

May 4, 2018

Representative Klint Kesto, Chairperson
Law and Justice Committee
Michigan House of Representatives
P. O. Box 30014
Lansing, MI 48909-7514

RE: Senate Bills 871 and 872

Dear Representative Kesto:

In lieu of appearing personally for testimony before your Committee, I submit the following observations in opposition to Senate Bills 871 and 872, which would significantly extend the current statutes of limitations for instituting criminal (SB 871) and civil (SB 872) proceedings alleging various forms of sexual misconduct.

With respect to criminal statutes of limitations, the United States Supreme Court stated in *Toussie v United States*, 397 US 112 (1970):

"The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."

Frank James Wilson, retired public health physician, epidemiologist, pulmonologist, and critical care physician, has written:

"I think all crimes should have statutes of limitations and that most should be shorter than they are.

If I'm accused of committing a crime last week, I will remember exactly where I was, what I was doing, and who else was there at the time it happened. Corroborating evidence like cell phone records or surveillance video may be available.

If I'm accused of committing a crime that occurred a year ago, I won't remember where I was at the time it occurred, unless it was on an especially memorable

day, like Christmas or Thanksgiving. However, I will have records that I can use to help me remember and document, like credit card records, bank records, appointment calendars, minutes of meetings, travel records, etc.

If I'm accused of committing a crime that occurred 30 years ago, I'm pretty much out of luck. Even if it occurred on Christmas, for most years I don't remember that particular Christmas in detail. Even if it occurred on a day memorable enough, like the day my daughter was born, that I remember my movements reasonably well, the witnesses who could corroborate my memory probably won't remember because for them it was just a regular day. In addition, they would likely be difficult or impossible to locate and might well be dead. Because of the difficulty of finding whatever exculpatory evidence might still exist, the cost of my defense, always burdensome for a middle-class person, would be much higher and would be more likely to bankrupt me. Nobody should have to undergo such an experience at the hands of his own government."

It is true, as the Supreme Court observed in *Pendergast v United States*, 317 US 412 (1943), that "every statute of limitations, of course, may permit a rogue to escape", but this problem must be balanced against well-established principle articulated by Sir William Blackstone two and a half centuries ago, that "the law holds it better that ten guilty persons escape than that one innocent party suffer."

Similar considerations undergird civil statutes of limitations, with respect to which the Supreme Court, in *Order of RR Telegraphers v Railway Express Agency*, 321 US 342 (1944), ruled:

"Statutes of limitations, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."

These statutes promote the strong public policy of requiring putative plaintiffs to promptly and diligently pursue their known claims, thereby creating predictability and finality in the civil justice system. In this connection SB 872 is particularly egregious, for it would not only greatly extend the current statute of limitations (which is quite consistent with those of most other states), but it would do so retroactively to December 31, 1996. This is a case of special pleading of the very worst sort, seeking to create a public act to the obvious advantage of only a very small class of individuals, namely some of the earliest victims of the notorious Dr. Larry Nassar. Such an exercise is so shameless that it hardly requires further condemnation here.

I do not write this as an apologist for sex offenders or any other class of criminal defendants or tortfeasors, for whom, indeed, I carry no brief. In fact, I served for nearly 10 years as an assistant prosecuting attorney and nearly 10 years as a district judge before starting my 30-year career as a circuit judge. During my tenure in the latter position, I have sentenced defendants in 15,164 felony cases by actual count to date, and my sentences are not generally seen as being notably lenient, especially in criminal sexual conduct cases. However, the integrity of the justice system requires that reasonable limitations be placed on the filing of criminal and civil cases for the reasons stated above, and in light of the Legislature's fairly recent response to the problem of wrongful convictions, I would think that many of the members will be in agreement. While extending the statutes of limitations as proposed by Senate Bills 871 and 872 might provide some further relief to some of the Nassar victims and their lawyers, it will also significantly increase the prospect of wrongful convictions in criminal cases, and retroactively increase the prospect of crippling and inappropriate judgments being entered in civil cases. Senate Bills 871 and 872 are, simply stated, bad policy, and they should not be enacted.

Thank you for considering these remarks, and I will be pleased to answer any questions the Committee may have.

Sincerely yours,

Donald A. Johnston
Circuit Judge

