

6-2020

## It's All In The DNA—How *United States v. Hano* Extends the Statute Of Limitations for the Eleventh Circuit

Caroline Walker

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlrl](https://digitalcommons.law.mercer.edu/jour_mlrl)



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Caroline Walker, Casenote, *It's All In The DNA—How United States v. Hano Extends the Statute Of Limitations for the Eleventh Circuit*, 71 Mercer L. Rev. 1191 (2020).

This Casenote is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

# It's All In The DNA—How *United States v. Hano* Extends the Statute Of Limitations for the Eleventh Circuit\*

## I. INTRODUCTION

It is likely that most professionals in all industries would agree that technology is rapidly evolving, most considering that assertion as a major understatement and some struggling to balance the variety of changes. In the legal realm, the DNA revolution has impacted both criminal prosecution and defense, specifically wrongful convictions, exonerations, proof of guilt at trial, and the reopening of cold cases. For example, since the first DNA exoneration in 1989, there have been 367 DNA exonerees in thirty-seven states to date.<sup>1</sup> Forty-four percent of the exonerations involved misapplication of forensic science.<sup>2</sup> Other law enforcement tools, such as rape kits or fingerprinting, have also benefited significantly as a result of the DNA revolution. But how will DNA technology continue to make its mark?

The decision from the United States Court of Appeals for the Eleventh Circuit in *United States v. Hano*<sup>3</sup> signifies how much DNA technology and scientific advances are affecting the law, cases, and society. Theoretically, the holding in *Hano* enables prosecutors to reopen cases closed due to the lack of sufficient DNA tools and evidence that were necessary to proceed. In criminal cases, the statute of

---

\*A special thanks for Professor Fleissner for his time, guidance, and encouragement in advising me on this Casenote. His dedication and passion for teaching the law is an inspiration to many. I am also grateful to my mom and dad for their unwavering love and support throughout law school.

1. INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Nov. 15, 2019). The Innocent Project was founded in 1992 by Peter Neufeld and Barry Scheck at Cardozo School of Law. Its purpose is to exonerate wrongfully convicted persons through DNA testing.

2. *Id.*

3. 922 F.3d 1272 (2019).

limitations normally and routinely commences at the time of the crime, however, with the *Hano* decision, the statute of limitations will now commence at the time that the testing of DNA implicates the alleged criminal.<sup>4</sup> This shift in the initiation of statute of limitations significantly alters previous and future criminal proceedings.

*Hano* involves a couple of matters of first impression for the Eleventh Circuit, one including the DNA evidence and its effect on statute of limitations.<sup>5</sup> On the first issue, the court of appeals held that the indictment was returned within the applicable limitation period due to 18 U.S.C. § 3297<sup>6</sup> and the implications of the DNA testing from the defendant.<sup>7</sup>

## II. FACTUAL BACKGROUND

Diosme Fernandez Hano and Reinaldo Arrastia-Cardoso were convicted of robbery and conspiracy to commit robbery under the Hobbs Act<sup>8</sup>, for the robbery of \$1.7 million from an armored truck.<sup>9</sup>

"On November 30, 2009, Hano and Arrastia-Cardoso robbed a Brink's armored truck" on duty in Fort Myers, Florida. While the truck operators, Jimmy Ortiz and Bernard Meaney, were at Fifth Third Bank, a man in a ski mask held Ortiz at gunpoint and forced Ortiz back into the truck. A second masked man "entered the truck, grabbed bags of money, and exited." Once Meaney saw the Pontiac getaway car behind the Brink's truck, he reversed and rammed the car with the Brink's truck. One of these collisions caused one of the robbers to leave behind his ski mask as the masked man fled the scene.<sup>10</sup>

Investigators and a DNA analyst tested the ski mask and gun grip that were left behind at the scene and found a "major profile on the outside of" the items. A major profile is created "when there is significantly more DNA from one contributor than any other in the

---

4. *Id.* at 1283.

5. The court also considered whether or not the Confrontation Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment prohibits use of the non-testimonial statements of a non-testifying criminal defendant. On the second issue of first impression, the Court held that there were no due process errors in the admission of testimony by the district court based on the Confrontation Clause of the Sixth Amendment. *Id.* at 1280.

6. 18 U.S.C. § 3297 (2012).

7. *Hano*, 922 F.3d at 1280.

8. 18 U.S.C. § 1951(a), (b)(1) (1994).

9. *Hano*, 922 F.3d at 1280.

10. *Id.* at 1280–81.

mixture of DNA recovered and makes it possible to identify that contributor."<sup>11</sup>

Originally, Hano and Arrastia-Cardoso were not listed as primary suspects in the case until September 2014, when Ruben Borrego Izquierdo (facing unrelated charges) shared information with the Federal Bureau of Investigation regarding the armed robbery in question. Izquierdo stated that Hano, who grew up in the same Cuban village as Izquierdo, told Izquierdo that Hano robbed an armored truck with Arrastia-Cardoso in 2009. Hano included the detailed facts of Ortiz, the purchase of the car, the vehicle identification number, and what Hano purchased with the stolen money.<sup>12</sup>

In 2015, Hano and Arrastia-Cardoso became prime suspects in the investigation and investigators received both of their DNA samples. "Hano's DNA [sample] matched the major DNA profile from the ski mask," and Arrastia-Cardoso's "matched the major profile on the gun grip." Regarding the probability factors of the DNA samples, the government analyst determined less than one in 700 billion chance that the suspects' DNA profiles would match a random person's DNA profile.<sup>13</sup>

In 2016, Hano and Arrastia-Cardoso were indicted and convicted for Hobbs Act robbery and conspiracy to commit Hobbs Act robbery.<sup>14</sup>

The present case was first heard in the United States District Court for the Middle District of Florida in 2016 and in 2017.<sup>15</sup> There, Hano made a substantial effort to emphasize his claim that since the car was destroyed, he did not have the same opportunity to examine the evidence recovered from the getaway car, and therefore his Due Process and Fifth Amendment rights had been violated.<sup>16</sup> Hano also contended that the DNA evidence found on the vehicle should not be admissible or reliable because the profile on the car "had a match frequency of one in twenty people."<sup>17</sup> However, Judge Chappell for the district court, quoted the Supreme Court of the United States from *Arizona v. Youngblood*,<sup>18</sup> stating "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not

---

11. *Id.* at 1281.

12. *Id.* at 1282.

13. *Id.*

14. *Id.*

15. *United States v. Hano*, No. 2:15-cr-101-FtM-38CM, 2017 U.S. Dist. LEXIS 180753 (M.D. Fla. Oct. 31, 2017).

16. *Id.* at \*12

17. *Id.*

18. 488 U.S. 51, 58 (1988).

constitute a denial of due process of law."<sup>19</sup> In conclusion, the district court denied Hano's motion in limine in regards to the DNA implication in Hano's effort to preclude the government from introducing the DNA profile into evidence.<sup>20</sup>

### III. LEGAL BACKGROUND

#### A. Length of Limitations Period

According to Criminal Resource Manual 650,<sup>21</sup> "federal law contains a single statute prescribing a general period of limitations, as well as several statutes that provide longer periods for specific offenses."<sup>22</sup> The length of the statute of limitations will vary on whether or not the crime committed was a capital offense, non-capital offense, terrorism offense, financial institution offense, violations of nationality, conspiracy to violate such laws, and more.<sup>23</sup> For example, Section 3282 of Title 18 of the United States Code<sup>24</sup> contains the general application of statute of limitations for various offenses.<sup>25</sup> To give an idea of the wide variety of length, § 3282 "states that, '(e)xcept as otherwise expressly provided by law,' a prosecution for a non-capital offense shall be instituted within five years after the offense was committed," while 18 U.S.C. § 3281<sup>26</sup> applies to capital offenses that may be "punishable by death" and "may be filed at any time."<sup>27</sup> Section 3286 "provides for an eight (8) year statute of limitations for the non-capital offenses under certain terrorism offenses," including aircraft destruction, airport violence, violent crimes against Congresspersons or Cabinet officers, willful injury to government property, and more.<sup>28</sup> Section 3293 of Title 18 "provides for a ten (10) year statute of limitations for" offenses regarding certain financial institutions "which involve violations of, or

---

19. *Hano*, 2017 U.S. Dist LEXIS 180753, at \*12.

20. *Id.* at \*13.

21. Offices of the United States Attorneys, 650. *Length of Limitations Period*, JUSTICE.GOV, [justice.gov/archives/jm/criminal-resource-manual-650-length-limitations-period](https://justice.gov/archives/jm/criminal-resource-manual-650-length-limitations-period) (last visited Nov. 15, 2019).

22. *Id.*

23. *Id.*

24. 18 U.S.C. § 3282 (2003).

25. *Id.*

26. 18 U.S.C. § 3281 (1994).

27. Offices of the United States Attorneys, 650. *Length of Limitations Period*, JUSTICE.GOV, [justice.gov/archives/jm/criminal-resource-manual-650-length-limitations-period](https://justice.gov/archives/jm/criminal-resource-manual-650-length-limitations-period) (last visited Nov. 15, 2019).

28. *Id.*

conspiracy to violate."<sup>29</sup> While it may seem as though the standard period for statute of limitations may be five years, it is clear that those timeframes vary greatly depending on the different crime or offense that may have been committed.

### *B. Theories Surrounding Statute of Limitations*

In *Toussie v. United States*,<sup>30</sup> the Supreme Court described statutes of limitations, its justifications and, its purpose for the criminal justice system for various cases.<sup>31</sup> Statutes of limitations serve "to limit exposure to criminal prosecution to a certain fixed period of time" in an effort "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."<sup>32</sup> The Court continued by stating Congress's intent and policy-based reason "that the statute of limitations should not be extended 'except as otherwise expressly provided by law'" according to 18 U.S.C. § 3282.<sup>33</sup> More than fifty years later, in relying on the *Toussie* decision, the Supreme Court once again evaluated statute of limitations and stated that such a "defense does not call the criminality of the defendant's conduct into question, but rather reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution" in *Smith v. United States*.<sup>34</sup>

### *C. The Roadmap to Congress's Enactment of 18 U.S.C. § 3297<sup>35</sup>*

On October 30, 2004, Congress enacted 18 U.S.C. § 3297. This statute was originally enacted to protect the reliability of evidence like DNA testing in criminal cases.<sup>36</sup> The enactment of 18 U.S.C. § 3297 "extends the limitations period in DNA cases because DNA evidence is uniquely precise."<sup>37</sup> By enacting protection of DNA evidence, cases that have been deemed "cold cases" or have lost ground due to inadequate evidence or proof, now have the ability to be reopened for further

---

29. *Id.*

30. 397 U.S. 112 (1970).

31. *Id.* at 112.

32. *Id.* at 114–15.

33. *Id.* at 115 (quoting 18 U.S.C. § 1382).

34. 568 U.S. 106, 112 (2013).

35. 18 U.S.C. § 3297 (2014).

36. Clifford S. Fishman & Anne T. McKenna, *DNA and the statute of limitations*, 7 Jones on Evidence § 60:50 (July 2019).

37. *Id.*

investigation and progress.<sup>38</sup> However, there was a significant Supreme Court decision that led to the enactment of 18 U.S.C. § 3297.<sup>39</sup> Only one year prior to Congress's enactment of § 3297, the Supreme Court held in *Stogner v. California*<sup>40</sup> "that a law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution."<sup>41</sup>

In *Stogner*, the Supreme Court assessed *ex post facto* clauses<sup>42</sup> and their constitutionality in a criminal case.<sup>43</sup> The issue in question presented before the Court centered around a new California statute authorizing criminal prosecutions where the passage of time had been barred and "was enacted after prior limitations periods for Stogner's alleged offenses had expired."<sup>44</sup> In the Court's opinion and analysis, Justice Breyer first stated that the California statute results in the kind of harm that the *Ex Post Facto* clause seeks to avoid and that by allowing such an extension it would "risk[] both 'arbitrary and potentially vindictive legislation,' and erosion of the separation of powers."<sup>45</sup> Second, Justice Breyer noted that the new California statute "aggravated" Stogner's crime in a sense "that, it 'inflicted punishment' for past criminal conduct that (when the new law was enacted) did not trigger any such liability."<sup>46</sup> In conclusion, the majority held that the California statute was unfair to Stogner due to its retroactive application and while a long line of judicial authority supports *Ex Post Facto* clauses, the Supreme Court reversed the California court's judgment.<sup>47</sup>

The dissent in *Stogner* provided two rationales for why the majority's reasoning and holding that the California statute is unfairly retroactive are improper.<sup>48</sup> The dissent opined that the majority's assertion that "the California statute is unfair and dishonest" to the Defendant is misplaced due to the Court's ability "to leave in place the uniform decisions by state and federal courts to uphold retroactive extension of

---

38. *Id.*

39. *Stogner v. California*, 539 U.S. 607 (2003).

40. *Id.*

41. *Hano*, 922 F.3d at 1286.

42. U.S. CONST. art. I, § 9, cl. 3 (federal government); U.S. CONST. art. I, § 10, cl. 1 (states).

43. *Stogner*, 539 U.S. at 609.

44. *Id.* at 610.

45. *Id.* at 611 (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

46. *Id.* at 613.

47. *Id.* at 632–33.

48. *Id.* at 650 (Kennedy, J., dissenting).

unexpired statutes of limitations against an *ex post facto* challenge.<sup>49</sup> The first rationale is the unsupported theory that a crime will become more serious if it is extended.<sup>50</sup> However, the dissenting opinion stated that there is no authority to support this distinction and that if an unexpired statute is extended, the seriousness of the crime does not increase.<sup>51</sup> The second rationale is "that an extension of the expired statute destroys a reliance interest," however, the dissent noted that this reliance interest only exists if the Court declares it instead of traditions or social understanding declaring it.<sup>52</sup>

The dissenting opinion also utilized psychological studies and reasonings for its position of extending the statute of limitations in sexual assault cases.<sup>53</sup> By referencing various studies and examples, the dissent acknowledged that most victims in sexual assault cases take a significant amount of time to make a claim against the predator due to psychological suppression of the incident and its painful memories.<sup>54</sup> Furthermore, when a child molester commits the crime, the child molester is much more aware of the effects and damage of the crime compared to the child victim.<sup>55</sup>

#### *D. Lower and Sister Courts' Analysis*

The Eleventh Circuit noted in its opinion that in addition to the reading and interpretation of 18 U.S.C. § 3297, there is persuasive authority offered by sister circuits that "have consistently applied section 3297 even when the otherwise applicable limitation period has already expired."<sup>56</sup> The Eleventh Circuit acknowledged that this case and issue of DNA testing is one of first impression, and therefore relied heavily on surrounding circuits' decisions and reasonings regarding the similar issue of extending the statute of limitations in criminal cases, where DNA and DNA implicated evidence were available.<sup>57</sup>

### **1. First Interpretation Lands in the Seventh Circuit**

The United States Court of Appeals for the Seventh Circuit was the first court to view and analyze the text of 18 U.S.C. § 3297 in *United*

---

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 651.

54. *Id.* at 652.

55. *Id.* at 651.

56. *Hano*, 922 F.3d at 1285.

57. *Id.*

*States v. Hagler*.<sup>58</sup> In *Hagler*, the court emphasized § 3297's design for the DNA test to meet a "single, identified person."<sup>59</sup> Originally, the *Hagler* case went cold due to the lack of definitive DNA identification.<sup>60</sup> The lower proceedings did not determine how many hits the DNA profile collected. However, in 2008, "the Indiana State Police upgraded its equipment to allow for more sensitive DNA testing and received grant funding to revisit old cases."<sup>61</sup> The defendant, Hagler, argued that the statute of limitations was worded in a way to suggest that DNA evidence can implicate more than one person and that the 2002 results of DNA implicated multiple people due to its multiple hits.<sup>62</sup> However, the court deciphered and analyzed the language "an identified person" to mean one person.<sup>63</sup> The court argued that the words "an" and "identified person," "suggest that the DNA evidence in question must be much more specific in its identifications than Hagler's reading allows."<sup>64</sup> In sum, the court refused to adopt such a broad interpretation that DNA evidence "'implicates' someone under § 3297 *only* if it matches to a single, identified person."<sup>65</sup> The Seventh Circuit explained that there may be "unusual cases" in the future that could possibly "'implicate' more than one person."<sup>66</sup>

In *United States v. Sylla*,<sup>67</sup> the defendant appealed a conviction based on an attempted bank robbery and the discharge of a firearm during a violent crime.<sup>68</sup> The defendant challenged that the void-for-vagueness doctrine applied, which was a similar effort compared to Hagler's assertion.<sup>69</sup> In *Sylla*, the defendant's DNA evidence was implicated on August 1, 2003, where ordinarily the robbery act's five-year statute of limitations would have expired on August 1, 2008.<sup>70</sup> However, due to Section 3297 and its "plain and unambiguous terms, the DNA match [that was found] on December 27, 2010, extended the limitations period for an additional five years from that date."<sup>71</sup> The court in *Sylla* stated

---

58. 700 F.3d 1091 (7th Cir. 2012).

59. *Id.* at 1097.

60. *Id.* at 1095.

61. *Id.*

62. *Id.* at 1097.

63. *Id.*

64. *Id.*

65. *Id.* at 1098.

66. *Id.*

67. 790 F.3d 772 (7th Cir. 2015).

68. *Id.* at 772.

69. *Id.* at 774.

70. *Id.* at 775.

71. *Id.*

that even if the vagueness doctrine applied to § 3297, the challenge would not "prevail because application of that provision to [Sylla's] case is sufficiently straight-forward."<sup>72</sup> Here, the court concluded that the government properly indicted the defendant within the five-year window on July 16, 2013.<sup>73</sup>

## 2. The Fourth Circuit Interpretation

In 2017, the United States Court of Appeals for the Fourth Circuit determined in *United States v. Lopez*<sup>74</sup> whether or not the statute of limitations would be extended in the Hobbs Robbery Act claim against defendants based on 18 U.S.C. § 3297.<sup>75</sup> Because the Fourth Circuit had never encountered this question before, the court relied heavily on the *Hagler* case from the Seventh Circuit.<sup>76</sup> The Fourth Circuit held that "'DNA testing *implicates* an identified person' in a felony, not when it '*could* implicate' a person."<sup>77</sup> Once again in reference to *Hagler*, the Fourth Circuit court stated that it was "clear that a person could not be 'implicated' under § 3297 until there was, at a minimum, an actual DNA 'hit' that would 'strongly tie that person to wrongdoing.'"<sup>78</sup>

### E. Setting the Stage for *United States v. Hano*

The numbers and science behind DNA technological studies are staggering and can be somewhat overwhelming, especially to those who are not familiar with the history of this scientific evolution. For example, according to YourGenome.org, "[t]he human genome [consists] of 3.2 billion bases of DNA."<sup>79</sup> The issues revolving around statute of limitation periods for DNA-implicated evidence and crimes have not always been at the forefront of court's rationales and decision-making processes. However, in today's environment, DNA technologies have made impressive progress in science, and an increasing number of criminal cases are influenced by DNA capabilities. *Hano* presents the

---

72. *Id.*

73. *Id.*

74. 860 F.3d 201 (4th Cir. 2017).

75. *Id.* at 212.

76. *Id.* The court also referenced Congress's larger understanding of § 3297 enactment, "which was that 'DNA evidence, unlike most other kinds of evidence can maintain its reliability for decades,' so that the concerns traditionally associated with delayed prosecution are significantly attenuated." *Id.* at 213.

77. *Id.* at 212 (quoting 18 U.S.C. § 3297) (emphasis added).

78. *Id.* (quoting *Hagler*, 700 F.3d at 1097).

79. YOURGENOME, <https://www.yourgenome.org/facts/what-is-dna> (last visited Nov. 15, 2019).

first issue for the Eleventh Circuit concerning implication of DNA and how it effects statute of limitations.<sup>80</sup>

#### IV. COURT'S RATIONALE

On appeal, the Eleventh Circuit recognized the standard of review for the statute of limitations issue of first impression in *Hano*.<sup>81</sup> The court acknowledged a de novo review of the interpretation and application of the statute of limitations, supported by *United States v. Farias*,<sup>82</sup> another Eleventh Circuit case.<sup>83</sup>

In *Hano*, Hano appealed the district court's decision that denied his motion to dismiss the indictment on the basis that the five-year statutory limitation period had expired.<sup>84</sup> The district court had denied the motion, stating that there was a "statutory exception for cases in which DNA testing implicates a person in a felony."<sup>85</sup> There were two issues of first impression before the Eleventh Circuit, the first dealing with "whether a five-year statute of limitations for a defendant implicated by DNA testing, . . . permits indictment within five years of that testing regardless of whether the limitation period otherwise applicable to the offense has already expired[.]"<sup>86</sup>

Judge William Pryor delivered the opinion of the court and divided the discussion into six distinct sections in a thorough analysis.<sup>87</sup> The first section of the opinion is centered around the statute of limitations issue, which is the topic labeled as first impression before the court.<sup>88</sup> In Section A, the court determined whether or not the indictment was returned within the applicable limitation period.<sup>89</sup>

Section 3297 states that when

DNA testing implicates an identified person in the commission of a felony, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing

---

80. *Hano*, 922 F.3d at 1280.

81. *Id.* at 1282.

82. 836 F.3d 1315 (11th Cir. 2016).

83. *Hano*, 922 F.3d at 1283.

84. *Id.*

85. *Id.*

86. *Id.* at 1280.

87. *Id.* at 1283.

88. *Id.* at 1283–86.

89. *Id.*

has elapsed that is equal to the otherwise applicable limitation period.<sup>90</sup>

In its analysis, the district court stated that the exception from § 3297 applied to the indictment of Hano "because DNA testing did not implicate him in the charged crimes until June 26, 2015, which left the government with five years to indict Hano after that date."<sup>91</sup> Therefore, based on the March 2016 indictment, the government indicted Hano "well within the" statute of limitations period from the § 3297 exception.<sup>92</sup>

The defendant, Hano, based his argument on the application note to § 3297, and stated that the lower court's ruling was erroneous due to the material in the application note.<sup>93</sup> The application note includes "[t]he amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section if the applicable limitation period has not yet expired."<sup>94</sup> Hano claimed that since the application note to 18 U.S.C. § 3297 includes "if the applicable limitation period has not yet expired," the statute should be interpreted as the exception of the statute of limitations.<sup>95</sup> Therefore, Hano argued that the statute should only apply to offenses committed after the date of enactment if the applicable limitation has not met its expiration "*at the time the defendant is implicated by DNA testing.*"<sup>96</sup>

In the defendant's briefs,<sup>97</sup> the defendant claimed that the "analysis of the relevant dates clearly shows that the Section 3282(a) limitation period expired prior to the DNA implication of Appellant rendering Section 3297 inapplicable."<sup>98</sup> However, the government argued "that the application note only clarifies that section 3297 applies retroactively to any offense so long as the limitation period applicable to an offense by default had not yet expired *at the time of enactment.*"<sup>99</sup>

---

90. 18 U.S.C. § 3297 (2014).

91. *Hano*, 922 F.3d at 1283.

92. *Id.*

93. *Id.*

94. *Id.* at 1283–84.

95. *Id.* at 1284.

96. *Id.*

97. Brief of Appellant Diosme Fernandez Hano, *United States v. Hano*, 922 F.3d 1272 (2019) (No. 18-10510), 2018 WL 3528745.

98. *Id.* at \*19.

99. *Hano*, 922 F.3d at 1284.

In agreement with the government, the court reasoned why Hano's argument does not suffice.<sup>100</sup> Judge Pryor noted that this interpretation offered by the defendant would require a complete disregard of the 18 U.S.C. § 3297's plain meaning.<sup>101</sup> The plain meaning<sup>102</sup> interpretation and the language of § 3297 makes it clear that a period of time "will run from 'the implication of the person by DNA testing' regardless of whether the implication period occurred within the ordinarily applicable limitation period."<sup>103</sup> Judge Pryor took the analysis a step further and considered the effects of Hano's interpretation. If Hano's interpretation applied, then "section 3297 would instead say that no statute of limitations will preclude prosecution until a period of time has elapsed that is equal to the otherwise applicable limitation period *if the person implicated by DNA testing while the otherwise applicable limitation period continues to run.*"<sup>104</sup> By quoting *Puerto Rico v. Franklin California Tax-Free Trust*,<sup>105</sup> Judge Pryor reasoned that "'our constitutional structure' does not permit us 'to rewrite the statute that Congress has enacted.'"<sup>106</sup>

The court continued by detailing the competing interpretations of the statute on a very intricate, grammar-based level.<sup>107</sup> The two different interpretations by the government and Hano are based on the "has not yet expired" clause.<sup>108</sup> Judge Pryor referred to *The Chicago Guide to Grammar Usage, and Punctuation*<sup>109</sup> to emphasize how the statute's language and grammar makes Hano's argument invalid based on the section's use of present-perfect tense.<sup>110</sup> "The present-perfect tense 'denotes an act, state, or condition that is now completed or continues up to the present.'"<sup>111</sup> Therefore, according to Judge Pryor, "the condition that 'continues up to the present' is that the normal limitation

---

100. *Id.*

101. *Id.*

102. In oral arguments, the panel of judges agree with the Defendant that the term "after" does create a problem of surplusage. However, the plain meaning interpretation of the statute controls.

103. *Hano*, 922 F.3d at 1284.

104. *Id.*

105. 136 S. Ct. 1938 (2016).

106. *Hano*, 922 F.3d at 1284 (quoting *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016)).

107. *Id.*

108. *Id.*

109. BRYAN A. GARNER, *CHICAGO GUIDE TO GRAMMAR, USAGE, AND PUNCTUATION* (Univ. of Chicago Press 2016).

110. *Hano*, 922 F.3d at 1284.

111. *Id.* (quoting GARNER, *supra* note 114, at 97).

period for an offense has not yet expired."<sup>112</sup> In the grammatical interpretation of the statute, Judge Pryor concluded that "the most natural reading of the note is that the time up to which the limitation period's failure to expire continues is the time of enactment," and that "[i]t makes no sense to say that section 3297 would apply unless the limitation period expired the very same moment the offense was committed."<sup>113</sup>

Hano made another argument regarding the timeframe that the DNA was implicated. Because the event of DNA implication is described in § 3297 and not the application note, the court stated that "it would be unusual if it supplied the temporal reference point for the present-perfect verb in the application note."<sup>114</sup> Because the application "stands on its own temporal ground," Hano's argument in support of the application note is invalid.<sup>115</sup> The court stated that text or context of the application note do not "provide[] any reason to think that the 'present' to which the present-perfect phrase 'has not yet expired' refers is any time other than that contemporaneous with the enactment of the text by Congress."<sup>116</sup>

In addition to the grammatical interpretation of the statute and the plain meaning of § 3297, the court also turned to persuasive authority.<sup>117</sup> Noting that Hano did not cite any authority for his position on the application note, the court directed its attention to sister courts' application and analysis of § 3297, authority that was pointed out by the government in the present case.<sup>118</sup> The court compared the present case and its application of § 3297 to similar cases. For example, the court acknowledged *Lopez*, where the crime occurred in February 2007 and the DNA match occurred over five years later in 2012.<sup>119</sup> Similar situations were noted in *Sylla* and *Hagler*, where statute of limitations periods were extended due to the DNA implication dates in relation to an act of crime being committed.<sup>120</sup>

Hano argued that the government attempted to disregard the word "after" out of the application note.<sup>121</sup> However, the court acknowledged

---

112. *Id.*

113. *Id.* at 1284–85.

114. *Id.* at 1285.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

that the conditional clause, "if the applicable period has not yet expired," paired with the word "before" "clarifies that section 3297 applies retroactively to offenses committed before the date of enactment if the otherwise applicable limitation period has yet to expire."<sup>122</sup> In conclusion, the court stated that "[t]he word after makes plain that section 3297 has prospective application."<sup>123</sup>

After a thorough analysis and explanation of the district court's holdings, Hano and Arrastia-Cardoso's appeal, the Eleventh Circuit affirmed the convictions and sentences of both of the defendants.<sup>124</sup> While there were only two issues of first impression for the court to consider, the admission and implication of DNA evidence relating to the statute of limitations played a vital role in the remainder of the analysis, the different contentions made by both parties, and ultimately the court's rationale in convicting both Hano and Arrastia-Cardoso.<sup>125</sup>

#### V. IMPLICATIONS

While other surrounding circuits have encountered the issue and analyzed the meaning and impact of 18 U.S.C. § 3297 in the criminal justice system, the matters presented in the *Hano* case were a first for the Eleventh Circuit. In regards to the Eleventh Circuit's holding on the first issue of 18 U.S.C. § 3297, indictment of suspects can now occur by identifying the suspect by the DNA hit or marker.<sup>126</sup> Through the Eleventh Circuit's holding, prosecutors can place an indictment on the books faster and the statute of limitations may commence at the time of testing rather than the time of the crime.<sup>127</sup>

If the Eleventh Circuit had supported the defendant's point of view in *United States v. Hano*, the result would have included a severe limit on the extensions of various statute of limitations for its jurisdiction. However, under this ruling, Congress and states can use devices like DNA testing discussed in *United States v. Hano* to extend statute of limitations, providing a broad ability of legislatures to enable that extension.<sup>128</sup>

This view and application of statute of limitations period regarding DNA evidence can also be extended beyond federal laws and cases to state-level statutes. With a state-level application, Georgia criminal

---

122. *Id.* at 1285–86.

123. *Id.* at 1286.

124. *Id.* at 1297.

125. *See id.* at 1283.

126. *Id.* at 1284.

127. *Id.*

128. *Id.* at 1286.

cases involving implicated DNA materials and evidence may be subject to a significant change as well, paving the way for a change of the various limitations periods for Georgia statutes.

On September 25, 2019, Petition for Certiorari was docketed by Defendant Diosme Fernandez Hano. On November 2, 2019, Petition for Certiorari was denied by the United States Supreme Court. The future of DNA implicated evidence and its effect on statute of limitations is a very timely topic and is likely to become a recurring challenge due to today's technological advances.

This new challenge is one that many lawyers, especially criminal lawyers, need to familiarize themselves with in order to understand the statute of limitations and its relation to DNA technology. The future of crime-solving using DNA technology will remain one open to change, as law enforcement officers and prosecutors are turning their sights to genetic genealogy technology to solve crimes.<sup>129</sup>

**Caroline Walker**

---

129. Tina Hesman Saey, *Crime solvers embraced genetic genealogy*, SCIENCE NEWS (Dec. 17, 2018, 9:32 AM), <https://www.sciencenews.org/article/genetic-genealogy-forensics-top-science-stories-2018-yir>.

