No.

IN THE

Supreme Court of the United States

JOEL HOWARD JAMES,
Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Based on a "class of one" analysis, does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution bar application of the nonresident tolling provision of MCL 767.24(10) where, although a person did not usually and publicly reside within the State of Michigan during the limitations period, no crime was reported nor any investigation initiated until years after the statute of limitations would otherwise have run?

2. Does the nonresident tolling provision of MCL 767.24(10) violate the Privileges and Immunities Clause in Section 1 of the Fourteenth Amendment to the United States Constitution insofar as it creates a distinction between residents of Michigan and nonresidents?

LIST OF PRIOR PROCEEDINGS

Alpena County District Court
Case No. 15-0337 FY
People of the State of Michigan
v Joel Howard James
08/12/15 Opinion and Order Denying Motion to Dismiss Re: Statute of Limitations

Alpena County Circuit Court
Case No. 15-006730-FH
People of the State of Michigan
v Joel Howard James
09/08/15 Opinion and Order Affirming District Court's Denial of Motion to Dismiss re: Statute of Limitations
01/18/18 Opinion and Order Dismissing Case/ on Basis that Tolling Provision of Statute of Limitations Violates Equal Protection Clause

Michigan Court of Appeals, Case No. 342504
People of the State of Michigan, Plaintiff/Appellee,
v Joel Howard James, Defendant/Appellant.
10/11/2018 Opinion - Authored - Published Dismissal Reversed and Remanded for Further Proceedings

Michigan Supreme Court Case No. 158719
People of the State of Michigan, Plaintiff/Appellee,
v Joel Howard James, Defendant/Appellant.
07/02/19 Order Denying Application for Leave to Appeal

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Cases

Michigan Attorney General Opinions

Michigan Court Rules

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Other Authorities

Petitioner Joel Howard James prays this Court will issue to the Michigan Court of Appeals a writ of certiorari to review that Court's attached opinion reversing the decision of the 26th Circuit Court in Alpena County, Michigan to dismiss the charges against him

OPINIONS AND ORDERS BELOW AND BASIS FOR JURISDICTION

Petitioner's basis for seeking dismissal at the trial court level included claims that, as applied to him, the State of Michigan lacked a rational basis under the equal protection clause of the United States Constitution to differentiate between residents of the state and nonresidents under the state's nonresident tolling provision, MCL 767.24. The state Circuit Court dismissed the case after finding that, as applied to Petitioner, the state lacked a rational basis for distinguishing between residents and nonresidents. The text of that opinion is located in the Appendix at pp. 24A – 29A. The Court of Appeals reversed in a published decision. The Court of Appeals' decision is located in the Appendix at pp. 1A – 16A. Leave to appeal to the Michigan Supreme Court was timely sought, but was denied on July 2, 2019. The Order denying leave to appeal is located in the Appendix at p. 17A. Accordingly, this Court has jurisdiction of this case pursuant to 28 U.S.C. §1257(a).

PERTINENT PROVISIONS OF LAW

The provisions of federal law pertinent to this petition are the Equal Protection Clause and the Privileges and Immunities Clause, which are both

found in Section 1 of the Fourteenth Amendment to the Constitution of the United States. Also pertinent to resolving the federal question of this case is Michigan's nonresident tolling provision, MCL 767.24. Although both are concise and readily quotable here, those provisions are, for ease of reference, reproduced in the Appendix at 34A – 35A and 30A – 33A, respectively.

STATEMENT OF THE CASE

Recent years have seen increasing instances of allegations levelled against individuals—both celebrity and ordinary citizen—involving claimed sexual misconduct from years (or even decades) earlier. Often, these accusations—which all too frequently are accompanied by great public outcry—surface for the first time long after any criminal statute of limitations has expired. Many such cases are impacted by nonresident tolling provisions. Under such provisions, a citizen who, unaware of the existence of any claim of wrongdoing and untainted by any type of formal or informal complaint or report to a governmental representative, allows his employment to take him outside the state of Michigan.[1] Such was the case with Petitioner Joel Howard James ("James").

From the early 1990s until 2013, Petitioner James primarily lived and worked in Alaska. During that time, he made regular return trips to Michigan,

[1] Although there are many other examples, cases involving decades old claims of sexual misconduct against Catholic priests and various celebrities come to mind.

where he owned a large tract of land. Until 2012, James had never been under criminal investigation of any sort, and Kristy Bartlett, the alleged victim in this case, had never reported any sort of alleged sexual misconduct by James. Then, in 2012, police officers initiated an investigation into James' alleged sexual misconduct.[2] As part of the investigation, officers spoke with Bartlett, who claimed that James had sexually assaulted her in 1996 or 1997.

At the culmination of the initial investigation in 2013, James was at a worksite in Alaska when he was approached by a group of police officers, placed under arrest, and transported to a local jail where he would be held for extradition to Michigan. When he had gone to work that day, he had no way of knowing that he would soon be facing charges with underlying allegations that were substantially more than 10 years old.

As the initial cases involving other alleged victims proceeded toward trial with Bartlett ready to serve as an "other acts" witness under Michigan statute, the People on June 1, 2015 filed additional charges naming Bartlett as the complaining witness alleging four counts of Criminal Sexual Conduct in the Third Degree ("CSC 3rd"). At all relevant times CSC 3rd was subject to a 10-year statute of limitations under MCL 767.24(3).[3]

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[2] The initial investigation was centered on two other women but would grow to include Bartlett. The cases involving other women are not relevant to this appeal.

[3] The statute further provides that the period of limitations remains open until the victim's twenty-first birthday, but this provision is inapplicable since Bartlett was born in 1982.

Because the sexual events were alleged to have occurred in 1996 or 1997, the applicable 10-year statute of limitations would have run in 2006 or 2007 if James were a Michigan resident. However, although he continuously owned property in the State of Michigan and routinely returned for periods of time in most years, it is undisputed that James' legal residence remained in Alaska until the time he was extradited to Michigan to face the current charges.

Logically, no police investigation as to Bartlett's allegations could have begun until after she had made them and, indeed, no police investigation of any sort involving James was commenced until approximately November 2012, shortly after Bartlett first reported the alleged sexual abuse. The People did not file charges until 2015.

This case hinges upon analysis of the Equal Protection Clauses of the Fourteenth Amendment as it relates to MCL 767.24, the nonresident tolling provision relevant to this matter:

> "Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed." MCL 767.24(10).

Petitioner initially moved to dismiss on different grounds while this case was in the 88th District Court. The District Court issued a written opinion dated August 12, 2015 that the case was not

untimely under the applicable statute of limitations and that the statute, if read literally, did not produce an "absurd and unjust result" inconsistent with the purposes and policies of the act.

Petitioner filed an interlocutory appeal to the 26th Circuit Court, which affirmed the District Court's decision. In doing so, though, the Circuit Court made a number of factual determinations (which the parties do not dispute) relevant to this appeal (Opinion and Order Dated September 8, 2015 see Appendix pp. 18A – 23A):

- James was, in 1996, a resident of Alaska and remained so until being extradited. (Appendix p. 19A).

- A ten-year statute of limitations applies to the charges. (Appendix p. 19A).

- Had James been a constant resident of Michigan, the statute of limitations would have expired. (Appendix p. 20A).

The case involving Bartlett has been tried on two occasions[4] resulting in acquittal as to two counts and hung juries as to the other two. When the People gave notice of their intent to try the case a third time, James filed a different motion on December 5, 2017. This time, James did not directly attack the statute, but instead claimed that it violated his right to equal protection and the privileges and immunities of

[4] First from September 29, 2015 through October 2, 2015, then May 11, 2016 through May 13, 2016.

citizenship under the state and federal constitutions as applied.

In an Opinion and Order dated January 18, 2018, the Circuit Court agreed, stating:

> "MCL 767.24(10) provides that the limitations period is tolled for "any period during which the party charged did not usually and publicly reside within this state…" In interpreting this language, courts have consistently held that nonresident tolling "applies *only* in those situations where a *suspect* is no longer a resident of this state." *People v Crear*, 242 Mich.App 158; 618 N.W.2d 91 (2000); overruled in part on other grounds by *People v Miller*, 482 Mich. 540, 759 N.W.2d 850 (2008) (emphasis added); see also *People v McIntire*, 232 Mich.App 71, 105; 591 N.W.2d 231 (1998), reversed on other grounds 461 Mich 147 (1999). These holdings corroborate a former attorney general opinion that determined the statute of limitations will not run against *an accused* while not usually and publicly residing within the state. Op Atty Gen, 1928-1930 p582. Logically, then, the tolling provision advances a state interest in permitting later prosecution in

cases where a suspect or accused no longer resides in Michigan.

In comparison, it is undisputed that defendant was not a suspect until after the statute of limitations had expired. This is because he was not accused of any wrongdoing until 2012, and no investigation commenced until that time. The Court is aware of no case in Michigan jurisprudence where nonresident tolling has been applied in under such circumstances. Rather, the tolling provision seems to have only been applied in limited situations where a *suspect* was a nonresident during the limitations period. See *People v Crear*, 242 Mich.App 158; 618 N.W.2d 91 (2000); overruled in part on other grounds by *People v Miller*, 482 Mich. 540, 759 N.W.2d 850 (2008); see also *People v McIntire*, 232 Mich.App 71, 105; 591 N.W.2d 231 (1998), reversed on other grounds 461 Mich 147 (1999); and *People v Budnick*, 197 Mich.App 21; 494 N.W.2d 778 (1992); The Court sees no rational basis for the tolling provision to be extended to this case.

The Court is mindful that this is an exceptionally limited, fact-driven

> circumstance involving MCL 767.24(10). Nonetheless, defendant, as a class of one, has sufficiently demonstrated that the statute violates equal protection in this manner." (Appendix p. 29A).

The People appealed the Circuit Court's decision, claiming that application of the nonresident tolling provision of MCL 767.24 to James violates neither the equal protection clauses nor the Privileges and Immunities clause of the Michigan or United States Constitution and that, in finding that the tolling provision did not apply to James, the Court abused its discretion.

James responded that he was (and remains) presumed innocent of any wrongdoing and denies even the occurrence of any of the incidents alleged to have transpired in 1996 or 1997. Moreover, because Bartlett did not make any complaint, allegation, or assertion or any kind against James until 2012; and because nobody—governmental entity or otherwise—commenced any sort of inquiry or investigation into Bartlett's claims until 2012, the government had no rational basis for distinguishing between nonresidents and residents until at least five years after the statute of limitations should have run. Accordingly, as applied to the unique circumstances of this case, application of the nonresident tolling provision of MCL 767.24 to James would violate his right to equal protection under the laws. Thus, the Circuit Court, having determined that the nonresident tolling provision was unconstitutional as applied to James, correctly concluded that it had no

choice but to dismiss as untimely the claims against him.

The Michigan Court of Appeals, in a published decision and a matter of first impression dated October 11, 2018, reversed the Circuit Court's decision, stating:

> "If a crime occurs, but no one reports it, is it still a crime? To ask the question is to answer it. The state of Michigan has an interest in discovering previously unreported crimes, and this interest serves as a rational basis for the Legislature's tolling of the statute of limitations with respect to nonresidents charged with a crime that remained unreported until after the untolled limitations period had lapsed." (Appendix p. 2A).

James next sought leave to appeal the Court of Appeals' decision with the Michigan Supreme Court because, he contended, the Court of Appeals created a domino effect of errors in assuming that a crime occurred. Rather than presume that criminal activity has occurred when hindsight of more than a decade is the only tool of analysis, James maintains that the test in determining whether the state has a rational basis for distinguishing between residents and nonresidents is whether some triggering event—a report, complaint, or investigation of some kind—occurs prompting the government to exercise its

interest. Under that test, the claims against James would be time barred because, for the entirety of the ten-year limitations period (and indeed, for an additional five or more years), the government had no notice that there was any sort of allegation to consider.[5]

The Michigan Supreme Court denied James' Application for Leave to Appeal in an Order dated July 2, 2019 (Appendix p. 17A).

REASONS FOR GRANTING THE PETITION

Given the current political climate with regard to claims of sexual misconduct from the distant past, this is a situation that is likely to be often repeated in the coming years. Accordingly, this is an issue of great public interest and, because it goes directly to the heart of Constitutional protections afforded individuals, it involves principles of major legal significance. Finally, this Court has not yet spoken on this issue, and there exists a conflict between state courts as to the application of nonresident tolling provisions.

The crucial overarching issue for consideration is this: whether James' rights as a "class of one"

[5] The Court of Appeals seems to conclude that if a tree falls in the forest (despite the presumption that it is innocent of falling), the government has an inherent interest in it even though the event may not be reported for decades. Petitioner James maintains that until there is a report of some sort, the state not only has no reason to know that a tree may have fallen, it is unaware even of the possibility of the existence of a forest in which it may be interested.

under the equal protection clause of both the Michigan and United States Constitutions are violated through the application of the nonresident tolling provision at MCL 767.24(10). For the reasons set forth below, the nonresident tolling provision, as applied to him, violated his rights to equal protection and the Court of Appeals erred in reversing the Circuit Court's earlier decision.

I. The steps in a criminal investigation do not presume criminal activity.

The Court of Appeals concludes without analysis that criminal activity has occurred in this case where no such finding has been made:

> "We point out the obvious—an unreported crime is still a *crime*, and the victim of an unreported crime is still a *victim*. There may be any number of reasons why a crime is not initially reported, including a victim's age, vulnerability, or fear, or the lack of corroborating witnesses or physical evidence. The state certainly has an interest in discovering previously unreported crimes, as well as subsequently investigating and prosecuting them. Cf *March*, 395 SW3d at 787 (holding that "the State's interest in *detecting* crime and punishing offenders is compelling" (emphasis added)); *Sher*, 149 Wis 2d at 16 (observing

> that the "statute is substantially related to the state's interests in *detection* of crimes, and the identification and apprehension of criminals (emphasis added)); *Scherling v Superior Court of Santa Clara County*, 22 Cal 3d 493, 503; 585 P2d 219 (Cal 1978) (concluding that "the Legislature could have determined that the *detection* of the crime and identification of the criminal are more likely if the criminal remains in the state than if he departs" (emphasis added))." (emphasis in original).

While it is obvious that an actual crime, though unreported, is still a crime, it is similarly obvious that the mere report of a crime does not gain actuality until the suspect defendant's presumption of innocence is burst by virtue of a conviction. See, e.g., Michigan Crim. Jury Instr. 1.8, 1.9, and 3.2(1) (Appendix pp. 36A – 40A). Indeed, a statute of limitations is blind to the ultimate truth or falsity of criminal allegations as its concern relates instead to the passage of time and its effect upon the accuracy of testimony and unfairness that may result from stale evidence and dull memories. *People v McCausey*; 65 Mich. 72, 73; 31 N.W. 770 (1887); *People v Budnick*, 197 Mich. App. 21; 494 N.W.2d 778 (1992); *People v Allen*, 192 Mich. App. 592, 602; 481 N.W.2d 800 (1992). This Court discussed the purpose of statutes of limitations in *Toussie v. U.S.:*

> "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 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. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." 397 U.S. 112 (1970).

In determining whether a statute of limitations has been violated, the Court has no power to consider the merits of the underlying claim, the factual development of the case, or the strength of the potential testimony against a defendant.[6] The calculation is a simple one: has more time passed than has been permitted by the legislature for filing a complaint against a defendant? Thus, the Court of

[6] Consider that in civil cases, motions for summary disposition pursuant to MCR 2.116(C)(7) in Michigan and Rule 12(b)(6) federally accept the pleadings as true and look only into additional documentary evidence that sheds light onto the timeliness of the complaint. See, e.g. *Kuznar v Raksha Corp*, 481 Mich 169, 175-176; 750 NW2d 121 (2008).

Appeals, in focusing on the supposed existence of crime, is at once making both a constitutionally impermissible "leap" and delving into matters not relevant to a statute of limitations analysis.

II. As applied to James as a class of one, MCL 767.24(10) constitutes a violation of his rights to equal protection of the laws.

Claims under the equal protection clause may either be made on behalf of a protected class or under a "class of one" theory. While protected classes are afforded heightened levels of scrutiny, class of one claims are subject to rational basis review. [7]

This Court has "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that [he or] she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (citing *Allegheny Pittsburgh Coal Co. v. Comm'n of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d

[7] The recognized suspect classes are race, national origin, religion and alienage. Although state citizenship has not been recognized as a suspect class, it bears many traits similar to the national origin class. That is, there is not a significant difference between treating a person differently because he or she is from India or Indiana. If the Court finds state citizenship to be a suspect class, it should measure conduct under the strict scrutiny standard. However, Defendant James contends that the application of the statute at issue here fails to meet even the less rigid rational basis standard.

688 (1989) and *Sioux City Bridge Co. v. Dakota Cty*., 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923)).

The extent to which individuals must be similarly situated to maintain a class of one claim is still an underdeveloped area of law. See *McDonald v Village of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004). However, as the Circuit Court noted, in order to be similarly situated, the challenger and his comparators must be "prima facie identical in all **relevant** respects or directly comparable…in all **material** respects." *United States v Moore*, 543 F.3d 891, 899 (7th Cir. 2008); *Lima Twp v Bateson*, 302 Mich.App 483, 503; 838 N.W.2d 898 (2013) (emphasis added).[8]

"[I]n order to prove that they are being treated differently than other people who are similarly situated, [the person claiming the violation] must obviously be able to identify a class of persons to whom they are similarly situated but less favorably

[8] While it is true that the issue of whether individuals are similarly situated is a factual question for a jury, here there is no factual dispute for a jury to decide. Instead, the parties agree as to the basic underlying facts and, although summary disposition is not an available avenue in a criminal proceeding, this Court has the ability to decide the underlying legal issue given the lack of factual dispute: Whether individuals or entities are similarly situated is generally a question of fact for the jury; "however, where there is no genuine issue of fact that such a comparator exists, the court may decide this matter on summary judgment." *JDC Mgmt, LLC v Reich*, 644 F.Supp.2d 905, 927 (W.D. Mich 2009) citing *Smith v. Atlanta Indep. Sch. Dist*., 633 F. Supp. 2d 1364, 2009 U.S. Dist. LEXIS 37767, 2009 WL 1259209, (N.D. Ga. May 4, 2009).

treated." *Sector Enterprises, Inc. v. DiPalermo,* 779 F.Supp. 236, 246–47 (N.D.N.Y.1991).

III. James is similarly situated to other individuals neither accused of nor under investigation for crimes until after the statute of limitations had run, regardless of state of residence.

Rather than presume governmental interest in the hypothetical possibility that someone could come forward at a future time, it seems far more sensible—and constitutionally sound—to distinguish between citizens only when such distinction becomes relevant. Here, there exists a clear group of similarly situated individuals: individuals who, though clothed in the presumption of innocence, may have engaged in illegal activity as to which (a) no objectively undeniable event (such as a stolen item or a burned down building) occurred, (b) no allegation was made during the term of the applicable statute of limitations and (c) no investigation had been commenced by any governmental agency during the term of the applicable statute of limitations.

Under this analysis, the distinction between residents of Michigan and nonresidents is wholly irrelevant and immaterial because nothing had been reported and there was nothing to investigate. Thus, because there had been no identifiable event, nothing had been reported, and there was no investigation underway, residents and nonresidents of Michigan are precisely the same—citizens equally bound by the laws of the State of Michigan and of the United States but not sought for questioning or under suspicion of

any kind. Moreover, the comparators, as citizens of the United States and beneficiaries of its Constitution, are equally protected by the equal protection clause whose breadth ignores state lines when applied to the circumstances of this case. [9]

And, equally importantly, there was no "victim" to protect or for whom to seek justice because none had come forward. Thus, there was neither a "wrong" to avenge nor a wrongdoer to seek. Indeed, any distinction between residents and nonresidents would be entirely insignificant and purely conjectural until an identifiable event occurs triggering a complaint, investigation, or inquiry of some sort.

The Court of Appeals began its equal protection analysis by finding that James was not similarly situated to Michigan residents. It found that because a person must be similarly situated in all material respects, and because state of residency is a material respect, residents and nonresidents should not be paired together for equal protection analysis:

> "As explained, defendant argues that he should be compared to Michigan residents who were not identified as a suspect for a reported crime within the untolled limitations periods.[10]

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[9] This protection is enhanced by James' entitlement to the privileges and immunities of citizenship under the 14th amendment as later discussed.

[10] This is not an accurate description. Indeed, James argues that he should be compared with individuals to which both of the following apply: (1) no "triggering event"—such as a criminal

> …
> There is, however, a flaw in Defendant's argument. The set of similarly situated persons must be comparable to defendant in all material aspects. On its face, the tolling provision applies to all persons who commit a crime in Michigan and then no longer reside usually and publicly in the state.[11] MCL 767.24(8). Following this, the most natural comparison set for defendant's claim would be those persons who do not usually and publicly reside here. See e.g. *State v March,* 395 SW3d 738, 788 (Tenn App 2011) ("The tolling statute on its face applies equally to all persons who commit a crime in this State and then depart.").

The inherent flaw in the Court of Appeals' analysis lies in its assumption that there is something to investigate prior to a triggering event:

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complaint, 911 call, report to counselor, etc.—occurred to initiate governmental action and (2) Defendant was never identified as a suspect. In James' analysis, state of residency does not matter because, until the "triggering event" occurs, any distinction between residents and nonresidents is purely irrelevant.

[11] Under this analysis, James should be immune from prosecution because he resided in Alaska before AND after the supposed criminal event occurred. Thus, the out of state residency did not follow the alleged criminal conduct, it preceded it.

"Yet, with respect to a state's police power, there is a material distinction between someone who resides within the state and someone who does not. A state's power to investigate and prosecute a person is severely diminished when that person does not reside within its borders. State and local law enforcement resources are not infinite, and such resources will often be insufficient to investigate, question, or prosecute someone who resides in a different state. See *Burns v Lafler*, 328 FSupp 2d 711, 721 (ED Mich 2004). Choices need to be made about how best to allocate finite law enforcement resources and rarely will those resources best be used pursuing out-of-state persons. Moreover, as laboratories for public policy, other states may not share Michigan's priorities with respect to criminal law, and a case that is important in this state may receive less attention from authorities in another state. See *State v Sher*, 149 Wis2d 1, 14; 437 NW2d 883 (Wis 1989). For these and other reasons, courts have held that residents and nonresidents are not similarly situated for equal-protection purposes. See, e.g.

Burns, 328 F Supp 2d at 721 (collecting cases).

Petitioner James agrees with the cited cases concerning governmental interest in distinguishing between residents and nonresidents. There is no question that, in a criminal investigation, the government's efforts are frustrated by a suspect or witness being absent from the state. But there is a crucial distinction between the cases cited by the Court of Appeals and James' case. In the cases cited, there was a complaint to investigate, whereas in James' case, the government was not expending any resources, its purposes were not frustrated, and its ability to investigate and prosecute was in no way diminished because no complaint had been made, no investigation initiated.

IV. Courts have previously held that speculative or hypothetical interests are not constitutionally actionable.

As applied to individuals, Courts have routinely held that "an abstract need or unilateral expectation" does not give rise to constitutional protection. See, e.g., *Richardson v Township of Brady, 218 F.3d 508 (6th Circ. 2000), Board of Regents v Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989).

These cases highlight the fact that "damages" perceived through the distorted lens of speculation, hypothesis or untamed imagination stand outside the door inside which constitutional protection resides.

Indeed, were the door to constitutional protection to be opened to the supposed impairment of a non-existent complaint and investigation as requested by the People and condoned by the Court of Appeals, a fundamental freedom against governmental intrusion would be forced to exit.

Such is the case here. No investigation was commenced, no allegations made, no charges filed, and no case filed until over five years after the statute of limitations should have run.

As there can be no dispute that James would be treated differently than a similarly situated person through application of the nonresident tolling provision, the next issue is whether there exists a rational basis for the different treatment.

V. There is no rational basis for the difference in treatment.

When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions." Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a "rational basis for the difference in treatment." *Engquist v Or. Dep't of Agric.*, 553 U.S. 591, 602; 128 S.Ct 2146; 170 L.Ed.2d 975 (2008); citing *Village of Willowbrook v Olech*, 528

U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000).

And in considering whether there is a rational basis for different treatment, courts must bear in mind the purpose behind a statute of limitations, namely, the potential for an unjust result due to the passage of time.

The Court of Appeals began its rational basis analysis with its conclusion that an unreported crime is still a crime. It found that "the state certainly has an interest in discovering previously unreported crimes, as well as investigating and prosecuting them." This rationale is indisputable as far as it goes. Certainly, one can imagine many circumstances where there would exist rational bases for treating those residing in another state differently than those residing in Michigan. Leaving the state knowing one is a suspect or even a "person of interest" to a fledgling investigation are prime examples, but when an individual's residency alone imparts no impact on a criminal investigation, as here, the Court of Appeals rationale is at once illogical and irrelevant.

In at least two published cases, state courts have rejected the prosecution's contention that residence in and of itself constitutes a rational basis for dissimilar treatment. In *Danuel v State*, 262 Ga 349 (1992), the Georgia Supreme Court analyzed a nonresident tolling provision similar to Michigan's. In that case, the defendant had moved across state lines shortly after the crimes had occurred, and both the victim and witnesses knew exactly where he was. The victim, defendant's daughter, reported the

conduct shortly after the defendant refused to pay the level fees for the victim's divorce and custody dispute.

There, the Court held:

> 'The state urges that OCGA § 17-3-2 (1) should be construed to mean that whether the applicable statute of limitation is tolled depends solely upon the legal residence of the alleged offender. On the other hand, Danuel contends that such an interpretation violates the equal protection clause of both the U.S. and the Georgia Constitutions. Assuming, without deciding, that Danuel is correct in this regard, we will not interpret OCGA § 17-3-2 (1) in a manner which causes it to be unconstitutional when there is another interpretation for the statute which is long standing, logical, and constitutionally sound." Id. at 352.

Similarly, in *Heitman v State*, 627 N.E.2d 1307 (1994), the Indiana Court of Appeals stated in the face of the state's "residents only" defense of a similar tolling provision:

> "Were we to enforce the State's interpretation of the statute of limitations, the absence of a fair and substantial relation between the classification of residence and

> the purpose of bringing criminals to justice would render I.C. 35-41-4-2(g)(1) unconstitutional. If a suspect has left Indiana and is evading extradition or is otherwise avoiding authorities, there would be reason to toll the statute of limitations. If a suspect has left Indiana but cooperates fully with Indiana authorities, and returns voluntarily to Indiana to face the charges against him, there would be no reason to toll the statute of limitations." Id. at 1309-1310.[12]

In this case—the first of its kind in Michigan—the Court of Appeals chose to paint with a broad brush the state's supposed interest:

> "Moreover, it is certainly conceivable that an unreported crime will more likely be discovered when the guilty party resides within the state where the crime occurred. A chance encounter between the guilty party and the victim, a casual conversation between the guilty party and someone with knowledge of the victim or circumstances, or a relatively minor traffic infraction

[12] The Court ultimately held the statute constitutional as its specific language, properly interpreted, classified suspects based on their "amenability to process" rather than residence location.

> leading to a confession, are just several circumstances in which residing in the same state where the crime occurred could increase the chance of local law enforcement discovering an unreported crime. Proximity often leads to discovery." (Appendix at p. 14A).

Then, in the next breath, the Court of Appeals identifies what is perhaps the strongest argument for reversal of its ultimate conclusion:

> "**Defendant is correct that a "purely hypothetical" criminal act cannot serve as a rational basis for distinguishing between residents and nonresidents**. Yet, the prosecutor's case here does not rest on a "purely hypothetical claim. Rather, the prosecutor presented sufficient evidence to establish that there was probable cause to believe that defendant sexually assaulted the complainant." (Appendix at p. 14A. emphasis added).

The flaw in the Court of Appeals' conclusion is that it considered evidence acquired after the statute of limitations had already run—the equivalent of counting a basket scored years after the final buzzer has sounded. Indeed, throughout the limitations period, the existence of a crime, or even of an

allegation of a crime, against Joel James was purely hypothetical.

In support of its identified rational basis, the Court of Appeals relied upon a number of non-precedential cases—each at least 28 years old—from outside the State of Michigan, including *Scherling v Superior Court*, 22 Cal.3d 493; 585 P.2d 219 (1978). There, the defendant alleged an equal protection violation where he was charged in 1976 for burglaries committed in 1966 and 1967 despite a three-year statute of limitations. Although the People claim that the crime was not reported until 1976, the court's opinion declares otherwise, outlining an investigation beginning as early as 1967 and well within the period of limitations.

Regarding the impact of the defendant's change of residence from California to Idaho, the Court declared:

> "It is not unreasonable to find that he would have been a target of suspicion sooner if he had remained in California." *Id.* at 14.

Next, the Court considered the Wisconsin case of *State v Sher*, 149 Wis.2d 1; 437 N.W.2d 878 (1989) regarding whether a nonresident tolling provision is related to a number of legitimate state objectives. The *Sher* court identified "the identification of criminals, the detection of crimes, and the apprehension of criminals." *Id.* at 14.

Unlike in the instant case, the *Sher* court considered a situation where a boat was stolen from a marina, reported as such, and investigated while the period of limitation was still running. The defendant was not charged until eight years later, in violation of the statute of limitations but for the nonresident tolling provision. Under those circumstances, the state had a legitimate interest in detecting what was clearly a crime because it had located and identified the corpus delicto. And it had an interest in identifying and apprehending the criminals because, once an investigation reveals a suspect, the next logical step is to charge the suspect with a crime.

But the world of equal protection, especially class of one equal protection, depends upon the specific factual scenarios of a case as its lifeblood. And here, none of the circumstances present in *Sher* existed. Instead, the proverbial radar was silent until years after the statute of limitations should have run.

In *New Mexico v Cawley*, 110 NM 705; 1990 N.M.S.C. 088; 799 P.2d 574 (1990), a criminal sexual conduct case, the defendant was alleged to have raped his ten-year-old stepdaughter in May 1968. After the alleged incident occurred and before a criminal complaint was filed, the defendant left New Mexico for Texas. It is not at all clear when the alleged incident was reported. However, the defendant resided in Texas for approximately eleven years, returning to New Mexico only occasionally for business and personal matters. Defendant was charged in 1988, ten years after the applicable statute of limitations would have run.

In affirming the conviction, the New Mexico Supreme Court held that the legislature "intended the tolling statute to foreclose the barring of a prosecution due to the voluntary absence from the state by a criminal offender." *Id.* at 577. In holding that a rational basis existed for the different treatment, the court relied on the state's concern that "the process of investigation and prosecution of a crime become more complex when a suspect leaves the jurisdiction." *Id.*

There is at least one crucial distinction between *Cawley* and the instant case. Where in *Cawley*, the defendant was deemed a suspect during his period of absence from the state, James was not so identified until at least five years after the statute of limitations would have otherwise run. Thus, the *Cawley* court's identified interest in keeping "suspects" within the jurisdiction for ease of investigation and prosecution has no bearing on James.

And other Michigan cases are uniformly distinguishable from the circumstances set forth in this case. A number of cases identify a state interest in permitting later prosecutions in cases where a suspect or accused no longer resides in Michigan. But in each of those cases, the incidents had been reported and an investigation was underway well before the statute of limitations had run. Moreover, no Michigan case analyzes the factual scenarios under a class of one equal protection analysis.

In *People v Crear*, 242 Mich.App 158; 618 N.W.2d 91 (2000), the court considered a sexual

assault alleged to have occurred in 1984 that was indisputably reported to school officials and police in that same year, though charges were not filed at that time. *People v Blackmer*, 309 Mich.App 199; 870 N.W.2d 579 (2015) involved an alleged sexual assault at gunpoint in 1981 that was reported and investigated immediately. Police closed the file in 1982 without having identified a suspect. Meanwhile, in *People v Rapp* (Docket Number 333613, unpublished November 2017), the alleged 1986 sexual assaults committed by defendant, a Catholic priest, had been reported to the church around the time of the events, and the defendant had been treated for pedophilic tendencies and shifted from parish to parish for years because of his sexual issues.

Meanwhile, *People v McIntire*, 232 Mich.App 71; 591 N.W.2d 231 (1998) involved a murder investigation commenced in 1982 with obvious distinguishing factors. The Defendant was aware of the ongoing investigation having been summoned to testify at an inquiry as a witness. In 1984, with the murder still unsolved and the investigation still incomplete, the Defendant moved to South Carolina.

In, 2004 Mich.App LEXIS 3224 (unpublished 2004), the Court of Appeals considered the claim of a Catholic priest alleged to have sexually abused an altar boy from 1971 until 2000[13] where the incidents were not reported until 2002. Defendant claimed that, despite moving to Florida in 1976, the

[13] The evidence suggested an ongoing sexual relationship between the two despite the priest's eventual change in residence.

approximate 30-year delay in reporting and filing charges violated MCL 767.24 because it was "fundamentally unfair" to toll the limitation period where he was "residing openly in Florida, the complainant knew his whereabouts, and he did not leave the state to avoid prosecution." *Olszewski* at 16 - 17.

The Court, finding the language of the statute plain and unambiguous, found:

> "Defendant admits that he transferred to Florida and left Michigan in 1976, and resided there continuously until he was charged in this case. Because there is no dispute that defendant had not usually and publicly resided in Michigan since 1976, the trial court did not err in concluding that the period of limitations was tolled and, consequently, that the charges in this case were timely filed." *Olszewski* at 16 - 17.

Olszewski is consistent with the District Court's earlier decision and the Circuit Court's earlier affirmance in the instant case. Simply put, the court examined the language of MCL 767.24, found it to be clear and unambiguous, and found it to apply to all nonresidents—not only those who fled the jurisdiction to avoid prosecution. What the court didn't do—and

this Court has not yet done—is examine the statute through a Constitutional lens.[14]

Such a challenge, however, is not without federal precedent. In *Burns v Lafler*, 328 F.Supp.2d 711 (E.D. Mich 2004), the Court considered such a challenge in an action arising out of an arson charge, and its "rational basis" analysis under equal protection confirms the accuracy of the Circuit Court's decision in this case.

In *Lafler*, the Adrian Auto Auction house was burned to the ground in 1991. An investigation started immediately thereafter and, although the defendant was identified as a suspect within two weeks of the fire, there was not sufficient evidence to authorize charges. In 1998, one of the defendant's co-conspirators spoke to police and implicated him in an actionable way. Between the time of the incident and the filing of charges, the defendant lived in Ohio.

When charges were filed against him approximately 7 years later, the defendant contended that the statute of limitations was violated and that, in any event, the nonresident tolling provision of MCL 767.24 violated his constitutional rights to Due

[14] Most recently, this Court considered the nonresident tolling provision in *People v Kasben*, 500 Mich 948, 890 N.W.2d 354 (2018, for publication), but as that case involved numerous legislative extensions of the statute of limitations which ultimately allowed prosecution at any time, and as the court did not consider an equal protection analysis, it is not relevant to the case at hand.

Process, Speedy Trial, and Equal Protection under the 5th, 6th and 14th Amendments.[15]

In considering the equal protection claim under a rational basis test, the Court concluded that:

> "A rational basis exists for provisions of the statute of limitations which exclude from the limitations period any time in which a criminal defendant was not a resident of the prosecuting state, **because nonresidents are not similarly situated to residents, in that investigating, charging, and prosecuting an individual with a crime is generally more difficult when the suspect is not within the state**." *Id.* at 721 (emphasis added), citing *People v Laughlin*, 293 Ill.App.3d 194, 687 N.E.2d 1162, 227 Ill.Dec.680 (Ill.App.Ct. 1998) and *Scherling v Superior Court*, 22 Cal.3d 493, 585 P.2d 219, 149 Cal. Rpter 597 (Cal.

[15] The federal court found that the due process claim was without merit because Defendant could not show either substantial prejudice to his right to a fair trial or that the delay was an intentional device by the government to gain a tactical advantage, both of which were required under *United States v Brown*, 959 F.2d 63 (6th Cir. 1992) and its progeny. And, because speedy trial rights are not implicated until charges are pending, his claim that the delay resulted in a violation of his right to a speedy trial similarly lacked merit. See *United States v MacDonald*, 456 U.S. 1, 71 L.Ed.2d 696, 102 S.Ct. 1497 (1982); *United States v Norris*, 780 F.2d 1207 (5th Cir. 1986)

1978); and *United States v Udell*, 109 F.Supp 96, 97-98 (D. Del 1952).

In *Laughlin*, the defendant, a teacher, resigned following a timely investigation into his alleged sexual abuse of students. In *Udell*, the defendant filed a falsified tax return with the Internal Revenue Service which that agency immediately began looking into. And in *Scherling*, police immediately began investigating a string of burglaries and quickly interviewed the defendant as a suspect. In each of these four cited cases, unlike here, the State had an immediate and identifiable interest in investigating, charging, and prosecuting a crime that had been reported and of which there was tangible evidence.

During the limitations period in this case—from 1997 to 2007—it would not have mattered if James was in Alaska, Alabama, Albania, Algeria or even Alpena inhabiting a tent pitched on the courthouse lawn. Indeed, James could have been employed by the Alpena County Sheriff's Department—the very agency that eventually investigated him—and have passed every background check, qualified under every ethical standard, and not aroused an ounce of suspicion from his coworkers or any other law enforcement officials.

VI. The difference in treatment as between James and similarly situated Michigan residents violates his Fourteenth Amendment right to the privileges and immunities of citizenship.

Although the extent of coverage of the Privileges and Immunities Clause is sometimes disputed, there is very little debate that one of the fundamental rights it protects is a right to travel:

> "Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases* (1873), it has always been common ground that this Clause protects the third component of the right to travel. Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." *Saenz v Roe*, 526 U.S. 489, 503; 119 S.Ct 1518; 143 L.Ed.2d 689 (1999).

The Court continued:

> "A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens." *Id*. at 503-504, citing *Slaughter-House Cases*, 83 U.S. 36, 112-113; 16 Wall. 36; 21 L.Ed 394 (1873).

Where, as here, a nonresident tolling provision draws distinctions between residents and nonresidents, a court must cast a wary eye and closely examine the circumstances at issue lest there remain untended a violation of the Privileges and Immunities Clause. In this instance, a tolling provision whose sole basis in reason is residency regardless of its actual impact on the state's interest in investigating and prosecuting crimes presents a constitutional violation times two lying directly in plain sight.

CONCLUSION

Our federal constitution stands as the finest example of governmentally protected individual rights known to mankind. The rights implicated in

this case are among its most important: the right to be presumed innocent until proven guilty beyond a reasonable doubt; the right to be treated the same as other similarly situated individuals; and the right to enjoy the same privileges and immunities as other citizens. It is only when governmental interests outweigh those precious rights that they must stand aside.

And while there are certainly instances where the State's interest in investigating, interrogating, charging, and convicting a criminal defendant is sufficient to outweigh the protections of privileges and immunities and equal protection, such is not the case where no complaint has been made, no investigation commenced, and no charges sought. In such an instance, the possibility of criminality is nothing more than mere conjecture. And where an otherwise legitimate governmental interest is purely a matter of abstract possibility, it cannot serve as a basis to differentiate between citizens and non-citizens, residents and nonresidents.

The simple fact is this: Joel James bore exactly the same odds of being criminally charged until 2007 as any resident of the state of Michigan. Thereafter, based solely upon the identifier "Alaska" on his driver's license and without an ongoing investigation or complaint, his odds became infinitely higher than those of a Michigan resident thanks solely to the nonresident tolling provisions of MCL 767.24. Its application under these circumstances is offensive to the United States Constitution. Accordingly, Defendant Joel James respectfully requests that this

Court issue a Writ of Certiorari to the Michigan Court of Appeals.

Respectfully Submitted,

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Date: September 30, 2019

APPENDIX

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

_____/

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellant,

FOR PUBLICATION

October 11, 2018
9:00 a.m.

v

No. 342504
Alpena Circuit Court
LC No. 15-006730-FH

JOEL HOWARD JAMES,

Defendant-Appellee.

_____/

Advance Sheets Version

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ. SWARTZLE, J.

If a crime occurs, but no one reports it, is it still a crime? To ask the question is to answer it. The state of Michigan has an interest in discovering previously unreported crimes, and this interest serves as a rational basis for the Legislature's tolling of the statute of limitations with respect to nonresidents charged with a crime that remained unreported until after the untolled limitations period had lapsed.

Defendant, a resident of Alaska, allegedly sexually assaulted a female minor while visiting Michigan in the 1990s. The statute of limitations periods expired in 2006 and 2007 absent any tolling, but the purported victim did not report the crime until 2012. The prosecutor charged defendant with criminal sexual conduct (CSC) III, a crime for which the statute of limitations is tolled while the person charged resides outside of Michigan. The charges were subsequently dismissed by the trial court on equal-protection grounds because, had defendant been a resident, the limitations period would have expired before the crime was reported. Finding this to be a distinction without a difference, we reverse.

I. BACKGROUND

Born in Michigan in 1955, defendant served in the military and eventually moved to Alaska. From the early 1990s until 2013, defendant worked primarily for construction companies in Alaska, although he periodically returned to Alpena County, where he still owned property. Beginning in 1992,

during these trips to Michigan, defendant sexually assaulted his then 11-year-old niece, and later, beginning in the early 2000s, defendant allegedly sexually assaulted his niece's minor daughter. Neither the niece nor her daughter reported the matter to authorities until 2012, and during the ensuing investigation, a third person disclosed to police that defendant sexually assaulted her multiple times in 1996 and 1997 when she was 13 and 14 years old.

Defendant was extradited to Michigan in 2013 to face CSC charges involving the niece and her daughter, and in 2015, the prosecutor filed similar charges against defendant involving the third person. Defendant was bound over on the various charges. A jury subsequently found defendant not guilty on charges related to the niece's daughter, but a second jury found defendant guilty of CSC-I with regard to the niece. The jury deadlocked on the charges involving the third person, and the prosecutor subsequently refiled a new information charging defendant with two counts of CSC-III involving this third person. The current appeal solely involves these refiled CSC-III charges.

Defendant moved to dismiss the refiled charges based on the statute of limitations. The statute of limitations for CSC-III in effect at the time stated that a charge had to be filed within 10 years after the offense occurred or before the alleged victim's twenty-

first birthday, whichever is later. MCL 767.24(3)(a).[1] Given the person's age at the time of the alleged assaults, the latest periods would have expired in 2006 and 2007, well before defendant was extradited and charged with CSC-III in 2015. Yet, the Legislature also included a tolling provision applicable to any limitations period that had not yet expired: "Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed." MCL 767.24(8).[2] In other words, the statute of limitations period is effectively "paused" during the time the party resides outside of Michigan or is otherwise "not usually and publicly" residing in this state. There is no question that defendant "did not usually and publicly reside" in Michigan from at least the 1990s until 2013, so if the tolling provision applies, the 10-year limitations

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[1] MCL 767.24 has been amended several times since the charges in this case were filed. Most recently, MCL 767.24 was amended to provide that a charge involving a minor victim of third degree sexual assault has to be filed "within 15 years after the offense is committed or by the alleged victim's twenty-eighth birthday, whichever is later." MCL 767.24(4)(a), as amended by 2018 PA 182. Because defendant was charged in 2015 with committing the instant offenses, however, the 2018 amendment is inapplicable to this case.

[2] "An out-of-state tolling provision has been part of MCL 767.24 for the entire time frame captured by this case." People v Kasben, 324 Mich App 1, 4 n 2; 919 NW2d 463 (2018). The out-of-state tolling provision codified in MCL 767.24(8) at the time the charges were filed in this case is now codified at MCL 767.24(11).

periods on the CSC-III charges would not have lapsed by the time defendant was charged.

In his motion, defendant argued that the tolling provision was unconstitutional as-applied to him, both under the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment. The trial court agreed with defendant, reasoning that "the tolling provision seems to have only been applied in limited situations where a suspect was a nonresident during the limitations period." The trial court could find "no rational basis for the tolling provision" to apply when no crime was reported and the party charged was not a suspect before the untolled limitations period had expired. Concluding that the tolling provision violated defendant's right to equal protection, the trial court dismissed the CSC-III charges.

This appeal followed.

II. ANALYSIS

There are two issues on appeal—does the tolling provision in MCL 767.24 violate defendant's constitutional right to interstate travel or his right to equal protection under the law? While defendant argues that these are fact-based inquiries, the pertinent facts are not in doubt. Accordingly, with respect to the constitutional and statutory issues applicable here, we review them de novo. People v Harris, 499 Mich 332, 342; 885 NW2d 832 (2016).

A. TOLLING A LIMITATIONS PERIOD DOES NOT VIOLATE THE RIGHT TO TRAVEL

We begin with defendant's argument that the tolling provision violates his constitutional right to travel. Under the federal Fourteenth Amendment's Privileges and Immunities Clause, a person has the fundamental right to travel across the United States. US Const, Am XIV, § 1; Jones v Helms, 452 US 412, 418; 101 S Ct 2434; 69 L Ed 2d 118 (1981). This fundamental right is not without qualification, and, in the criminal context, the right is subject to the legitimate interests of states. See Jones, 452 US at 419.

We find little merit in defendant's argument. The tolling provision here only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's borders. Although the provision does create a negative consequence for someone who resides outside of Michigan and becomes a suspect in a crime that occurred within the state, this Court has already held that "the tolling provision advances a compelling state interest in permitting later prosecutions in cases where a defendant no longer resides in the jurisdiction." People v Crear, 242 Mich App 158, 166; 618 NW2d 91 (2000), overruled in part on other grounds by People v Miller, 482 Mich 540 (2008); cf. Commonwealth v Lightman, 339 Pa Super 359, 372; 489 A2d 200 (1985) (Spaeth, P.J., concurring and

writing for the majority) (holding that "appellant's right to travel was qualified, if at all, not by an arbitrary distinction drawn by the government, but by his own criminal conduct"). Although Crear was subsequently overruled on other grounds and therefore the decision is not binding, Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 262; 657 NW2d 153 (2002); MCR 7.215(J)(1), we agree with its analysis and come to the same conclusion—the tolling provision of MCL 767.24 does not violate the right to travel found in the Privileges and Immunities Clause of the Fourteenth Amendment.

B. THE TOLLING PROVISION DOES NOT VIOLATE EQUAL PROTECTION

This leaves us to consider defendant's primary claim before the trial court and now on appeal—whether defendant's "rights as a 'class of one' under the equal protection clause of both the Michigan and United States Constitutions are violated through the application of the nonresident tolling provision." The scope of Michigan's Equal Protection Clause is coextensive with that of its federal counterpart, so the provisions will be considered together in analyzing defendant's claim. Const 1963, art 1, § 2; US Const, Am XIV, § 1; see Crego v Coleman, 463 Mich 248, 258; 615 NW2d 218 (2000). In essence, equal protection requires that persons be treated alike with respect to "certain, largely innate, characteristics that do not justify disparate treatment." Crego, 463 Mich at 258.

Defendant concedes that the tolling provision is constitutional on its face, but he argues that the provision is unconstitutional as-applied to him because he was never a suspect in a crime reported before the statute of limitations period would have run absent any tolling. Only after the untolled limitations periods would have lapsed did the women come forward and report that they had been sexually assaulted by defendant years before. If he had been a resident [3] throughout this period, then the limitations periods would have expired in 2006 and 2007 before any sexual assault was reported or he had become a suspect, and, as a result, he would now be beyond prosecution. To apply the tolling provision in this case would be to treat him unequally to those residents who are similarly situated, according to defendant.

Defendant presents his claim as an as-applied, "class of one" equal-protection challenge. [4] To prevail

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[3] As noted, the tolling provision applies to those who did "not usually and publicly reside" in Michigan, MCL 767.24(8), and this encompasses more than just those who did not physically reside in the state. For our purposes, we will refer to the distinction between "residents" and "nonresidents," but the latter term should be understood to include those who physically lived in Michigan, though not "customarily and openly." Kasben, 324 Mich App at 9 (cleaned up).

[4] A "facial" challenge and an "as-applied" challenge can share some overlapping features. As the Sixth Circuit observed in Green Party of Tennessee v Hargett, 791 F3d 684, 692 (CA 6, 2015), an as-applied claim "can challenge more than just the plaintiff's particular case without seeking to strike the law in all its applications." If successful, then defendant's legal position

on the claim, defendant must show both that (1) he "has been intentionally treated differently from others similarly situated," and (2) "there is no rational basis for the difference in treatment." Willowbrook v Olech, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). To be similarly situated to an identified group, defendant must show that he is comparable in all material respects to the members of that group. If he cannot establish that he was treated unequally in some material way, then there is no violation of equal protection. Lima Twp v Bateson, 302 Mich App 483, 503; 838 NW2d 898 (2013).

As for the rational-basis inquiry, it is a highly deferential one. Defendant must negate "every conceivable reason for the government's actions" or show "that the actions were motivated by animus or ill-will." Loesel v Frankenmuth, 692 F3d 452, 462 (CA 6, 2012) (cleaned up). With respect to a claim based on legislation, the Legislature need not have actually articulated a particular rationale, and it is sufficient if the Court can identify an interest that may have reasonably been the rationale. TIG Ins Co, Inc v Dep't of Treasury, 464 Mich 548, 561- 562; 629 NW2d 402 (2001). "Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with mathematical nicety, or even whether it results in some inequity

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would presumably apply to all nonresidents who were charged under similar factual circumstances.

when put into practice." Crego, 463 Mich at 260 (cleaned up). Given this, there is a strong presumption that the statute is constitutional. People v Conat, 238 Mich App 134, 154; 605 NW2d 49 (1999).

Nonresidents Are Not Similarly Situated to Residents. As explained, defendant argues that he should be compared to Michigan residents who were not identified as suspects for reported crimes within the untolled limitations periods. Had defendant been a resident, the limitations periods would not have been tolled, the periods would have expired in 2006 and 2007, and he would have been immune from prosecution. But because he was a nonresident, he was extradited and charged with CSC-III. Defendant contrasts this purportedly similarly situated group with those persons (resident or not) who were identified as suspects in reported crimes prior to the expiration of the untolled limitations periods.

There is, however, a flaw in defendant's argument. The set of similarly situated persons must be comparable to defendant in all material aspects. On its face, the tolling provision applies to all persons who commit a crime in Michigan and then no longer reside usually and publicly in the state. MCL 767.24(8). Following this, the most natural comparison set for defendant's claim would be those persons who do not usually and publicly reside here. See, e.g., State v March, 395 SW3d 738, 788 (Tenn Crim App, 2011) ("The tolling statute on its face

applies equally to all persons who commit a crime in this State and then depart.").

Defendant disagrees and instead compares himself to residents. Yet, with respect to a state's police power, there is a material distinction between someone who resides within the state and someone who does not. A state's power to investigate and prosecute a person is severely diminished when that person does not reside within its borders. State and local law enforcement resources are not infinite, and such resources will often be insufficient to investigate, question, or prosecute someone who resides in a different state. See Burns v Lafler, 328 F Supp 2d 711, 721 (ED Mich, 2004). Choices need to be made about how best to allocate finite law enforcement resources, and rarely will those resources best be used pursuing out-of-state persons. Moreover, as laboratories for public policy, other states may not share Michigan's priorities with respect to criminal law, and a case that is important in this state may receive less attention from authorities in another state. See State v Sher, 149 Wis 2d 1, 14; 437 NW2d 878 (1989). For these and other reasons, courts have held that residents and nonresidents are not similarly situated for equalprotection purposes. See, e.g., Burns, 328 F Supp 2d at 721 (collecting cases).

The State Has an Interest in Discovering Previously Unreported Crimes. Defendant rejoins that his situation is factually distinguishable from Burns and similar cases, because in each of those cases there was at least a crime reported, if not a suspect

identified, within the untolled limitations period. According to defendant, the state has no legitimate interest in tolling a limitations period for which there has not been a crime reported or suspect identified. As he sums up in his brief, "there was no 'victim' to protect or for whom to seek justice because none had come forward" and "the State has absolutely no interest in distinguishing between residents and nonresidents for purposes of a purely hypothetical future claim."

Defendant's position is without support in law or reason. With respect to law, nowhere in the statute is there a requirement that "the party charged" has to have been an actual suspect in an identified crime prior to the expiration of the untolled limitations period. The term "party charged" simply refers to the party, here defendant, who was charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply. There is no qualification placed on the "party charged" for the tolling provision to apply other than that the party must not have "usually and publicly reside[d] within this state." We will not read into the statute a term that the Legislature did not put there. D'Agostini Land Co, LLC v Dep't of Treasury, 322 Mich App 545, 557; 912 NW2d 593 (2018).

Similarly, the authority that the trial court relied upon for the proposition that, for the tolling provision to apply, defendant must have been a "suspect" or an "accused" prior to the expiration of the

untolled limitations period, is inapposite. See Crear, 242 Mich App 158; People v McIntire, 232 Mich App 71; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999); OAG, 1928-1930, p 582 (September 16, 1929). While these authorities do indeed use terms such as "suspect" and "accused," in none of these cases was the court or attorney general faced with the question presented here. It is clear that the terms were used in those cases merely as generic descriptions, not as specific limitations on who may be subject to tolling while residing out of state.

With respect to reason, we point out the obvious—an unreported crime is still a crime, and the victim of an unreported crime is still a victim. There may be any number of reasons why a crime is not initially reported, including a victim's age, vulnerability, or fear, or the lack of corroborating witnesses or physical evidence. The state certainly has an interest in discovering previously unreported crimes, as well as subsequently investigating and prosecuting them. Cf. March, 395 SW3d at 787 (holding that "the State's interest in detecting crime and punishing offenders is compelling") (emphasis added); Sher, 149 Wis 2d at 16 (observing that the "statute is substantially related to the state's interests in the detection of crimes, and the identification and apprehension of criminals") (emphasis added); Scherling v Superior Court of Santa Clara Co, 22 Cal 3d 493, 503; 585 P2d 219 (1978) (concluding that "the Legislature could have determined that the detection of the crime and

identification of the criminal are more likely if the criminal remains in the state than if he departs") (emphasis added).

Moreover, it is certainly conceivable that an unreported crime will more likely be discovered when the guilty party resides within the state where the crime occurred. A chance encounter between the guilty party and the victim, a casual conversation between the guilty party and someone with knowledge of the victim or circumstances, or a relatively minor traffic infraction leading to a confession, are just several circumstances in which residing in the same state where the crime occurred could increase the chance of local law enforcement discovering an unreported crime. Proximity often leads to discovery.

Defendant is correct that a "purely hypothetical" criminal act cannot serve as a rational basis for distinguishing between residents and nonresidents. Yet, the prosecutor's case here does not rest on a "purely hypothetical" claim. Rather, the prosecutor presented sufficient evidence to establish that there was probable cause to believe that defendant sexually assaulted the complainant. Whether the passage of time or delay in reporting undermines the prosecutor's case is a question for the jury, not for this Court on appeal.

Finally, we do recognize that there is some tension between applying the tolling provision in this

case and the general interests served by a statute of limitations. As explained by the federal Supreme Court, "Such a limitation 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." Toussie v United States, 397 US 112, 114-115; 90 S Ct 858; 25 L Ed 2d 156 (1970). By tolling the limitations period for nonresidents in cases like this one, there is an increased risk that basic facts might become obscured with the passage of time. Yet, this is an increased risk faced in all situations involving nonresidents. In the face of this risk, the Legislature has seen fit to draw a distinction between residents and nonresidents and, for the reasons set forth earlier, it had a rational basis for doing so. As there is no suggestion that the Legislature or prosecutor was motivated by animus or ill-will, defendant's as-applied, "class of one" equal-protection claim must fail.

III. CONCLUSION

The Legislature distinguishes between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes. There are rational grounds for doing so, including the investigation, prosecution, and, indeed, the very discovery of previously unreported crimes. Given this, it is not a violation of defendant's right to interstate travel or equal protection to charge him with CSC-III

related to alleged criminal conduct not reported until after the untolled limitations periods had expired. Accordingly, we reverse the trial court and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ William B. Murphy
/s/ David H. Sawyer

APPENDIX B

Order
Michigan Supreme Court Lansing, Michigan
July 2, 2019

	Bridget M. McCormack,
158719	Chief Justice
	David F. Viviano,
SC: 158719	Chief Justice Pro Tem
COA: 342504	Stephen J. Markman
Alpena CC: 15-006730-FH	Brian K. Zahra
	Richard H. Bernstein
	Elizabeth T. Clement
	Megan K. Cavanagh,
	Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
JOEL HOWARD JAMES,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the October 11, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
July 2, 2019 Larry S. Royster, Clerk

APPENDIX C

STATE OF MICHIGAN
IN THE 26th CIRCUIT COURT
FOR THE COUNTY OF ALPENA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

Circuit Court File No.: 15-006753-AP
v. Lower Court File No.: 15-0337-FY

JOEL HOWARD JAMES
Defendant.
_____/

K. Edward Black (P64056)
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_____/

OPINION AND ORDER

PRESENT: HON. MICHAEL G. MACK, CIRCUIT COURT JUDGE

This Court granted defendant's interlocutory application for leave to appeal. On September 4, 2015, oral argument was heard on the matter. The sole issue placed under advisement was whether the nonresident tolling provision of MCL 767.34(8) produces an "absurd and unjust result." The 88th District Court held that it does not. For the reasons provided herein, I affirm.

I. BACKGROUND

Defendant has been charged with criminal sexual conduct that allegedly occurred in 1996. At that time, he was a resident of Alaska and remained so until being extradited. A ten-year statute of limitations applies to the charges.

II. APPLICABLE STATUTE

> Any period during which the party charged did not usually and publically reside within this state is not part of the time within which the respective indictments may be found and filed. MCL 767.24(8).

III. STANDARD OF REVIEW

Questions of statutory construction are reviewed de novo. *People v Danto*, 294 Mich App 596; 822 NW2d 600 (2011).

IV. ANALYSIS

Statutes that are plain and unambiguous are to be applied as written, and are not open to judicial interpretation. However, a departure from an unambiguous statute is permitted where a literal

construction would produce an "absurd and unjust result" inconsistent with the purposes and policies of the act, *People v Brewersdorf,* 438 Mich 55; 475 NW2d 231 (1991). In this matter, the allegations did not surface until 2012. Had defendant been a constant resident of Michigan, the statute of limitations would have expired. However, the limitations period was tolled because he resided in Alaska. See MCL 768.24(8). Defendant now argues this produces an "absurd and unjust result."

At oral argument, defendant referred this Court to the decision in *People v Budnick,* 197 Mich App 21; 494 NW2d 778 (1992). In *Budnick*, the defendant was charged with first degree criminal sexual conduct. The act was alleged to have occurred in October of 1975. The complainant was ten years old at the time of the offense and reached her twenty-first birthday on March 2, 1986. The defendant had lived continuously in Wisconsin since 1978. He moved to quash on the ground that prosecution was barred by the statute of limitations.

Defendant's reliance on *Budnick* is misplaced. When *Budnick* was decided, the applicable statute of limitations was MCL 767.24. The statute provided:

> (1)…Except as otherwise provided in subsection (2), all…indictments [other than for certain offenses not at issue here] shall be found and filed within 6 years after the commission of the offense. However, any period during which the party charged did not usually

> and publicly reside within this state shall not be considered part of the time within which the respective indictments shall be found and filed.
>
> (2) Notwithstanding subsection (1), if an alleged victim was under 18 years of age at the time of the commission of the offense, an indictment for an offense under section 145c or 520b to 520g of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.145c and 750.520b to 750.520g of the Michigan Compiled Laws, may be found and filed with 6 years after the commission of the offense or by the alleged victim's twenty-first birthday, whichever is later.

This Court held that the nonresident tolling provision of subsection (1) had equal application to the prosecution of offenses that fell within subsection (2). *Id.* At 26. Therefore, if the defendant did not take up residence in Michigan after 1978, the six-year statute of limitations remained tolled. *Id.* At 27. This holding, which is consistent with the intent of legislature, does not support defendant's current position.

The prosecution has cited *People v McIntire*, 232 Mich App 71, 94; 591 NW2d 231 (1998), rev'd on

other grounds, 461 Mich 147 (1999). [5] In *McIntire,* the Court held that the limitations period could be tolled even though the defendant was living openly in South Carolina, it was easy for authorities to locate him, he did not leave the state to avoid prosecution, and the defendant's absence did not prevent prosecutors from going forward with the case. *Id.* at 98. The Court concluded that applying the tolling provision under such circumstances was what the Legislature intended. *Id.* at 97-99. The Court also rejected the views of other states where tolling provisions were applied only when a suspect had absconded or was not amenable to process. *Id.* at 100. Although the defendant in *McIntire* may have been aware of a possible ongoing investigation, the present circumstances are otherwise substantially similar. Consequently, unless the defendant took up residence in Michigan during the period in question, the statute of limitations would be tolled. This does not create an "absurd and unjust result."

This court also acknowledges that factual disputes involving MCL 767.24 should be submitted to a jury. *People v Artman,* 218 Mich App 236; 553 NW2d 673 (1996). Here, defendant has presented some evidence tending to show that he may have resided in this state during the period in question. He owns property in Lachine, Michigan; regularly visited that property; and has maintained contacts in this state. The question of whether this demonstrates residence is for a jury to decide.

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[5] Although *McIntire* was reversed on other grounds, the Court's analysis regarding the statute of limitations has still been found to be persuasive.

For these reasons, in addition to the reasons stated on the record, the district court is **AFFIRMED.**

Dated: September 8, 2015

Hon. Michael G. Mack, Circuit Judge

I hereby certify that I served a copy of the foregoing document upon all attorneys/parties of record.

Date: 9/8/15 Joan M. LaMarre
Clerk

APPENDIX D

STATE OF MICHIGAN
IN THE 26th CIRCUIT COURT
FOR THE COUNTY OF ALPENA

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

File No.: 15-006730-FH

v.

JOEL HOWARD JAMES
Defendant.
_____/

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_____/

OPINION AND ORDER

PRESENT: HON. MICHAEL G. MACK, CIRCUIT COURT JUDGE

Defendant Joel James is charged with third-degree criminal sexual conduct which allegedly occurred in 1996 and 1997. During the period in question, the defendant owned property in Michigan but was a continuous resident of Alaska. He now moves to dismiss. According to defendant, the nonresident tolling provision in MCL 767.24(10) [6] is unconstitutional as applied to him because it impermissibly infringes on his constitutional right to equal protection.

I. Timeliness

The prosecution contends the present motion is untimely for essentially raising a previously rejected argument. The Court does not agree. While the defendant used substantially similar verbiage in prior motions, he now advances an entirely different constitutional challenge, i.e., that MCL 767.24 is unconstitutional as applied to the facts of this case. As such, the Court cannot conclude that the motion is untimely.

II. Equal Protection

Equal protection of the law is guaranteed by the United States and Michigan constitutions. U.S. Const, AM XIV; Const 1963. Both afford similar protections and require that all persons similarly situated be treated alike under the law. *Doe v Dept of Social Services,* 439 Mich 650; 487 NW2d 166 (1992).

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[6] The Court notes that Public Act 2017, No. 79 (effective October 9, 2017) recently changed the nonresident tolling provision in MCL 767.24 to subsection (10).

While a facial challenge is extremely rigorous, an as-applied challenge is less stringent and requires a court to analyze the constitutionality of the statute against a backdrop of the facts developed in the particular case. *Kennan v Dawson,* 275 Mich App 671, 680; 739 NW2d 681 (2007).

Defendant's equal protection argument is premised on a "class-of-one" theory. [7] The United States Supreme Court and Michigan Supreme Court have recognized that a class-of-one may advance an equal protection claim where (1) an individual has been intentionally treated differently from others similarly situated, and (2) there is no rational basis for the difference in treatment. *Sioux City Bridge Co v Dakota Co,* 260 U.S. 441; 43 S Ct 190; 67 L Ed 340 (1923); *Village of Willowbrook v Olech,* 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000); *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp,* 486 Mich 311; 783 NW2d 695 (2010). The Court will address each factor in turn.

A. Similarly Situated

Courts have yet to define the extent to which individuals must be similarly situated to others in order to maintain a class-of-one claim. *McDonald v Village of Winnetka,* 371 F3d 992, 1002 (7th Cir. 2004). Federal appellate courts have held that to be considered similarly situated, the challenger and his comparators must be "prima facie identical in all

[7] Although such claims are typically presented in civil proceedings, they have also been pursued in criminal cases. See *United States v Green,* 654 F3d 637, 651; (6th Cir. 2011).

relevant respects or directly comparable…in all material respects." *United States v Moore,* 543 F3d 891, 899 (7th Cir. 2008); *Lima Twp v Bateson,* 302 Mich App 483, 503; 838 NW2d 898 (2013). This is because equal protection ensures that people under similar circumstances will be treated alike, but does not require a person under different circumstances to be treated the same. *Yaldo v North Point Ins Co,* 217 Mich App 617, 623; 552 NW2d 657 (1996).

Defendant asserts that he is similarly situated to a resident charged under identical circumstances. The Court agrees. And under this scenario, a resident would be entitled to dismissal pursuant to the statute of limitations, while he is not. Therefore, the issue becomes whether there is a rational basis for this difference of treatment.

B. Rational Basis

Under the rational basis test, courts will not overturn government action unless the varying treatment is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational. *Kimel v Fla Bd of Regents,* 528 U.S. 62; 120 S Ct 631; 145 L Ed 2d 522 (2000). "A rational basis shall be found to exist if any set of facts reasonably can be conceived to justify the alleged discrimination." *Syntex Laboratories v Dept of Treasury,* 233 Mich App 286, 290; 590 NW2d 612 (1998).

MCL 767.24(10) provides that the limitations period is tolled for "any period during which the party charged did not usually and publicly reside within this state…" In interpreting this language, courts have consistently held that nonresident tolling "applies *only* in those situations where a *suspect* is no longer a resident of this state." *People v Crear,* 242 Mich App 158; 618 NW2d 91 (2000), overruled in part on other grounds by *People v Miller,* 482 Mich 540; 759 NW2d 850 (2008) (emphasis added); see also *People v McIntire,* 232 Mich App 71, 105; 591 NW2d 231 (1998), reversed on other grounds 461 Mich 147 (1999). These holdings corroborate a prior attorney general opinion that determined the statute of limitations will not run against *an accused* while not usually and publicly residing within the state. Op Atty Gen, 1928-1930, p 582. Logically, then, the tolling provision advances a state interest in permitting later prosecutions in cases where a suspect or accused no longer resides in Michigan.

In comparison, it is undisputed that the defendant was not a suspect until after the statute of limitations had expired. This is because he was not accused on any wrongdoing until 2012, and no investigation commenced until that time. The Court is aware of no case in Michigan jurisprudence where nonresident tolling has been applied under such circumstances. Rather, the tolling provision seems to have only been applied in limited situations where a *suspect* was a nonresident during the limitations period. See *People v Crear,* 242 Mich App 158; 618 NW2d 91 (2000), overruled in part on other grounds by *People v Miller,* 482 Mich 540; 759 NW2d 850

(2008), *People v McIntire,* 232 Mich App 71, 105; 591 NW2d 231 (1998), reversed on other grounds 461 Mich 147 (1999); and *People v Budnick,* 197 Mich App 21; 494 NW2d 778 (1992); The Court sees no rational basis for the tolling provision to be extended to this case. [8]

The Court is mindful that this is an exceptionally limited, fact-driven circumstance involving MCL 764.24(10). Nonetheless, defendant, as a class-of-one, has sufficiently demonstrated that the statute violates equal protection in this matter.

The motion to dismiss is **GRANTED.**

It Is So **ORDERED.**

Dated:1/18/18 Hon. Michael G. Mack, Circuit Judge

I hereby certify that I served a copy of the foregoing document upon all attorneys/parties of record.

Date: 1/18/18 Clerk Vicki Hamilton

[8] In so finding, the Court need not reach the question whether MCL 767.24(10) infringes on defendant's constitutional right to travel.

APPENDIX E

MCR 767.24

Indictment; crimes; "Theresa Flores's Law"; definitions; Brandon D'Annunzio's law; findings and filing; exceptions for victims under 18; extension or tolling.

Sec. 24.

(1) An indictment for any of the following crimes may be found and filed at any time:

(a) Murder, conspiracy to commit murder, or solicitation to commit murder, or criminal sexual conduct in the first degree.

(b) A violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a, that is punishable by imprisonment for life.

(c) A violation of chapter LXVIIA of the Michigan penal code, 1931 PA 328, MCL 750.462a to 750.462h, that is punishable by imprisonment for life.

(d) A violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, that is punishable by imprisonment for life.

(2) An indictment for a violation or attempted violation of section 13, 462b, 462c, 462d, or 462e of the Michigan penal code, 1931 PA 328, MCL 750.13, 750.462b, 750.462c, 750.462d, and 750.462e, may be found and filed within 25 years after the offense is committed. This subsection shall be known as "Theresa Flores's Law".

(3) Except as provided in subsection (4) for a violation of section 520c or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520c and 750.520d, in which the victim is under 18 years of age, an indictment for a violation or attempted violation of section 136, 136a, 145c, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136, 750.136a, 750.145c, 750.520c, 750.520d, 750.520e, and 750.520g, may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.

(b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later.

(4) An indictment for a violation of section 520c or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520c and 750.520d, in which the victim is under 18 years of age may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 15 years after the offense is committed or by the alleged victim's twenty-eighth birthday, whichever is later.

(b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed

at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 15 years after the individual is identified or by the alleged victim's twenty-eighth birthday, whichever is later.

(5) As used in subsections (3) and (4):

(a) "DNA" means human deoxyribonucleic acid.

(b) "Identified" means the individual's legal name is known and he or she has been determined to be the source of the DNA.

(6) An indictment for kidnapping, extortion, assault with intent to commit murder, attempted murder, manslaughter, armed robbery, or first-degree home invasion may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed.

(b) If the offense is reported to a police agency within 1 year after the offense is committed and the individual who committed the offense is unknown, an indictment for that offense may be found and filed within 10 years after the individual is identified. This subsection shall be known as Brandon D'Annunzio's law. As used in this subsection, "identified" means the individual's legal name is known.

(7) An indictment for identity theft or attempted identity theft may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 6 years after the offense is committed.

(b) If evidence of the offense is obtained and the individual who committed the offense has not been identified, an indictment may be found and filed at

any time after the offense is committed, but not more than 6 years after the individual is identified.

(8) As used in subsection (7):

(a) "Identified" means the individual's legal name is known.

(b) "Identity theft" means 1 or more of the following:

(i) Conduct prohibited in section 5 or 7 of the identity theft protection act, 2004 PA 452, MCL 445.65 and 445.67.

(ii) Conduct prohibited under former section 285 of the Michigan penal code, 1931 PA 328.

(9) An indictment for false pretenses involving real property, forgery or uttering and publishing of an instrument affecting an interest in real property, or mortgage fraud may be found and filed within 10 years after the offense was committed or within 10 years after the instrument affecting real property was recorded, whichever occurs later.

(10) All other indictments may be found and filed within 6 years after the offense is committed.

(11) Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed.

(12) The extension or tolling, as applicable, of the limitations period provided in this section applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect.

APPENDEX F

14TH AMENDMENT
UNITED STATES CONSTITUTION

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.
Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G

MICHIGAN MODEL CRIMINAL JURY INSTRUCTIONS

1.8

M Crim JI 1.8 Reading of Information

(1) This is a criminal case. The paper used to charge the defendant with a crime is called an information*. The information in this case charges the defendant, _____, with the crime of _____, and reads as follows:

[*Read information.*]

(2) The defendant has pled not guilty to this charge. You should clearly understand that the information I have just read is not evidence. An information is read in every criminal trial so that the defendant and jury can hear the charges. You must not think it is evidence of [his / her] guilt or that [he / she] must be guilty because [he / she] has been charged.

Use Note

*The judge should say "indictment" or "complaint" where appropriate.

History

M Crim JI 1.8 (formerly CJI2d 1.8) was CJI 1:2:19-1:2:20; amended January, 1991.

Reference Guide

Case Law

Tot v United States, 319 US 463 *(1943).*

1.9

M Crim JI 1.9 Presumption of Innocence, Burden of Proof, and Reasonable Doubt

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he / she] is guilty.

(2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his / her] innocence or to do anything.* If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

(3) A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that a doubt that is reasonable, after a careful and

considered examination of the facts and circumstances of this case.

Use Note

This instruction must be given in every case.

*For some affirmative defenses, a defendant must produce evidence. The court should instruct the jury on the defendant's burden of production of evidence where it is most appropriate to do so. The committee recommends that this be done when the court instructs on the nature and requirements of the affirmative defense itself.

History

M Crim JI 1.9 (formerly CJI2d 1.9) was CJI 1:2:21 and 1:2:24. Amended November, 1990; January, 1992.

3.2(1)

M Crim JI 3.2 Presumption of Innocence, Burden of Proof, and Reasonable Doubt

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he / she] is guilty.

Use Note

This instruction must be given in every case.

*For some affirmative defenses, a defendant must produce evidence. The court should instruct the jury on the defendant's burden of production of evidence where it is most appropriate to do so. The committee recommends this be done when the court instructs on the nature and requirements of the affirmative defense itself.

History

M Crim JI 3.2 (formerly CJI2d 3.2) was CJI 3:1:02-3:1:05. Amended November, 1990; January, 1992.

Reference Guide

Case Law

Victor v Nebraska, 511 US 1, 5 (1994); *Martin v Ohio*, 480 US 228 (1987); *Sandstrom v Montana*, 442 US 510, 517-524 (1979); *County Court of Ulster County v Allen*, 442 US 140, 156-157 (1979); *Kentucky v Whorton*, 441 US 786, 789 (1979); *Taylor v Kentucky*, 436 US 478, 487-488 (1978); *In re Winship*, 397 US 358, 364 (1970); *Davis v United States*, 160 US 469, 486-487 (1895); *People v Allen*, 466 Mich 86, 643 NW2d 227 (2002); *People v Nowack*, 462 Mich 392, 400, 614 NW2d 78 (2000); *People v Konrad*, 449 Mich 263, 273, 536 NW2d 517 (1995); *People v Murphy*, 416 Mich 453, 463-464, 331 NW2d 152 (1982); *People v Wright*, 408 Mich 1, 19-26, 289 NW2d 1 (1980); *People*

v Gallagher, 404 Mich 429, 437-439, 273 NW2d 440 (1979); *People v D'Angelo*, 401 Mich 167, 182-183, 257 NW2d 655 (1977); *People v Bagwell*, 295 Mich 412, 419, 295 NW 207 (1940); *People v Williams*, 208 Mich 586, 594-595, 175 NW 187 (1919); *People v Ezzo*, 104 Mich 341, 342-343, 62 NW 407 (1895); *People v Potter*, 89 Mich 353, 355, 50 NW 994 (1891); *People v Macard*, 73 Mich 15, 26, 40 NW 784 (1888); *People v DeFore*, 64 Mich 693, 701, 31 NW 585 (1887); *People v Steubenvoll*, 62 Mich 329, 334, 28 NW 883 (1886); *People v Finley*, 38 Mich 482, 483 (1878); *Hamilton v People*, 29 Mich 173 (1874); *People v Hill*, 257 Mich App 126, 667 NW2d 78 (2003); *People v Snider*, 239 Mich App 393, 420-421, 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 656, 601 NW2d 409 (1999); *People v Hubbard (After Remand)*, 217 Mich App 459, 487, 552 NW2d 493 (1996), overruled in part on other grounds by *People v Harris*, 495 Mich 120, ___ NW2d ___ (2014) and *People v Bryant*, 491 Mich 575, 822 NW2d 124, *cert denied*, 133 S Ct 664 (2012); *People v Sammons*, 191 Mich App 351, 372, 478 NW2d 901 (1991), cert denied, 505 US 1213 (1992); *People v Jackson*, 167 Mich App 388, 390-391; 421 NW2d 697 (1988).