope of police behavior to that which is necessary to achieve a specific law-enforcement goal. California courts have held that, to meet this standard, "John Doe" arrest warrants "should also contain sufficient descriptive material to indicate with reasonable particularity the identification of the person whose arrest is ordered."\textsuperscript{170} The question, then, is whether the inclusion of a DNA profile in an arrest warrant sufficiently describes the individual to justify an arrest.

At first blush, the answer appears to be that it does. After all, DNA evidence is highly probative of the identity of a criminal suspect, if not always of actual guilt.\textsuperscript{171} But if the goal of the particularity requirement is to reduce police officers' discretion to prevent questionable officer conduct, then questions remain about the efficacy of "John Doe" DNA arrest warrants.

\footnotesize
\textsuperscript{166} Cal. Penal Code § 804. (West 2009) ("Except as otherwise provided in this chapter, for the purpose of this chapter, prosecution for an offense is commenced when any of the following occurs: (a) An indictment or information is filed. (b) A complaint is filed charging a misdemeanor or infraction. (c) The defendant is arraigned on a complaint that charges the defendant with a felony. (d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.") (emphasis added).

\textsuperscript{167} Compare Cal. Penal Code § 804(d) (West 2009) with U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.") (emphasis added).


\textsuperscript{170} People v. Montoya, 63 Cal. Rptr. 73, 77 (Ct. App. 1967).

\textsuperscript{171} See People v. Nelson, 185 P.3d 49, 52 (Cal. 2008).
To illustrate, imagine that a DNA profile has been constructed following a sexual assault and that a “John Doe” DNA arrest warrant has been issued. Unlike in Robinson, comparison in the DNA database reveals no matches. Instead, police rely on a tip from an informant who asserts knowledge of the crime and claims he knows who committed it. The only means by which the police can verify the identity of the person named by the informant is by obtaining DNA from that person and comparing it against the DNA obtained following the crime. At this point, the “John Doe” DNA arrest warrant ceases to simply be an authorization for arrest; it becomes an investigatory tool used in coordination with other such tools to determine the identity of the suspect. In this sense, a “John Doe” DNA arrest warrant would be used more opaquely as an investigatory tool—a means of lengthening the timeframe for the investigation—than as a tool for the commencement of a prosecution.

In his dissenting opinion, Justice Moreno noted that the “John Doe” DNA arrest warrant issued in Robinson was such that “the prosecution likely would never had been able to identify the suspect had he not been arrested for a new crime and been forced to provide a blood sample.” Further, the warrant “did not describe the defendant at all, because it gave no means for a peace officer attempting to execute the warrant to recognize the defendant and make an arrest.” The significance of this point seems small where, as in Robinson, the defendant is identified by virtue of a comparison in a computer database very soon after the statute of limitations expired. But where the police have to conduct a longer and more extensive investigation to identify the suspect, it is not clear that a “John Doe” DNA arrest warrant provides sufficient information to remove the sort of discretion that the Framers feared law enforcement might have.

A final criticism pertaining to the particularity requirement is the court’s failure to adequately consider the function of notice. Commentators have suggested that one purpose of the particularity requirement is to give notice to criminal suspects or soon-to-be defendants. The Robinson court did not analyze this aspect of the case, perhaps because the court did not consider it to

172. Robinson, 224 P.3d at 84 (Moreno, J., concurring and dissenting).
173. Id.
174. See id. at 61–62 (majority opinion).
176. Courts have generally not given this issue much treatment. The Dabney court considered the issue and concluded that “it would be helpful, for notice purposes, to also include any known physical appearance characteristics.” State v. Dabney, 663 N.W.2d 366, 372 (Wis. Ct. App. 2003). The Martinez court considered the notice requirement in terms of a “John Doe” DNA indictment, and concluded that the right to notice was attached at arraignment when the indictment was unsealed. People v. Martinez, 855 N.Y.S.2d 522, 525–26 (App. Div. 2008). Courts largely appear unwilling to consider the notice issue given that defendants seem unlikely to obtain notice of the charges against them via an arrest warrant. Ulmer, supra note 15, at 1610–13.
be of primary importance to the policies underlying the particularity requirement. But failing to consider this argument may prejudice those criminal defendants who are most likely to need and require notice. Meredith Bieber argues that, where a suspect believes he may be accused of rape, under very specific and unlikely circumstances the lack of a strong description in a "John Doe" DNA arrest warrant would damage his case. For example, this hypothetical suspect would have no means of knowing whether he should begin amassing evidence in his defense. Though the circumstances under which this problem would appear are rare, the California Supreme Court’s refusal to consider them may harm criminal defendants in the future.

2. Other Purposes of the Statute of Limitations

Until Robinson, the use of "John Doe" DNA arrest warrants had been confined to circumstances in which the statute of limitations threatened to extinguish a criminal charge. This could change. Law enforcement officials could conceivably seek these warrants as investigative tools rather than as means to toll the statute of limitations. Thus, the Robinson decision calls for discussion about the purposes of statutes of limitations.

The U.S. Supreme Court has stated that the statute of limitations "is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." This statement expresses dual concerns: first, that a criminal defendant’s ability to raise a defense might be damaged by fading memories and eroded exculpatory evidence, and second, that a crime might become remote enough to warrant repose. A third point raised by some commentators is that the statute of limitations helps promote prompt and diligent prosecution.

In Robinson, the first point does not rise to the level of requiring serious discussion. It seems fairly clear from the record that the only issue in dispute was the identity of the perpetrator; no claim was made that a sexual assault had not taken place. But further questions remain. Imagine, for instance, a case in which sexual contact had taken place between two adults, but that there remained an issue whether consent was given.

178. See Dabney, 663 N.W.2d at 372 (explaining that a "John Doe" DNA arrest warrant would be more helpful for notice purposes if it contained a physical description as well, but this deficit was not fatal to the State's case).

179. Bieber, supra note 13, at 1086. Specifically, a person who believes he might be subject to a rape charge could not learn from a "John Doe" DNA arrest warrant whether he will be.


181. Id. at 115 ("Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.").

182. See People v. Robinson, 224 P.3d 55, 61 (Cal. 2010).

183. See CAL. PENAL CODE § 261(a)(2) (Deering 2009) ("Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here it is
after issuance of the "John Doe" DNA arrest warrant and the running of the
statute of limitations, his defense is limited by the degree to which memories—
his own and, perhaps, those of others who may have knowledge about the
incident—have faded.

The issue of faded memories occurs in other sexual abuse settings,
specifically where the statute of limitations has been modified to enable people
who were sexually abused as children to report the crime long after the statute
of limitations has expired. In this setting, where claims age and the memories
of the parties and potential witnesses fade, there is a danger that the accused
will no longer be able to raise an adequate defense, and the subsequent trial will
be reduced to a credibility contest between the accuser and the accused, each
with recollections that may have become distorted over time.

The strongest criticism of the holding, perhaps, is that it provides no back
door for those cases which, unlike Robinson, have disputed elements other than
identity, and for which exculpatory evidence is no longer available after the
statute of limitations has run. In his dissent, Justice Moreno noted that the
ruling effectively circumvents the statute of limitations for any crime, not just
those where DNA evidence proves to be an almost-certain indicator of guilt.

Justice Moreno further objects to the way in which the ruling sweeps in a broad
swath of cases rather than deferring to the judgment of the legislature.
Presumably, a bill deliberated by the legislature would be more comprehensive
and focused than the court’s holding.

As to the second issue, repose, it is not clear that this concern warrants
much, if any, discussion in Robinson. It is unquestioned that rape is a heinous

accomplished against a person's will by means of force, violence, duress, menace, or fear of
immediate and unlawful bodily injury on the person or another.

184. See CAL. PENAL CODE § 803(g) (Deering 2009) (extending the statute of limitations to
one year within the date of a reported sexual assault under certain conditions); see also Judge Joan
Comparé-Cassani, Extending the Statute of Limitations in Child Molestation Cases Does Not
Violate the Ex Post Facto Clause or Stogner, 5 WHITTIER J. CHILD & FAM. ADVOC. 303, 307–10
(2006) (explaining history of California’s laws regarding the statute of limitations for child sexual
abuse cases).

185. See Scott H. Greenfield, Where Were You, 34 Years Ago?, SIMPLE JUSTICE BLOG
(Apr. 14, 2010, 8:34 EST), http://blog.simplejustice.us/2010/04/14/where-were-you-34-years-
ago.aspx.

186. Robinson, 224 P.3d at 85 (Moreno, J., concurring and dissenting) ("Our ruling is not
limited to situations like the present case in which DNA is extracted from semen recovered from a
rape victim. It would apply equally if a human hair is found at the crime scene from which DNA
can be extracted, or if the suspect left blood at the scene. And it is not limited to cases involving a
sexual assault. Thus, the prosecution can effectively circumvent the statute of limitations in any
case in which the police happen to find DNA evidence linking a suspect to the crime. In those
cases, an arrest warrant identifying the suspect only by his or her DNA profile can be filed and the
statute of limitations will not bar the case from being prosecuted whenever a match is made—
whether that be a matter of months, years, or decades.").

187. Id. at 84 ("The majority opinion will have the unfortunate effect of usurping the
Legislature's reasoned and measured treatment of the statute of limitations in cases involving
DNA evidence.").
crime carrying with it the possibility of severe punishment.\textsuperscript{188} It would be surprising to learn that any person supported a statute of limitations on sexual assault for the sole reason that time has passed. However, this may not be the case for other crimes. Say, for example, police discovered a discarded envelope from stolen mail, and the suspect left behind blood from a paper cut. Under \textit{Robinson}, the DNA evidence could be used to circumvent the statute of limitations for a crime for which society might think the passage of time has reduced the need for prosecution. Therefore, the criticism that \textit{Robinson} sweeps too broadly in its statute of limitations holding may hold true for crimes judged less harshly by society.

The third point raised above may prove more salient, as a statute of limitations can encourage law enforcement officials and prosecutors to proceed quickly, efficiently, and with an eye toward accuracy.\textsuperscript{189} Where a “John Doe” DNA arrest warrant is available, officials might feel a reduced sense of urgency in investigating the case. They might come to rely on a “cold hit” from the database, hoping that the suspect is arrested on another charge, his DNA is entered into the database, and the computer matches the previously collected DNA evidence with the suspect’s newly collected DNA sample. Thus, the computer replaces the investigatory work officials might have conducted.

In addition, Sixth Amendment “speedy trial” issues may arise in these instances.\textsuperscript{190} Because \textit{Robinson} approves of the use of “John Doe” DNA arrest warrants in general, police could seek one immediately following the creation of a DNA profile from a crime scene. This would, however, commence the prosecution. If the identification of the defendant took years beyond the running of the statute of limitations, there would be the potential for the defendant to raise a “speedy trial” objection to the prosecution.\textsuperscript{191} Yet, here there is no incentive for officials to seek an arrest warrant until right before the statute of limitations runs. Even where the sole piece of information used in the warrant—the DNA profile—is the same at the beginning of the statutory period and at the end, law enforcement officials may be able to use the statute of limitations as a “free” period in which no “speedy trial” issues arise.

Though some of the hypotheticals in this section may seem far-fetched, a salient concern exists that the \textit{Robinson} decision swept too broadly in casting aside the purposes of the statute of limitations in cases where “John Doe” DNA arrest warrants may be issued. A narrower decision might have achieved the same results with fewer negative consequences.

\textsuperscript{188} See \textit{CAL. PENAL CODE} § 264(a) (Deering, 2009) (“Rape, as defined in Section 261 or 262, is punishable by imprisonment in the state prison for three, six, or eight years.”).

\textsuperscript{189} Bieber, supra note 13, at 1091–92.

\textsuperscript{190} See \textit{U.S. CONST. amendVI} (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

\textsuperscript{191} See, e.g., Doggett v. United States, 505 U.S. 647–48 (1992) (holding that an eight- and-a-half-year delay between an indictment and arrest violated the defendant’s right to speedy trial).
CONCLUSION

It is difficult to find fault with the outcome in Robinson. In 1994, an intruder broke into Deborah L.’s home, brutally raped her, and fled. Robinson was identified as the perpetrator just over six years later, and his identity was a virtual certainty. That he was captured on an arrest warrant that supplanted his name with a DNA profile and that his arrest took place shortly after the statute of limitations had run would seem to most observers to be overly technical loopholes preventing the incarceration of a person guilty of a heinous crime.

All the same, the implications of the Robinson decision appear to reach farther than to the case itself. The consequences may represent an erosion of protections for criminal defendants that the Constitution and time-tested statutory provisions enshrine. Though the statute of limitations, the particularity requirement in the Fourth Amendment, and the exclusionary rule can appear as technicalities in this case, where the defendant is very likely guilty and where few would empathize with his circumstances, they represent fundamental principles necessary to protect fairness in future cases with different fact patterns.

The use of “John Doe” DNA arrest warrants is undoubtedly a boon for law enforcement, particularly in cases where DNA evidence can be conclusive proof of guilt. Whether they represent an erosion of defendants’ protections in other cases will be a question for future courts.