

February 3, 2021

Testimony to the **House Judiciary Committee**

By Jackson Lofgren on behalf of the ND Association of Criminal Defense Lawyers

**Testimony In Opposition to HB 1387**

Chairman Klemin and Committee Members:

My name is Jackson Lofgren and I represent the ND Association of Criminal Defense Lawyers. The NDACDL is made up of lawyers who dedicate at least a portion of their practice to criminal defense. The mission of the NDACDL is “to promote justice and due process...” and “...promote the proper and fair administration of criminal justice within the State of North Dakota. **We are strongly opposed to HB 1387.**

Statute of limitations in a criminal case serve a commonsense purpose. They ensure the prompt prosecution of criminal charges thereby sparing the accused of the unfair burden of having to defend against stale charges after memories have faded and evidence has been lost.

We like to think our brains perfectly record data. But, we know over time we lose some of this information. We might be able to recall what we had for lunch the next day or a few days later but not a month later. Just as information is lost over time our minds can create memories of events that did not happen. Studies have revealed just how susceptible we are to false memories. In what has been labeled the “lost in the mall” study researchers were able to plant false childhood memories in approximately 30% of the participants.<sup>1</sup> During the 1980s there was a wave of hysteria that children around the country were being subject to satanic sexual abuse at schools and daycares. The most prominent case, the McMartin preschool trial, went on for seven years and cost over \$15 million dollars. It resulted in no convictions in large part because recordings proved the children had been pressured into stating they had been abused by coercive interview techniques. This underscores why statute of limitations are important and cases must be persecuted in a timely manner before memories fade and change.

Probably the most recent public example of why statute of limitations are important is the confirmation proceedings of United States Supreme Court Justice Brett Kavanaugh. Justice Kavanaugh faced allegations from Dr. Christine Blasey Ford that he had sexually assaulted her at a party when they were teenagers nearly forty years prior. Regardless of your views on the allegations, the proceedings demonstrated the problems caused by old claims. Dr. Ford originally reported to her therapist the attack occurred in the mid-1980s. Kavanaugh would have been at Yale at the time. Later she amended the date to the summer of 1982. Dr. Ford was inconsistent on the genders of the people she described at the party. Investigators obtained statements from Kavanaugh, two of the men alleged to be at the party, and a female who was a lifelong friend of Dr. Ford’s. They all denied having any recollection of the gathering. There were also inconsistencies in Dr. Ford’s statements about the location of the house where the attack allegedly occurred and the layout of the home.

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<sup>1</sup> Loftus, E.F. & Pickrell, J.E. (1995) *The formation of false memories. Psychiatric Annals*, 25, 720-725.

Kavanaugh was confirmed by the United States Senate and now sits on our nation's highest court. In North Dakota he would have been charged with a felony sex offense. Our statute of limitations for sex offenses involving minors is already virtually non-existent. Under N.D.C.C. §29-04-03.1 the prosecution has to commence within twenty-one years of the offense, or if not reported within the twenty-one years, within three years of the offense being reported to law enforcement. Hypothetically, in North Dakota a person could wait seventy years to report an alleged sexual offense and the state could bring charges as long as they are filed within three years of the report. This is a recipe for wrongful convictions that HB 1387 will only make worse by giving law enforcement ten years from the date of the report to file charges. If law enforcement cannot find competent evidence to bring a charge in three years it is unlikely the case will get any more reliable by giving them ten years.

Additionally, the bill's changes are not limited to child sex offenses. It drastically extends the statute of limitations for all felonies other than murder. It more than doubles our current three year statute of limitations which has been in place since at least 1987. The three year statute of limitations is reasonable and has worked just fine for over thirty years.

Imagine, you are sitting at home when there is a knock at the door. It is the police. They have come to arrest you because someone identified you as the perpetrator of an aggravated assault that occurred in front of a bar on February 3, 2014. It was not you but the victim wrongly identified you after having come across your Facebook profile.<sup>2</sup> How do you prove your innocence? Had you been charged months or even a few years afterwards you might remember where you were at or who you were with you on the night of the assault. Some of the businesses in the area might have had video surveillance showing they charged the wrong person. Maybe you would have had access to telephone or credit card records showing you were actually somewhere else. Unfortunately, because of the passage of time all of this information has been lost. With all exculpatory evidence destroyed you find yourself in front of a jury with no way of protecting yourself other than your own word. Cases just like this are going to happen if HB 1387 passes.

As a former prosecutor I would have hated trying to prove a seven year old felony case. Prosecutions are not like wine, they do not get better with age.

The NDACDL is adamantly opposed to HB 1387 and ask that you recommend a **DO NOT PASS** on this bill.

Thank You,

*Jackson J. Lofgren*

Jackson Lofgren

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<sup>2</sup> Mistaken eyewitness identification contributed to approximately 69% of the more than 375 wrongful convictions in the United States that were later overturned by post-conviction DNA evidence. <https://innocenceproject.org/eyewitness-identification-reform/>