No. 01-1757

In The
Supreme Court of the United States

MARION R. STOGNER,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

On Petition For Writ Of Certiorari
To The California Supreme Court

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED (Rule 14.1 (a))

1. Did the California Legislature's abolition of the Statute of Limitations requirement, which historically comprised an element of the crimes charged, so as to charge Petitioner retroactively, violate the *Ex Post Facto* Clause?

2. Did the California Legislature's abolition of the Statute of Limitations arbitrarily retract a liberty interest the state had conferred on Petitioner?

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OPINION BELOW (Rule 14.1(d))

The opinion of the California Court of Appeal, First Appellate District, which is the subject of this petition, was reported at 93 Cal.App.4th 1229 (2001). It appears in Appendix G. The California Supreme Court's order of February 27, 2002, denying discretionary review is attached as Appendix I. There is no written decision of the respondent Superior Court.

JURISDICTIONAL STATEMENT

The judgment of the California Court of Appeal to be reviewed was filed on November 21, 2001. (App. G, 19.) The California Supreme Court denied discretionary review on February 27, 2002. (App. I, 37.) The petition was filed pursuant to Rule 13.1 within 90 days of that date and was subsequently granted on December 2, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND CALIFORNIA PENAL CODE STATUTES INVOLVED

The United States Constitution, Article I, section 10, clause 1, provides: "No State shall ... pass any ... Ex Post Facto Law..." (U.S. CONST. Art. I, § 10, cl. 1).

The United States Constitution, Amendment XIV, states: "No State shall ... deprive any person of life, liberty, or property, with out due process of law..." (U.S. CONST. Amend. XIV).

Penal Code Section 288(a). (CAL. PEN. CODE § 288(a) (West 1999) (App. J, 38).

Penal Code Section 800. (CAL. PEN. CODE § 800 (West 1985 & Supp. 2002) (App. K, 39).

Penal Code Section 803(g). (CAL. PEN. CODE § 803(g) (West 1985 & Supp. 2002) (App. L, 40).

STATEMENT OF THE CASE

In April 1998, a complaint was filed charging Petitioner with two counts of a lewd act upon a child under California Penal Code section 288(a), (App. J, 38), alleged to have been committed 25 to 43 years earlier. (App. A, 1.) The complaint acknowledged on its face that the limitations period for the offenses had expired, but alleged that the charges could be prosecuted pursuant to Penal Code section 803(g) (App. L, 40.)[1]

Petitioner successfully demurred to the complaint on the ground, *inter alia*, that section 803(g) constituted an *ex post facto* law. The district attorney moved, unsuccessfully, in superior court to reinstate the complaint. On the State's appeal[2], the California Appeals Court reversed pursuant to the California Supreme Court's holding in *People v. Frazer*, 21 Cal.4th 737 (1999), that Penal Code section 803(g) was not unconstitutional. *People v. Stogner*, No. A084772 (Cal.App. Oct. 4, 1999). (App. B, 5.)

This Court denied discretionary review. *Stogner v. California*, No. 99-8895 (Oct. 2, 2000) (App. C, 9.) However, at the time of the denial, no California court had adjudicated Petitioner's 805.5[3] claim, nor had they

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[1] Effective January 1, 1994, section 803(g) created a new one year limitations period for certain sex offenses, following a report to a law enforcement agency by a person of any age that he or she has been the victim of sexual misconduct while under the age of 18. It applies only to such causes of action already barred by Limitation.

[2] The original demurrer raised the Statutory bar under Penal Code 805.5, but it was not litigated under the State's Appeal.

[3] Penal Code Section 805.5 provides:

(a) As used in this section, "operative date" means January 1, 1985.

(b) Except as provided in subdivision (c), this chapter applies to an offense that was committed before, on, or after the operative date.

evaluated his Constitutional claims in light of *Carmell v. Texas,* 529 U.S. 513 (2000).

The complaint was reinstated in superior court but subsequently dismissed when the prosecutor filed an indictment. (App. B, 5.) That indictment, filed March 14, 2001, again charges Petitioner with two counts of molestation as against Jane Doe I and Jane Doe II, alleging conduct between 1955 and 1964 and between 1964 and 1973, respectively. (App. D, 10.) Again the indictment alleged that the charges could be prosecuted under section 803(g).

Petitioner demurred, asserting that no cause of action was stated, and the court lacked jurisdiction. The demurrer raised *ex post facto* and due process violations, and alleged that section 805.5 barred application of section 803(g). (App. E, 14.) Upon denial of the demurrer, Petitioner filed a writ of prohibition. The Court of Appeals granted an Alternate Writ on the grounds that Petitioner had no other adequate remedy at law, but in it's published opinion ultimately ruled against him. (App. F, 15); *see also Stogner v. Superior Court*, 93 Cal.App.4th 1229 (2001) (App. A, 1.) A request for rehearing was denied. (App. H, 36.) The California Supreme Court denied discretionary review. (App. I, 37.)

(c) This chapter does not apply, and the law applicable before the operative date does apply, to an offense that was committed before the operative date, if:
  (1) Prosecution for the offense would be barred on the operative date by the limitation of time applicable before the operative date.
  (2) Prosecution for the offense was commenced before the operative date.

(CAL. PEN. CODE § 805.5) (West 1985 & Supp. 2002)

SUMMARY OF THE ARGUMENT

(Rules 10, 14.1 (h))

The State's retroactive actions violate the *Ex Post Facto* and Due Process Clauses and all sense of fairness and finality contained therein. The State's claim of power to legislate retroactively is against the nature of criminal Statutes of Limitations.[4] In California the Statute is a basic and required element and ingredient of the prosecution's case. The State circumvents its inability to overcome the law by altering it after the fact. The California courts, through their decisions in *Frazer* and *Stogner* have upheld these laws in a manner which retroactively vests jurisdiction, cedes power to the State to Prosecute, forfeits Petitioner's rights and creates a new cause of action to punish Petitioner.

California has created, through its enactment of Statutes of Limitation, a tripartite right of absolute finality in Petitioner's favor. Where applicable[5] this rule confers a substantive right upon the people. *See People v. Williams*, 21 Cal.4th 335, 339 (1999); *People v. Chadd*, 28 Cal.3d 739, 758 (1981); *People v. Zamora*, 18 Cal.3d 538, 547 (1976). It places an absolute limit on the State's ability to prosecute by terminating liability and denies punishment. *Zamora*, 18 Cal.3d at 547. It bars California's courts from exercising fundamental jurisdiction over the subject and the subject matter. *See People v. Williams*, 21 Cal.4th 335, 340, 347 (1999); *People v. McGee*, 1 Cal.2d 611, 613 (1934).

Although California created this rule, it now seeks to destroy it. California seeks to retroactively strip Petitioner of this right and inject new elements into an

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[4] *People v. Frazer*, 21 Cal.4th 737, 777 (1999) (Kennard, J. dissenting).

[5] California has created Limitations Statutes for most, but not all crimes, at all times relevant herein the limitations period was three years; *see also* CAL. PEN. CODE § 800. (App. K, 39.)

expired cause of action in order to prosecute Petitioner, by Indictment for conduct barred by the Statute of Limitations for over twenty-five years.

Based on California Penal Code § 803(g), the State claims that the scourge of child molestation legislatively compels and constitutionally permits the retroactive forfeiture of Petitioner's right consistently ruled not subject to forfeiture. *See People v. Williams,* 21 Cal.4th 335 (1999); *People v. McGee*, 1 Cal.2d 611 (1934); *People v. Hoffman*, 132 Cal.App. 60 (1933); *but see People v. Frazer*, 21 Cal.4th 737 (1999). It claims the power to destroy a rule of law effectively in place since the State's foundation. *See Frazer* at 743. It has rewritten its own rules[6] to retroactively cast out Petitioner from legislation designed through Penal Code section 805.5 to specifically reaffirm his particular right.

This Writ requests this Court to determine whether rights, so ingrained in American jurisprudence as to be deemed irrevocable, can be retroactively revoked without violating the dictates of the United States Constitution. For if California is successful in depriving Petitioner of this right in this situation, then such right has effectively been destroyed for all persons the States may choose to prosecute, no matter how distant in time and memory the conduct may be. No matter how long the State has promised otherwise. No matter how final the rule has been expressed to be.

It is therefore respectfully requested that the matter be fully and fairly adjudicated under established

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[6] In 1985 the California Legislature overhauled the entire Statute of Limitations scheme. For crimes barred by the limitations in effect prior to the enactment date of this legislation, the prior Statutes of Limitation were preserved and specifically exempted from the new legislation. The First District Court of Appeal ruled that this exemption was excepted by passage of Penal Code §803(g). (App. G, 19.)

principles of due process, *ex post facto*, fairness and finality that have guided all citizens, the states, and the courts under the United States Constitution.

A. Issue One: Ex Post Facto

The State has retroactively redefined the material ingredients of the offense, altered the rules of evidence, disregarded the significance of ultimate facts and enlarged the crimes thereunder, seeking punishment where none could be had. Petitioner asserts that he is entitled to rely on the Statute of Limitations, complete since 1976, that California is attempting to revoke retroactively. Petitioner asserts these actions violate each of the *Calder* categories under the *Ex Post Facto* Clause.

B. Issue Two: Due Process

The State attempts to revoke a right, which the State's Highest Court continues to assert is substantive, belongs to Petitioner, and cannot be forfeited. Petitioner requests that this Court find the State does so in violation of the *Due Process* Clause. The Fifth and Fourteenth Amendments of the United States Constitution guarantee the principle that no person will be deprived of life, liberty or property without due process of law. Stripping the completed defense of the Statute of Limitations from Petitioner deprives him of a State guaranteed ability to regain his freedom. Having deprived him of the mechanism that compelled the courts to enjoin the State from infringing on his liberty any further, he must still face a trial that California and this Court have agreed is conclusively and presumptively unfair. *See United States v. Marion*, 404 U.S. 307, 322 (1971); *People v. Zamora*, 18 Cal.3d 538 (1976).

ARGUMENT

A. Ex Post Facto

As a necessary defense against the government, the Framers twice placed the *Ex Post Facto* Clause in the United States Constitution. So important were its terms that it was necessary to include it as a prohibition not only against the federal government (U.S. CONST. Art. 1, § 9) but the individual states as well (U.S. CONST. Art.1, § 10).[7] It is an express restraint upon the power of the state and federal legislatures that prohibits arbitrary or vindictive retroactive legislation. *See Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). It also serves to prevent the lack of fairness and notice inherent in retroactive punitive measures. *See Weaver v. Graham*, 450 U.S. 24, 28-9 (1981)[8]; *Carmell v. Texas*, 529 U.S. 513, 532-33 (2000); *Miller v. Florida*, 482 U.S. 423, 429-30 (1987).

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[7] Chief Justice Marshall traced the restriction upon legislative power to various provisions of the United States Constitution, "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State." *Cummings v. Missouri*, 71 U.S. 277, 322 (1866) quoting *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

[8] "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature it violates the Clause if it is both retrospective and more onerous..." *Weaver*, 450 U.S. at 30-31.

The seminal case defining the *Ex Post Facto* Clause, articulated the history and purpose of that term. *See Calder v. Bull*, 3 U.S. 386 (1798). As Justice Chase stated, "I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control...." *Id*. at 387-88. Thus the substantial protections of the *Ex Post Facto* Clause were designed exclusively as "additional bulwark[s] in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation." *Id*. at 390.

In reaching its decision, the *Calder* Court illuminated the types[9] of retrospective legislative action that would violate the proscription. *Id*. at 390. Justice Chase in particular articulated four categories that today control determinations of whether retrospective penal legislation is constitutional or not.[10] *See Carmell*, 529 U.S. at 522-6.

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[9] These categories were conceived from experience with the legislative despotism exercised by England, which the Framers sought to negate with the *ex post facto* restraint on legislative power. *See Calder*, 3 U.S at 389.

[10] The categories are:

> 1st Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. at 390.

In defining the *Ex Post Facto* Clause, the *Calder* Court understood that not every retroactive law was impermissible. *Id*. at 391. Thus the Court approved of subsequent laws that might pardon an offender, or otherwise forgive him. *Id*. These laws were retrospective and penal, but not impermissible because they ameliorated the consequences for the particular offender. *Id*. As Justice Chase noted: "There is a great and apparent difference between making an UNLAWFUL act LAWFUL; and making an innocent action criminal and punishing it as a CRIME." *Id*.

Rather, "the restriction not to pass any *ex post facto* law, was to secure the person of the subject from inquiry, or punishment, in consequence of such law." *Calder v. Bull*, 3 U.S. 386, 390 (1798). Because 803(g) operates after the fact on events predating it, it is retrospective. Because it seeks only to ensnare and punish those persons who would otherwise be beyond prosecution, it is penal and cannot be seen as ameliorative. It is an *ex post facto* law, which within the *Calder* definitions violates the Constitution of the United States.

Calder Category One

The classic understanding of *Calder* one occurs "when after an action, indifferent in itself, is committed, the legislator, then, for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." *Calder*, 3 U.S. at 396 (Paterson, J., citing 1 William Blackstone, Commentaries *46.) However this is not the only scenario by which an *ex post facto* law might operate against prior conduct completed before the passage of such laws. The Statute of Limitations' role analyzed through category one has two separate and distinct functions. First, by the passage of the requisite time, the Statute of Limitations acts as an operation of law to change the legal consequences of certain acts committed beforehand.

Such a change in consequences was fixed in law and time prior to the passage of 803(g) and discharged criminal liability and punishment for the allegations at issue.

Second, once time runs, the Statute of Limitations retains all of its characteristics as a defense to the criminal charges and when asserted defeats the State's prosecution. If 803(g) retroactively acts upon either of these qualities of the completed bar to the Petitioner's detriment, it violates *ex post facto*.

Statute of Limitations as an Operation of Law

An act, whether wrongful or not, may not acquire all or even certain legal significance until another act occurs. For clarity's sake, the initial act will be deemed the primary act and the event following, the secondary act.

Existing law may operate upon a secondary act so as to cause it to change the legal consequences of the primary acts antecedent to it. Thus a secondary act may pardon, grant amnesty, or otherwise divest or lessen the criminality or punishment, which might have attached to the first act alone, *if not for the passage of the secondary act*. Similarly, the reverse may be true: a secondary act may enlarge the significance of the first, or now cause it to be criminal.[11] If the laws controlling both events exist by

[11] The crime of conspiracy is the classic example; requiring not only the primary act (the agreement), but a secondary or "overt act" to make the conduct criminal. "No agreement amounts to a conspiracy unless an overt act be done to effect the object thereof, and the pleading and proof of such an act is necessary to constitute the offense. The overt act marks the commission of the crime and fastens criminal liability upon the conspirators, the period of limitations must be deemed to begin running at that time; and where, as here, the conspiracy as charged is a continuing one, the period begins to run with the commission of

the time both acts are completed, then no *ex post facto* violations occur. It is only where subsequent to the completed acts, a law is passed which seeks to alter their legal significance, that the retrospective legislation, if detrimental to the individual, is e*x post facto*.[12]

The legal significance of 803(g) is that it retroactively operates after a secondary act that was in place prior to 803(g), and which had, by operation of law already affected the primary acts preceding it. In this case, Petitioner's continued presence in California through September 1976 was the secondary act which

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the last overt act alleged. *See People v. Crosby*, 58 Cal.2d 713, 728 (1962). Similarly, *Zamora* which traced the history of both the California and federal rule noting that it was neither the completed object that made the conspiracy (e.g., the related substantive offense), nor the agreement itself, finding that the requirement of an overt act to provide a "*locus penitentiae* – an opportunity to reconsider, terminate the agreement, and thereby avoid punishment for the conspiracy." *People v. Zamora*, 18 Cal.3d 538, 549 n. 8 (1977) (citations omitted.)

Consider also, manslaughter: "In this state, the law makes the crime of manslaughter a composite one. The striking of the victim does not alone make the crime, nor does the death of the victim without a striking (or some other conduct or force) make the crime; it is a combination of the two." *People v. Rehman*, 62 Cal.2d 135, 139 (1964).

[12] There exists, as Justice Chase explained in *Calder*:

> a manifest distinction between the case where one fact relates to, and affects, another fact, as where an after fact, by operation of law, makes a former fact, either lawful or unlawful; and the case where a law made after a fact done, is to operate on, and to affect, such fact. In the first case both the acts are done by private persons. In the second case the first act is done by a private person, and the second act is done by the legislature to affect the first act.

Calder v. Bull, 3 U.S. 386, 390, 393 (1798).

discharged the legal and criminal significance of his actions that predated September 1973.[13] An e*x post facto* analysis under *Calder* category one then cannot occur without also understanding the legal significance of the passage of the date September 1976. As this Court explained, the critical inquiry is "whether the law changes the legal consequences of acts completed before its effective date."[14] *Weaver v. Graham*, 450 U.S. 24, 31 (1981) (finding that even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates *ex post facto* if, as here, it retroactively reduces the amount of good time which could be earned by prisoners) (cited with approval in *Miller v. Florida*, 482 U.S. 423, 430 (1987).)

Thus in *Lynce v. Mathis*, 519 U.S. 433, 435 (1997), a prisoner, convicted in 1986, received good time credits awarded solely to relieve overcrowding under a 1983 statute and was released in 1992. A new statute, given effect retroactively, reduced said credits and resulted in the prisoner's reincarceration. *Id.* at 436. Arguing against the *ex post facto* claim, the State asserted it could have relieved overcrowding by other means and thus at most had created only a speculation or hope that the prisoner would receive such credits. *Lynce*, 519 U.S. at 437. This Court found the argument unpersuasive noting that the prisoner was actually awarded the credits before they were retroactively canceled. It held that "[t]he 1992 statute has unquestionably disadvantaged petitioner because it

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[13] The September 1976 date reflects the date of expiration of the last applicable limitations period in this case.

[14] There is a distinct difference between an act which, by operation of law may vest an accused with a right, and a law which seeks to undo what has already been accomplished by operation of law. *See Weaver*, 430 U.S. at 30-1. It is not necessary under *ex post facto* analysis for any right to be vested for a violation to occur. *Id.* Petitioner's argument is strengthened, however because a right has also vested.

resulted in his rearrest and prolonged imprisonment." *Id*. at 446-47. It was the fulfilling of the conditional secondary act, the actual granting of the credits, which had ameliorated the punishment under the primary act that, when taken by State action, violated *ex post facto*.

In *State v. Keith*, 63 N.C. 140 (1869), 1869 W.L. 1378 (N.C.), the Supreme Court of North Carolina was confronted with this issue in the context of a legislative grant of "unequivocal pardon" to Civil War soldiers for all homicides and felonies done in discharge of their duties. *Id*. at *2. This Act was subsequently repealed and a former soldier prosecuted. *Id*. Finding the effect of the pardon under state law to entirely destroy the offense, as if never committed, the court held the repeal *ex post facto* as making criminal what before the repeal was not. *Id*. at *3-4. While never squarely addressing this issue, this Court has agreed in dictum in *Cummings v. Missouri*, 71 U.S. 277, 329 (1869).[15]

A Statute of Limitations, particularly in California functions in the exact same way. In this regard it legally divests the State of a cause of action in its entirety, removes the punishment that might have been annexed, and bars a legal conviction. In Petitioner's case, the two relevant acts had already occurred, the alleged primary act has passed, but so too has the secondary act which has altered any legal significance the primary act may have had as a criminal or criminally punishable matter.

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[15] Nor was the Court's discussion purely theoretical. In *Ex Parte Garland*, 1 U.S. 333 (1866), the companion case to *Cummings*, the Court was again faced with loyalty oaths in the context of a former Confederate and lawyer, who had received an executive pardon, and wished to return to practice before the Supreme Court, but for such "loyalty oaths." The *ex post facto* issue was raised in this context but was not reached since the Court granted Garland relief on the basis of separation of powers in light of executive clemency.

In this regard it is important to recall that any allegations of wrongfulness are not evaluated as torts or moral wrongs, but whether or not a crime has been committed. A crime is solely an offense against a sovereign. *See Means v. Cheyenne Tribal Court*, 154 F.3d 941, 948 (1998). It is by definition sanctioned and enforced by the particular sovereign offended, which seeks retribution and promotes deterrence through its criminal laws. The particular sovereign in question then solely defines the crime.

In California, the Statute of Limitations has consistently been ruled a material ingredient of an offense. *See People v. Crosby*, 58 Cal.2d 713 (1962). The California Supreme Court has repeatedly recognized that prosecutions failing to establish this ingredient do not state a public offense[16] and are thus barred. In *People v. Chadd*, 28 Cal. 3d 739, 756 (1981), it was

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[16] Through Penal Code Section 15, California equates the terms crime and public offense and defines them as requiring both commission of the prescribed acts and punishment upon legal conviction. Both are necessary prongs to make a public offense. "The section is in the conjunctive; both of the conditions must be satisfied before the act will constitute a crime." *McComb v. Superior Court*, 68 Cal.App.3d 89, 96-7 (1977) citing *People v. Crutcher*, 262 Cal.App.2d 750, 754 (1968). *See also People v. McNulty*, 93 Cal. 427 (1892).

Penal Code section 15 provides:

> A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and by which, is annexed upon conviction, either of the following punishments:
> 1. Death;
> 2. Imprisonment;
> 3. Fine;
> 4. Removal from office; or
> 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State.

(CAL. PEN. CODE §15 (West 1999)).

recognized that "the courts have described as 'failing to state a public offense' an accusatory pleading that shows on its face a violation of section 800." *People v. McGee*, 1 Cal.2d 611, 613 (1934) similarly held that an action barred by limitation fails to state a public offense. *See also People v. Rehman*, 62 Cal.2d 135, 139 (1964). In *Miller v. Florida*, 482 U.S. 423, 433 (1987), the Court noted that the proscribed violation occurs if the law "changes the ingredients of the offense or the ultimate facts" needed to establish guilt.

Thus in California a crime does not occur within the legal definition if barred by the Statute of Limitations. Whether this result is because the criminality of the act is removed, the punishment abolished, or because a legal conviction is barred, makes little difference since all are required to state a public offense against California.

Examining these terms of art within the *Calder* definitions, category one is violated by a law which seeks to create a public offense through 803(g) retroactively, when Petitioner has not committed a public offense. To then incorporate a new ingredient through 803(g) in order to criminalize his past behavior and punish him for it renders his lawfully acquired innocence into a crime.

Expressed another way, the destruction of the cause of action, by way of the Statute of Limitations results from the passage of the statutorily enacted period. The absence of a cause of action means not only that the state is barred from prosecution but that the court lacks fundamental subject matter jurisdiction as well. Because Petitioner's Statute of Limitations bar is complete he cannot be prosecuted.[17]

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[17] In California, a Statute of Limitations in a criminal case creates a substantive right, which renders a court wholly without

The Court's overruling of *Kring v. Missouri*, 107 U.S. 221 (1883) supports this analysis. *See Collins v. Youngblood*, 497 U.S. 37, 51 (1990).[18] *Collins* explained that *Kring* rested on expansive dicta, which was broader than the scope intended by the four categories in question. [19] This Court stated: "The references in

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jurisdiction once that right has ripened. The result of such ripening is that it destroys not only the remedy that might have been available if timely presented, but the underlying right or cause of action as well. *See People v. McGee*, 1 Cal.2d 611, 613 (1934) ("In criminal cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter (citation omitted)); *see also Chambers v. Gallagher*, 177 Cal. 704, 708 (1918). "[W]hen the statute of limitation has run, the power to proceed in the case is gone." *McGee*, 1 Cal.2d at 614. The state has been divested of the right of action. *See also People v. Chadd*, 28 Cal.3d 739, 756 (1981) (a violation of the statute of limitations described as "failing to state a public offense." Thus the underlying cause of action was destroyed with the running of the statute. Section 803(g) therefore creates a new cause of action in violation of *Calder* category one.

[18] The *Collins* Court noted that the *Kring* decision was supported by only five members of the court, with four members voicing a strong dissent. *See Collins*, 497 U.S. at 48-50.

[19] This was essentially the same position taken by the *Kring* dissenters. *Kring* did not rest so much on whether or not his claimed defense was merely procedural or substantive, a line that has continually caused much consternation (*See Collins*, 497 U.S. 37, 44-5), but whether certain contingencies were required before their significance could be set up as a defense. In *Kring*, the primary act, the killing, had occurred before the change of law, but the significance of the secondary act—the resulting acquittal of first degree murder upon a plea to a second degree murder—had previously been altered by legislative act *before* Kring pled. At the time, the majority viewed the matter in a broad way as "alter[ing] the situation of a party to his disadvantage," a phrase often repeated but which *Collins* noted did not fully comport with the original *Calder* understanding. *Id*. at 235; *Collins*, 497 U.S. at 49.

On the other hand, the strong *Kring* dissent, joined in by the Chief Justice, and perhaps forecasting the views of the *Collins* majority, would have instead held that because the contingencies

Duncan and Malloy to "substantial protections" and personal rights" should not be read to adopt without explanation an undefined enlargement of the *Ex Post Facto* Clause." *Collins*, 497 U.S. at 46. As such, a contingent possibility, such as relied upon by *Kring*, which is dependant not just on the future acts of the accused, but of the prosecution as well, *and to which nothing* had yet attached, was an over inclusive definition of a defense based solely (at that point) on the law regulating the effect of guilty pleas which had already changed. *Id*. at 50.[20]

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themselves had not been fulfilled by the defendant prior to their change, the defendant had no basis upon which he could now claim to rely upon them. *Kring*, 107 U.S. at 240. As future contingencies, they were seen as no more than mere modes of procedure, which until acted upon, could be altered by the legislature. *Id*. at 241. As an unfulfilled secondary act, its repealed contingencies were of no legal effect or significance for Kring. The dissent would have found an *ex post facto* violation *only* if the contingencies had been fulfilled prior to the change in law. *Id* at 239-40.

[20] "It is the essential characteristic of an *ex post facto* law that it should operate retrospectively, so as to change the law in respect to an actor or *transaction* already complete and past. Such is not the effect of the rule of the constitution of Missouri now in question." *Kring v. Missouri*, 107 U.S. 221, 240 (1883) (Matthews J., dissenting; emphasis added). As the dissent in *Kring* pointed out, at best such a claim might fit within *Calder* category four but even then, it did not meet its requirements: while that rule (that a second degree murder plea obviated any charge of first degree murder) was in force the prisoner had no such evidence of which he could avail himself. How then, has he been deprived of any benefit from it? The evidence, of which it is said the prisoner has been deprived, came into being after the law had been changed. It was evidence created by the law itself, for it consists simply in a technical inference; and the law in force when it was created necessarily determines its quality and effect. It operated upon a transaction between the prisoner and the prosecution, which might or might not have taken place; and when it did take place that consent must be supposed to have been given by both with reference to the law as it then existed, and not with reference to a law which had then been repealed. *Id*. at 239-40.

Indeed in *Collins*, the defendant was convicted under a Texas law that allowed the State to sentence him to life imprisonment, but to which was added an unlawful $10,000 fine. *Collins*, 497 U.S. at 39. The new law, passed at a time when Youngblood's writ was pending, *but which had not yet been decided by the appellate court*, in fact acted to ameliorate the punishments in Youngblood's case by removing the fine altogether. *Id*. Youngblood's claim to be entitled to a new trial under the *Ex Post Facto* Clause while his appeal was pending had not yet attached, nor could he claim to have been harmed by a reduction in the punishment.[21] Youngblood conceded that his claim did not fall within the requisite *ex post facto* categories, but only within a broader view of the Clause, to wit that any alteration that deprived him of any potential benefit was taken *ex post facto*. *Id*. at 44. The *Collins* Court denied his request and in overruling *Kring*, limited the Clause to its proper foundation.[22]

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[21] It is a long held "controlling rule" that if "subsequent to judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed..." *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801). Of course the *Collins* concurrence recognized that if the reformatory law had acted to *impose* the improper fine, that would have violated the *Ex Post Facto* Clause because it would have increased punishment. *Collins*, 497 U.S. at 54 (Stevens, J. concurring.)

[22] Significantly, while the *Kring* court was divided 5-4, they were not so divided if both the primary and secondary acts had passed before any change in the law. Had such occurred all nine members of the court would have held for Kring. Even more significantly, both the majority and the minority expressed a similar view as held by Petitioner in regards to a Statute of Limitations where the time had actually passed. Both would have ruled it an *ex post facto* violation to allow 803(g) to act upon it. *See Kring*, 107 U.S. at 451 citing *State v. Sneed*, 25 Tex.Supp. 66 (1860) with approval and with the following language from the dissent:

Under *Calder* category one, the Statute of Limitations issue in the case before the Court must be viewed in light of these precedents. Here two acts are in question, the primary act being the alleged wrongdoing, and the secondary act by operation of existing law, divested the first act of certain legal significance. The secondary act was the passage of the three-year anniversary of the first act, occurring in Petitioner's case no later than September 1976. At that point, all criminality that might have attached in California was abolished.

Thus if the Statute of Limitations acts as a legal bar to prosecution, as it does in California, to allow either criminalization or punishment retroactively violates *Calder* category one.

Moreover, once the Statute of Limitations expired, the rebuttable presumption of innocence is transformed to a mandatory conclusive presumption of innocence. *See Carmell*, 529 U.S. at 532-33. The "presumption of innocence" is "bedrock, axiomatic and elementary – the foundation of our criminal law." *In re Winship*, 397 U.S. 358, 363 (1970). However, once the statute of limitations expires, the presumption of innocence becomes a mandatory conclusive presumption because the state can no longer meet the threshold requirement to rebutting the presumption of innocence, thereby rendering any conviction after the statutory period void. *See People v. Zamora*, 18 Cal.3d

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> it would be a violation of the constitutional maxim which forbids retrospective legislation inconsistent with vested rights, to deprive, by a repeal of statutes of limitation, a defendant of a defense which had become perfect while they were in force.

Kring, 107 U.S. at 231 (Matthewson, J., dissenting.)

538, 564-65 (1976); *People v. Le*, 82 Cal.App.4th 1352 (2000); *People v. Williams*, 21 Cal.4th 335 (1999); *Cf. United States v. Marion*, 404 U.S. 307, 322 (1971) ("These statutes [of limitation] provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.")

As A Defense

While the *Calder* categories do not explicitly mention the word "defense," they fall under the categories such that that they may not be removed retroactively. *See United States v. Hall*, 26 F.Cas. 84, (1809). The reason is clear: if the asserted defense defeats the prosecution, the person is acquitted.

The first time California's highest court considered the matter, they called the Statute of Limitations a good defense to defeat the prosecution. *See People v. Miller*, 12 Cal. 291 (1859). Since then no California Supreme Court has held otherwise. Rather than overrule this longheld fundamental defense, *People v. Frazer*, 21 Cal.4th 737 (1999) attempts to truncate the meaning of the relevant terms in order to hold it outside *Collins v. Youngblood*, 497 U.S. 37 (1990) and therefore not ex post facto. For each of the following reasons, they are wrong.

California Penal Code section 803(g) deprives petitioner of a complete defense that arose under the Statute of Limitations in existence at the time of his alleged offenses and which vested prior to any change in the law. By law then, Petitioner's defense would result in an acquittal. *See generally People v. Zamora*, 18 Cal.3d 538 (1976). The deprivation contravenes the prohibition against *ex post facto* legislation because it eliminates a defense that negates an ingredient the prosecution must prove to sustain a conviction. The defense also operates as a form of legislatively enacted

pardon, amnesty, or excuse.[23] The abolishment of the Statute of Limitations therefore violates the first *Calder* category.

Although *Collins v. Youngblood*, 497 U.S. 37 (1990) is cited by *Frazer* for the proposition that only certain defenses, those negating an element of the proscribed conduct or operating as an excuse or justification for the crime charged, are encompassed within the first and second *Calder* categories, in fact, the Court did not elaborate what defenses were included in those labels and which ones were excluded. *Frazer*, 21 Cal.4th at 757. It is important to note that *Collins* was not a case about defenses, pretrial, trial or otherwise. *Collins* ruled that a statute allowing appeals courts to reform and ameliorate improper sentences did not offend the *Ex Post Facto* Clause. *Collins*, 497 U.S. at 52.[24] Thus while the *Collins* Court was not specific, one can

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[23] Black's Law Dictionary defines excuse as follows:

> **excuse.** ... **2.** *Criminal Law*. A defense that arises because the defendant is not blameworthy for having acted in a way that would otherwise be criminal. ? The following defenses are the traditional excuses: duress, entrapment, infancy, insanity and involuntary intoxication.

BLACK'S LAW DICTIONARY 430 (7th ed. 1999.) Although the statute of limitations is not listed as a "traditional" excuse, it falls within the definition since a defendant is no longer statutorily blameworthy, that is he can no longer be prosecuted or punished, even when his conduct would otherwise be "criminal."

[24] The *Collins* Court framed the result in the language of *Beazell v. Ohio*: "The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with a crime of any defense available according to law at the time when the act was committed." *Collins*, 497 U.S. at 169-70.

assume that a defense that negates a material ingredient of the crime charged or justifies or excuses conduct implicates the first *Calder* category. *See Collins*, 497 U.S. at 49-50. In the first instance, eliminating a material ingredient or ultimate fact that the prosecution must prove to sustain a conviction effectively makes evidence that would result in acquittal now supportive of a conviction.

The *Frazer* court waters down the *Collins* analysis such that the only defenses protected by the ban on *ex post facto* legislation are those that address the "'criminal quality of the act' as evidenced 'either by the legal definition of the offense or by the nature or amount of the punishment' at the time it occurs." 21 Cal.4th at 760. The court reasoned that its conclusion was warranted by reliance, which it viewed as the sole aim of the *Ex Post Facto* Clause.[25] *Frazer*, 21 Cal.4th at 757. It referred to *Collins* for reinforcement: "For this reason, *Collins* made clear that *ex post facto* protection extends only to 'defense[s]' bearing on the 'definition' and

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[25] Justices Harlan warned against citing notice and reliance as the single goal of the *Ex Post Facto* Clause: "Aside from problems of warning and specific intent, the policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong (as for instance when the penalty is increased retroactively on an existing crime), may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." *James v. United States*, 366 U.S. 213, 247 n.3 (1961). In declining to abandon the fourth *Calder* category, this Court echoed Justice Harlan: "... the absence of a reliance interest is not an argument in favor of abandoning the category itself. If it were, the same conclusion would follow for *Calder's* third category (increases in punishment), as there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions." *Carmell v. Texas*, 529 U.S. 513, 531 n.21 (2000).

'elements' of proscribed conduct, or involving 'excuse or justification' for its commission. *Id.* at 760 (emphasis omitted).

Although *Collins* made reference to defenses that are linked with the legal definition of the offense the decision in no way concludes that the government can abolish a defense that negates an element of the crime the prosecution must prove. *Collins*, 497 U.S. at 50. The *Frazer* definition of defenses truncates its proper examination by failing to account for the legislative and judicial definitions of a crime.[26] Rather, they limit their analysis solely to the elements of the proscribed conduct rather then the offense. Moreover, the *Frazer* definition of defense simply cannot apply with precision to all the defenses inherent in a defendant's absolute right to mount a defense. The court's decision also brings to light an interesting anomaly in the law. That is, the distinction between proscribed conduct and the elements of an offense the prosecution must prove at trial to sustain a conviction.

For instance, in California identity is not part of the definition of the proscribed conduct of a crime (CALJIC No. 2.72) (6th ed. 1996) and yet it is a required element that the prosecution must prove. (CALJIC No. 2.91) (6th ed. 1996.) Likewise, Statutes of Limitations in California are not part of the definition of proscribed

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[26] Examining only the definition of penal code section 288 they do not find the limitations defense within its terms. The reason for this error is their failure to examine the ingredients that comprise this public offense in California. By statutory definition and judicial interpretation the scope of this defense is that it bars seizure of the person, conviction and punishment. A failure to prove this ingredient is fatal to a criminal cause of action maintained by the state. The state fails to comprehend that where no public offense lies, no crime has been committed.

conduct but are an element of a relevant offense[27] in which the prosecution bears the burden of proof. *See People v. Le*, 82 Cal.App.4th 1352, 1360 (2000).

It would be unthinkable for the legislation to retroactively abolish the defense of mistaken identification, and yet that is the necessary conclusion after applying the *Frazer* interpretation of *Collins*.

While California has made the molestation of children a crime, it has also made prosecution subject to limitations. When time runs, the accused holds a complete defense. This defense negates an element of the crimes charged, proof of which is borne by the prosecution. This defense also operates as an excuse.

Defenses of excuse do not operate in the same manner as defenses that negate an element. Consider the excuse of immunity. Asserting immunity from prosecution does not void an element of the "crime." Indeed the assertion is collateral to the proscribed conduct. The same could be said for such defenses as entrapment, necessity or the momentary handling of a controlled substance for the purpose of disposal. *See People v. Mower*, 28 Cal.4th 457, 480 (2002). These defenses essentially admit all of the elements of the relevant crimes as defined by *Frazer*. *Id*. at 480-81. To draw a distinction amongst defenses available to the defendant and provide lesser protection for certain substantive defenses is simply arbitrary. The same standards subsumed in the concept of fundamental fairness apply to all such defenses including excuse. Retroactive removal then is precisely the type of concern which the *Ex Post Facto* Clause was designed to prevent. There is no merit to an argument that purports to

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[27] The term relevant refers to those offenses where time is a material ingredient in the sense that they are accompanied by a Statute of Limitations. *See* CAL. PEN. CODE § 955 (West 1985).

remove an absolute defense from a distinct group of defendants because of the status of the crime with which they are charged. Although the State of California is entitled to abolish the statute of limitations prospectively, it cannot do so retroactively.

The State attempts to overcome the problem inherent herein by holding that all they need do is effectively remove this ingredient and a public offense is then stated. Even were that true it is qualitatively a different offense and by all accounts, a new offense. It also destroys this "good defense", turning what was a substantive right belonging to the people and redefining it as a remedial process belonging to the state. *See also People v. Doctor,* 257 Cal.App.2d 105, 110 (1967) ("We remind ourselves that the bar of the statute of limitations in a criminal matter is going to jurisdiction rather than merely a remedy.")

Calder Category Two

Under the *Ex Post Facto* Clause, the punishment aspect of retrospective legislation falls under both *Calder* one and three. The second category then refers to both the aggravation and enlargement of crime beyond the creation of new punishment or increases to existing punishment. It must therefore be viewed as a distinct category. While proscribed conduct can fall under more than one *Calder* category, *Calder* two certainly is not merely duplicative of the others. As Justice Paterson stated in *Calder,* "The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty." *Calder,* 3 U.S. at 397**.** Similarly, while the State attempted to confine the *Calder* categories down to two, this Court has made clear that nothing in *Collins* or any other decision was meant in anyway to overrule *Calder's* original four categories which have been repeatedly endorsed by prior Supreme Court opinions. *See Carmell,* 529 U.S. at 525.

A law that aggravates or makes greater without simply falling into categories one or three encompasses a situation where the scope of the crime is made either larger or is now "more serious."[28] It is self-evident that a crime for which the state declares it is no longer seeking to try to convict or to incarcerate is less serious than one for which the state declares it will forever seek prosecution.[29] Secondly, the crime is enlarged because it now includes others within its grasp who previously were not, which is clearly the legislature's intent under 803(g). *See Stogner v. Superior Court*, 93 Cal.App.4th 1229 (2001); *People v. Frazer*, 21 Cal.4th 737 (1999). That such an enlargement is proscribed has been clear, see *Cummings v. Missouri* which found that a loyalty oath was exacted not to determine fitness for callings "but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." *Cummings v. Missouri*, 71 U.S. 277, 320 (1866).

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[28] Justice Story, writing on the *Ex Post Facto* Clause noted that included "the act, if a crime, is aggravated in enormity, or punishment..." 3 Commentaries on the Constitution of the United States § 1339: 212.

Black's definition of "aggravate" as, "made worse or more serious," (Black's Law Dictionary 65 (7th ed. 1999)) is not unlike the concept understood in Webster's, "a: to make heavy: BURDEN b: INCREASE, 2: To make worse, more serious, more severe; intensify unpleasantly." WEBSTER'S NEW COLLEGIATE DICTIONARY 23 (7th 1974)."

[29] The Legislative purpose behind the Statute of Limitations supports the notion, recognizing the "fear that never-ending threat of prosecution will be more detrimental than beneficial to society." *Cowan v. Superior Court*, 14 Cal.4th 367, 375 (1996); *see also In re Medly*, 134 U.S. 160, 172 (1890) (recognizing that increases in mental anguish to prisoner which flowed from his inability to ascertain when the State might choose to execute its punishment enlarged punishment and was *ex post facto.*

The State further enlarges the crime by creating retroactive jurisdiction in the criminal courts of California. A proposition California courts had historically specifically held contrary to the meaning of their limitations period.[30] The Legislature, certainly in

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[30] The seminal case defining the statute of limitations as also jurisdictional in a criminal context is *People v. McGee*, 1 Cal.2d 611 (1934). In the first instance, they drew a distinction, "based on the different character in the proceedings" between criminal and civil statute of limitations. "In civil actions the statute is a privilege which may be waived by the party. In criminal cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter. . .[W]hen the statute of limitation has run, the power to proceed in the case is gone." *Id*. at 613-14 (citation omitted.)

Thus, once the statute has ripened, a court is without subject matter jurisdiction to proceed regardless of whether the parties desire to waive or forfeit that right. *See also Chambers v. Gallagher*, 177 Cal. 704, 708 (1918) ("There can be no question that ...by passage of the statute of limitations [the legislature] intended a permanent divestment of a right of action in all matters to which the statute relates.") In California therefore, the courts have recognized not only the destruction of the remedy for a right, but that the right itself is destroyed. The State has been divested of the right of action. "In this connection, we remind ourselves that the bar of the statute of limitations in a criminal action is a matter going to jurisdiction rather than merely to remedy." *People v. Doctor*, 257 Cal.App.2d 105, 110 (1967) citing *People v. McGee*, 1 Cal.2d at 613; *see also People v. Chadd* 28 Cal.3d 739, 756 (a violation of the statute of limitations described as "failing to state a public offense.")

Thus in *Cowan v. Superior Court*, 14 Cal.4th 367, 371-72 (1996), the California Supreme Court grappled with this jurisdictional issue in a case where a defendant wanted to waive the right. If the statute was jurisdictional as *McGee* stated, then even the defendant lacked the ability to waive it. If it were "merely a substantive defense" he could waive it. *Id*. The issue in *Cowan* arose because the defendant, charged with murder, a cause of action for which no statute of limitations exists, wished to enter a plea to the lesser included offense of manslaughter, which was then viewed as potentially time barred. *Id*. at 370.

Rather than overrule well-established precedent, including

position to define it prospectively, instead made no such substantive change in their overhaul of the present statutory scheme effective since 1985. It is only now

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McGee, the *Cowan* court held that the lower court had retained jurisdiction over the murder charge actually before it, and, since no limitation applied to that cause of action, subject matter jurisdiction had not been lost. *Id*. at 374. The question became one of "excess of jurisdiction" as to the proposed plea bargain instead of a lack of subject matter jurisdiction. *Cowan*, 14 Cal.4th at 374. In that particular context, and not having lost the power to proceed, the defendant could choose, if he desired, to waive the statute as to the manslaughter charge. *Id.* In effect the *Cowan* court held that because the underlying right had not been destroyed, the question became solely one of approving an ameliorating remedy desired by the defendant who could therefore waive his substantive right to the lesser charge. "In this case, because the court had the power to proceed over the *murder* charge, it should also have the power to proceed over a lesser included ...offense." *Id*. at 373.

In *People v. Williams*, 21 Cal.4th 335 (1999), the court was again urged to reject the jurisdictional approach. The issue first having arisen on appeal, the State argued that *Cowan* had essentially done away with jurisdiction, such that if a defendant fails to timely raise the statute of limitations issue, then the defendant could unknowingly forfeit it. *People v. Williams*, 21 Cal.4th 335, 340 (1999). Rejecting this claim, the court upheld the *McGee* principle, stating "as has long been the rule of California, a person can raise the Statute of Limitations at any time in a time barred action." *Id*., at 345.

Important in this analysis is an understanding that *Cowan's* did not overrule the jurisdictional approach per se, but only made a "slight adjustment" to its analysis to accommodate the desired plea to the lesser. *Id*. at 340. *Williams* makes clear that any broader interpretation of *Cowan* was not intended, nor necessary for its decision. *Id*. at 340-41. Rather, *Cowan*, held that to the extent *McGee* could be interpreted as barring pleas to "time barred lessers" it was overruled. *Cowan*, 14 Cal.4th at 372-374. This distinction is important in that it makes fundamental sense with the California view of Statute of Limitations. If the underlying cause of action is destroyed, then nothing can be done to resurrect it. However, where the underlying cause of action is not destroyed, then the court has power to provide a lesser "the remedy", and no sound policy reason exists for disallowing such a knowing waiver to a lesser if it is to the benefit of the accused.

that they attempt to create a different rule, only retroactively.

In *Means v. Cheyenne Tribal Court*, 154 F.3d 941, 942 (9th Cir. 1998) (overruled on other grounds in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001), the Ninth Circuit was confronted with the question of whether a court, not having jurisdiction over a subject could nevertheless prosecute him for crimes committed within their jurisdiction. Lacking power over the subject, the sovereign lacked the ability to define his conduct as criminal. "Imposing jurisdiction retroactively therefore makes it a crime as to Means after the fact–exactly what is forbidden by the *Ex Post Facto* Clause." *Means*, 154 F.3d at 948.

Whether viewed as eliminating an element or defense, or creating jurisdiction retroactively, 803(g) essentially enlarges or aggravates the crime by encompassing others, like Petitioner, who, prior to 803(g) had not been within its reach.

Calder Category Three

California has long held that once the Statute of Limitations has run, the person cannot be punished. *See People v. Miller*, 12 Cal. 291, 294 (1859). In this way it is not unlike a limited pardon, which relieves the person of the punishment that may be imposed for a crime, but does not necessarily absolve him of the criminality itself**.** For even if the argument could be sustained that the term crime has a broader significance than given in California, or that punishment became fixed on the date of the primary act, nevertheless it is undisputed that on the second date the punishment for that "crime" was removed. *Id.*; *see also Lynce v. Mathis*, 519 U.S. 433, 449 (1997) (where the punishment once reduced could not be increased retroactively). The removal of punishment means that any new punishment for that same "crime" exceeds that which attached

previously, in violation of *Calder* Category three. But for Penal Code section 803(g), the state cannot inflict any manner or form of punishment upon defendants for whom the Statute of Limitations expired prior to enactment of the revival statute. Moreover, the State of California cannot do indirectly what it cannot do directly.

Calder Category Four

The new law that permits prosecution of Petitioner's time barred case effectively eliminates a material ingredient of the crime that the prosecution must prove in order to convict. Under Penal Code 803(g), the district attorney no longer needs to prove that the offenses occurred within the time period necessary to overcome the Statute of Limitations. Moreover the preexisting rules created an irrebuttable presumption that resulted in a dismissal. That same presumption is now withdrawn. However viewed, it is clear that this law "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *See Calder v. Bull*, 3 U.S. 386, 390 (1798); *see also Carmell v. Texas*, 529 U.S. 513, 539 (2000). It violates *Calder's* fourth category.

The California Supreme Court's decision in *People v. Frazer*, 21 Cal.4th 737 (1999), decided before *Carmell*, misconstrued *Collins* to narrow the original four *Calder* categories to two: "Collins made clear that the two categories of impermissible retroactive legislation–redefining criminal conduct and increasing punishment –are exclusive." *Frazer*, 21 Cal.4th at 756.

The *Frazer* Court may not have anticipated this Court's reaffirmation of the fourth *Calder* category in

Carmell.[31] However, when Petitioner appealed a denial of his demurrer to the indictment and raised *Carmell* as an applicable authority, the appellate court once again indicated it was bound by *Frazer* and chose not to take up the issue. Likewise, the California Supreme Court declined to apply *Carmell*.

Penal Code section 803(g) retroactively eliminated an element the prosecution had to prove. Such a change is precisely the type deemed fundamentally unfair in *Carmell*: "A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof." *Carmell*, 529 U.S. at 532.

Carmell makes clear that the fourth *Calder* category remains an important restraint on the government's actions. Because an elimination of the statute of limitations through retroactive application of section 803(g) fundamentally alters the prosecution's burden necessary to convict, section 803(g) violates the *Ex Post Facto* Clause.

B. Due Process

The state cannot under the auspices of police power retroactively rescind a statute, which rendered the state powerless to prosecute, divested the court of jurisdiction and provided Petitioner with a complete

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[31] Since *Carmell* was decided, the Court of Appeals for the Second District has recognized that *Frazer* may have indeed misread the United States Supreme Court's intent, noting that many appellate courts, including in California, and citing *Frazer* specifically, mistakenly believed that *ex post facto* "did not prohibit the application of new evidentiary rules...." *In re Melvin J.*, 81 Cal.App.4th 742, 758 n. 7 (2000.)

defense in the event of trial. To do so violates Petitioner's fundamental right to liberty.

Among individual rights, liberty is ranked as fundamental. Liberty's meaning is expansive and encompasses issues such as the right to refuse medical treatment, contraception and family life. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). However, freedom from physical restraint is at the core of our understanding of liberty. No other right can be deemed more fundamental. *See e.g., Reno v. Flores*, 507 U.S. 292 (1993); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Ingraham v. Wright*, 430 U.S. 651 (1977).

Nonetheless, as with all rights, liberty is not absolute. It must be harmonized with other rights and powers stemming from the United States Constitution or some other independent source. *See Texaco Inc., v. Short*, 454 U.S. 516, 525-26 (1982). The police power is one that finds its source independent of the United States Constitution. It is based in the state's sovereign nature and its duty to protect the health, safety and welfare of its citizens. However this power has never been viewed as omnipotent. As with individual liberty, the State's police power is also not absolute. *See Calder v. Bull*, 3 U.S. 386, 387-88 (1798); *Fletcher v. Peck*, 10 U.S. 87, 135 (1810).

Penal Code section 803(g) amplifies the conflict inherent in Petitioner's fundamental right to liberty and the state's sovereign police power. However the conflict created by the enactment of 803(g) violates due process where California legislatures, since the state's inception, have always utilized criminal Statutes of Limitation and California courts have always interpreted these statutes to confer a substantive and irrevocable right.

The passing of time, now complete under the terms set by the State itself, divests from the State the power to prosecute and restores Petitioner's liberty. It is no longer subject to state intrusion. This exhaustion of power and restoration of liberty is irrevocable; the presumption of innocence previously afforded to the Petitioner is now irrebuttable.

Fundamental Right of Liberty

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). The due process clause of the Fifth Amendment applicable to the states through the Fourteenth, was intended to secure for individuals, *inter alia*, the "right to be free from and to obtain judicial relief, for unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). The guarantees afforded "always have been thought to encompass freedom from bodily restraint and punishment." *Id.* at 673-74 (finding that freedom from corporal punishment implicates a liberty interest); *see also Reno v. Flores*, 507 U.S. 292 (1993); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (commitment to a mental health facility implicates a liberty interest); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (right to liberty implicated by pretrial detention).

A liberty interest can also be created by state statute. Coupled with its creation is the expectation that it will not be taken arbitrarily. Due process is the stronghold for such vital interests and this Court has time and again affirmed that a State cannot statutorily confer a liberty interest and arbitrarily withhold or destroy it. *See e.g.*, *Sandin v. Connor*, 515 U.S. 472, 483-84 (1995) (recognizing "that states may ... create liberty interest which are protected by the Due Process Clause"); *Board of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987) (parole statute mandating release once

designated findings were made created liberty interest); *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980) (statute permitting transfer of prisoner to mental health facility upon finding of mental illness created a liberty interest); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (state created right to good time credits that could be taken only for serious misbehavior created a liberty interest); *Carlo v. City of Chino*, 105 F.3d 493, 497 (9th Cir. 1997) (statute requiring arrestees be given phone calls that could be denied only in event of physical impossibility conferred a liberty interest.)

Underscoring this point, the *Wolff* Court stated, "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is protection of the individual against arbitrary action of the government." *Wolff*, 418 U.S. at 558.

Although these cases also refer to the process required as a preventative measure against arbitrary action, Petitioner maintains that no amount of process will suffice. Here the harm is ongoing, for the prosecution that California had no power to bring is occurring, the forum for which no jurisdiction existed has ruled against Petitioner and the absolute defense to this unlawful action has been destroyed. This situation was contemplated by Justice Harlan when he wrote, "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three." *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan J., dissenting).

State Power

It is unquestionable that the State possesses the power to define criminal conduct and prohibit said conduct through legislation; that it can prosecute where probable cause exists to believe a crime was committed; and that it can punish where it has proven to a jury or the court as fact finder that the crime was committed.

It is also a maxim that the State possesses the power to destroy such crimes, as well as their effects. It can repeal criminal statutes, thereby erasing the criminality attached to such conduct; it can decline to prosecute by granting immunity or by enacting legislation that provides for pretrial diversion[32]; and it can ultimately pardon conduct either prior to or after a guilty finding by jury or court; thereby erasing punishment or criminality or both.

However, the State can assert no basis for a claimed "retention" of an expired power to prosecute. Indeed, such a proposition is contrary to all accepted views of constitutional government. For if the inalienable rights of life and liberty are vested in the people, and if in limited circumstances the State is permitted to curtail that liberty, when that permission ends, even if by nothing more than an act of legislation, then the State is without the power to act.[33]

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[32] Thus under Penal Code Section 1000 et seq., even after a plea of guilty to certain possessory type drug charges, a person is absolved of all criminality for all respects, including permitting a successful divertee to state upon all job applications, save those related to law enforcement, that he/she has never been arrested, prosecuted, or convicted for said diverted crimes. (CAL. PEN. CODE § 1000 et. seq. (West 1985 & Supp. 2002.)

[33] "[The statute of limitation's] terms not only strike down the right of action which the state had acquired by the offence, but also remove the flaw which the crime had created in the offender's title to liberty. In this respect, its language goes deeper than statutes barring civil remedies usually do. They expressly take away the

Thus it cannot proceed to prosecute those who have successfully completed pretrial diversion. It cannot fail to follow through with its obligations pursuant to a plea negotiation. It cannot repeal a grant of immunity from prosecution. It cannot repeal a pardon. In short, the state cannot undo; so as to divest a substantive right accrued to the individual, that which was done through a lawful exercise of its police power.

State action that is tantamount to a wanton or arbitrary interference with private rights is not a permissible exercise of a state's police power. *See Atlantic Coast Line R.R. Co., v. City of Goldsboro*, 232 U.S. 548, 559 (1914). California claims the power to repeal a Statute of Limitations that has with due course of time, granted the Petitioner a substantive right to be free from prosecution, beyond the reach of jurisdiction and the ability to utilize this absolute defense to secure the right granted. This it cannot do.

This was the understanding of Chief Justice Marshall in *Fletcher v. Peck*, 10 U.S. 87, 135 (1810), when he stated, "But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by an absolute power."

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remedy only by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the state has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end." *Moore v. State*, 43 N.J.L. 203 (1881); s*ee also Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg J., concurring) (although "... a ... State may ... serve as a laboratory; and try novel social and economic experiments, I do not believe that this includes the power to experiment with the fundamental liberties of citizens ...") quoting *Pointer v. Texas*, 380 U.S. 400, 413 (1965).

California cannot do to Petitioner's vested liberty what Georgia could not do to Fletcher's vested title to property.

Historical Practice

In 1976, California exhausted its power to proceed against Petitioner. It terminated with the running of the Statute of Limitations duly enacted. The decisional law in place since this State's first inquiry into the meaning of the Statute of Limitations in the criminal system in 1859 permits no other alternative. Indeed, all of California jurisprudence mandates that the passing of time has irrevocable consequences. *But see People v. Frazer*, 21 Cal.4th 737 (1999).

California's Statute of Limitations was first enacted in 1850; the same year California became a state. It was later codified by the California legislature in 1872. *See People v. Frazer*, 21 Cal.4th 737, 743 (1999). Since its introduction, the availability of the statute as a complete defense has been made abundantly clear. *See People v. Miller*, 12 Cal. 291, 295 (1859) (finding that time was material to any offense subject to limitation, and thus, *"Prima facie*, the lapse of time is a good defense…").

Over the centuries, the California Supreme Court has repeatedly endorsed this view of the statute declaring it to be a substantive right. *See People v. Zamora*, 18 Cal. 3d 538, 547 (1976); *People v. Chadd* 28 Cal.3d 739, 757 (1981). Even *People v. Frazer*, 21 Cal.4th 737, (1999), agreed that Statutes of Limitation exist for the defendant's benefit, such statutes "seek to protect both the judicial system[34] *and the defendant*

[34] Statutes of Limitations aid in reducing the costs inherent in investigation and prosecuting old claims and the inevitable congestion of the courts where the presentation of these claims

from the burden of litigating claims after a specified time has passed, and after relevant evidence is presumably less reliable or no longer available." *Frazer* at 758 (emphasis added). In that same term, the California Supreme Court recognized that "To allow defendants to lose the protection of the limitation accidentally could mean that persons could languish in prison under convictions that could not have occurred had they merely thought of the statute of limitations in time." *People v. Williams*, 21 Cal.4th 335, 341(1999).

Historically it has been well understood by both federal and state courts that expired statutes of limitation serve as a complete and final bar to prosecution. In *Adams v. Woods*, 6 U.S. 336, 342 (1805), Chief Justice Marshall noted that "This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years . . . ." S*ee also Pendergast v. United States*, 317 U.S. 412, 418-19 (1942). This reason alone has justified federal and state courts to consistently rule that a person with a completed Statute of Limitation defense has no possibility of prosecution and thus has no need to rely on the Fifth Amendment privilege against self incrimination. *See Brown v. Walker*, 161 U.S. 591, 597-8 (1896); *Hale v. Henkel*, 201 U.S. 43, 67 (1906) ("It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the amendment ceases to apply.") California has expressed the same rule for well over a hundred years. *See Ex parte Cohen*, 104 Cal. 524 (1894). Holding even as late as 1993, that the finality of its Statute of Limitations meant that a party in a civil proceeding had not made a sufficient showing that he would incriminate himself in a civil molest case if forced to testify where the time had

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can be time consuming, confusing and may lead to erroneous verdicts.

run on the criminal offense. *See Blackburn v. Superior Court*, 21 Cal.App.4th 414, 428 (1993).

Thus the Statute of Limitations must be viewed in this context. It expresses a rule of such finality that we have been assured that when the bar is in place we may not only speak freely, but may even be compelled to speak. It is this understanding, so deeply rooted in our traditions and consciousness as to trigger the relinquishment of other rights routinely afforded to criminal defendants, that 803(g) seeks to wrench from its historical and constitutional context.

So clear has this rule been that throughout the country's history it has been disputed only rarely. Until *Frazer* each such attempt was rejected. *See People v. Frazer*, 21 Cal.4th 737 (1999). A challenge was proffered in 1860 in Texas, and rejected. *See State v. Sneed*, 25 Tex.Supp. 66 (1860) ("The state having neglected to prosecute within the time prescribed for its own action, lost the right to prosecute the suit.") There were similar challenges with similar results in New Jersey in 1881 and in Oregon in 1994. *See Hart Moore v. State*, 43 N.J.L. 203, 1881 WL 8329 at *6 (1881) ("Until the fixed period has arrived, the statute is a mere regulation of the remedy, and, like other such regulations, subject to legislative control; but afterwards, it is a defence, not of grace, but of right; not contingent, but absolute and vested; and, like other such defences, not to be taken away by legislative enactment.");[35] *State v. Cookman*,

[35] *See Hart Moore v. State*, 43 N.J.L. 203 (1881) ("[I]t would be a strained and unnatural interpretation of our act to say that it simply withholds jurisdiction from the court. Its language ... does not relate to the courts, but to the person accused. The answer which, under it, the defendant must make to an accusation before the tribunal which once had the right to punish him, is, not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that, after inquiry, the court must pronounce judgment of acquittal. And probably no one would

127 Or.App. 283 (1994) ("In short, we cannot accept the proposition that the state has the supernatural power to exhume and revitalize a prosecution that is dead and buried.")[36]

The Substantive Nature of the Right

While *Frazer* denied a substantive due process claim, it failed to apply or explore the nature of this right.[37] A review of California case law shows the various stages at which this substantive right can be asserted. Its use as a multifaceted defense speaks to its inherent power.

In California, the Statute of Limitations defeats the power to prosecute in the first instance and serves as a defense to attack the charging document such as by way of demurrer. *See People v. Ayhens*, 85 Cal. 86 (1890) (approving such action under Penal Code Section

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contend that after such judgment, any change in the law could legally subject the defendant to a second prosecution.") California courts are in accord, but of course also deny jurisdiction.

[36] The historical practice even at common law in England shows a general repugnance towards retrospective legislation in general. *See Dash v. Van Kleeck*, 7 Johns. 477 (1811) (Kent, Ch., J.) ("There has not been, perhaps a distinguished jurist or elementary writer, within the last two centuries, who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with caution, distrust or disapprobation.")

[37] *Frazer*, instead called Statutes of Limitation "acts of legislative grace," without further explanation and ignoring Supreme Court precedent that altering penal statutes, even those "accorded by the grace of the legislature" are not insulated from constitutional scrutiny. *Weaver v. Graham*, 450 U.S. 24, 30-1 (1981). Moreover while *Frazer* ruled on the meaning of section 803(g) in relationship to the new limitations period set up in the1985 legislation, it did not rule on claims based on the preexisting statutory rules upon which Petitioner also relies under Penal Code Section 805.5. While the lower court ruled the new statutes applicable, it relied solely on *Frazer* to deny the Constitutional rights even though *Frazer* never examined those rights in light of *Carmell v. Texas*, 529 U.S. 513 (2000).

1004 because it is a legal bar to prosecution). Thus a cause of action shown to be outside the statutory period fails to "state a public offense and the defendant could not be prosecuted thereunder and no judgment of conviction could be based upon it." *People v. Hoffman*, 132 Cal.App. 60, 62 (1933) (noting that this was the state of the law since *People v. Miller* 12 Cal. 291 (1859)); *People v. McGee*, 1 Cal.2d 611 (1934). Even where no demurrer is lodged, the prosecution can be defeated by special pretrial motion. *People v. Zamora*, 18 Cal.3d 538 (1976). At trial the matter is put at issue by a plea of not guilty and the State must bear the burden of proving that the Statute has not run in its case in chief. *See People v. Cunningham*, 99 Cal.App.2d 296, 299 (1950).

This right then is more than "simply" jurisdictional and is greater than an affirmative defense. The failure by the State to prove this element can result in a directed verdict (*see People v. Zamora*, 18 Cal.3d 538 (1976), or if submitted to the jury, to an acquittal. *See People v. Doctor*, 257 Cal.App.2d 105 (1967). As the California Supreme Court recognized in *People v. Zamora*, 18 Cal.3d 538, 565 n. 25 (1985), its bar is also "aimed as much at the *prevention of untimely prosecutions* as it is at the prevention of untimely convictions." (emphasis added). Thus California has long recognized that the running of the Limitations period is a legal bar to prosecution. *See People v. Asavis*, 27 Cal.App.2d 685, 687 (1938).

Moreover it renders void a judgment, even based on a voluntary plea of guilty, if found in violation of its proscription. *See People v. Hoffman*, 132 Cal.App. 60, 62-3 (1933). It is a basic attack on the court's ability to proceed in the first instance. *See People v. McGee*, 1 Cal.2d 611, 613 (1934). No court has ever maintained that California can exercise original jurisdiction in violation of the *McGee* rule. *See People v. Williams*, 21

Cal.4th 335 (1999); *cf. People v. Frazer*, 21 Cal.4th 737 (1999).

The State of California can no longer control this powerful right, which it chose to grant. It may not divest Petitioner of his liberty in defiance of the law it created, interpreted, employed, and repeatedly endorsed. Petitioner Marion Stogner has the fundamental right to be free from prosecution, twenty-two years after the Statute of Limitations has run. *State v. Sneed*, 25 Tex.Supp. 66 (1860); *Hart Moore v. State*, 43 N.J.L. 203 (1881); *State v. Cookman*, 127 Or.App. 283 (1994); *State v. Martin*, 138 N.H. 508 (1994.)

Although none of the evidence has changed, 803(g) alters the applicable rules so that they no longer obligate the State to concede that Petitioner must prevail. These facts no longer require a court to dismiss the matter or prevent it from passing further judgment or sentence on him. *See People v. McGee*, 1 Cal.2d 611 (1934); *People v. Hoffman*, 132 Cal.App. 60 (1934). In the same way he can no longer resist the powers of the prosecution on these facts. Penal Code Section 803(g) therefore removes from the defendant's arsenal the most complete and effective defense he can assert here. *See Carmell v. Texas*, 529 U.S. 513 (2000); *see also Montana v. Egelhoff*, 518 U.S. 37 (1956). Instead he is forced to face trial conclusively considered by the State and federal courts to be unfair. *See United States v. Marion*, 404 U.S. 307 (1971); *People v. Zamora*, 18 Cal.3d 538 (1976).

803(g) subtly, but effectively renders Petitioner's ability to marshal these facts (even though not part of his burden), ineffective to gain an acquittal. It alters the rules after the fact for the sole purpose of improving the prosecution's chance of conviction. *Carmell v. Texas*,

529 U.S. 513 (2000).[38] 803(g) does not in any way afford greater protection to Petitioner, rather, it increases his burden. Prior to 803(g) the conclusive presumption could not be dispelled even by demonstrating a lack of prejudice to the defendant. *People v. Zamora*, 18 Cal.3d 538, 547 (1976). After section 803(g), Petitioner bears the burden of convincing the court that the passage of time has resulted in loss or impairment of evidence. While it has long been recognized that there is an increasing difficulty faced by a criminal defendant in obtaining reliable evidence, or any evidence at all, as time passes, *Zamora*, at 546, it bears noting that the passage of time also impairs his ability to show the significance and reliability of such destroyed evidence. Section 803(g) then represents the worst type of burden shifting.[39] By rendering proof that these facts exist insufficient to bar prosecution, 803(g) makes a mockery of the right to present evidence on an issue firmly rooted in American jurisprudence.[40]

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[38] In *Carmel v. Texas*, the High Court commented, "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell* at 532. The notions of justice and fair play have long been associated with the due process clause. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316. (1945).

[39] "While due process does not 'ba[r] States from making changes ... that have the *effect* of making it easier for the prosecution to obtain convictions,' *McMillan v. Pennsylvania*, 477 U.S. 79, 89, n.5 (1986) (emphasis added), an evidentiary rule whose sole *purpose* is to boost the State's likelihood of conviction distorts the adversary process. *Cf. Washington v. Texas*, 388 U.S. 14, 25 (1967) (Harlan, J., concurring in result; emphasis added); *Montana v. Egelhoff*, 518 U.S. 37, 68 (1996); (O'Connor, J., dissenting.)

[40] The Clause does place limits upon restriction of the right to introduce evidence, but only where the restriction offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. 'Our primary guide in

803(g) has already and will continue to deprive Petitioner of Liberty and the substantive and procedural rights necessary to ensure that Liberty. It permits California to destroy a state-ensured binding guarantee[41] which has been in place since the State's foundation and which was well understood to have this meaning of finality under American criminal jurisprudence.

Despite these well-recognized principles, the courts of California ignore them and all concerns for finality and plain meaning. On the one hand stating the right cannot be forfeited, the courts permit the state to forfeit it for Petitioner. *See People v. Williams*, 21 Cal.4th 335 (1999); *People v. Le* 82 Cal.App.4th 1352, 1360 (2000); *People v. Frazer*, 21 Cal.4th 737 (1999). Calling it a substantive right, they refuse to give it substance. *See. People v. Zamora*, 18 Cal.3d 538 (1976); *People v. Frazer*, 21 Cal.4th 737 (1999). They insist on a lack of jurisdiction yet claim 803(g) creates jurisdiction retroactively. *Accord People v. McGee*, 1 Cal.2d 611 (1934); *Cowan v. Superior Court*, 14 Cal.4th 227 (1996); *People v. Williams*, 21 Cal.4th 335 (1999); *People v. Frazer*, 21 Cal.4th 737 (1999).

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determining whether the principle in questions is fundamental is, of course historical practice." *Montana v. Egelhoff*, 518 U.S. 37, 68 (1996); *see also Medina v. California*, 505 U.S. 437, 446 (1992).

[41] In California cases, the passage of the statutory time has also been deemed akin to an immunity, (*see People v. Snipe*, 25 Cal.App.3d 742, 747 (1972); *see also People v. Hoffman*, 132 Cal.App. 60, 63 (1933)), or an "amnesty." *See In re Gustavo M.* 214 Cal.App.3d 1485, 1494 (1989). *See also In Re Bray*, 97 Cal.App.3d 506, 513 (1979) citing *State v. Keith* (1869) 63 N.C. 140 ("the ordinance was declared invalid because it deprived the prisoner of an immunity to which he had become entitled by statute. The amnesty act placed Civil War soldiers in the position as if the acts they committed were not criminal. The soldiers could not constitutionally be deprived of that benefit.")

Although the legislature had enacted special legislation through Penal Code section 805.5 preserving Petitioner's rights under prior law, the courts have ignored principles of finality expressed in doctrines such as stare decisis[42] and statutory interpretation. "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1974); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974) ("[A] court is to apply the law in effect at the time it renders its decision"). *People v. Haskins* 177 Cal.App.2d 84, 87-8 (1960) (Amendments may be construed as legislative reaffirmances of existing law).[43]

The legislature and the courts have ignored well established precedent that has expressed concern,

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[42] "[L]aw, to be obeyed, must be known; to be known, it must be fixed; to be fixed, what is decided to-day must be followed to-morrow; and *stare decisis et non quieta movere* is simply a sententious expression of these truths." 26 CHAMBERLAIN, THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT (1885).

[43] Prior to *Stogner*, a long line of legal tradition had analyzed the old Statute of Limitations upon which Petitioner relies, finding that the *ex post facto* clauses barred the statutory extension of a Statute of Limitations once the original term had expired. *See Lynch v. Superior Court*, 33 Cal.App.4th 1223, 1227-28 (1995); *People v. Eitzen*, 43 Cal.App.3d 253, 265-67(1974); *Sobiek v. Superior Court*, 28 Cal.App.3d 846, 849-50 (1972). *Stogner* has interpreted this Statute contrary to its long history and Petitioner's position that prior judicial determination should prevail is but a reflection of the type of finality expressed in the *Teague v. Lane* 489 U.S. 288(1989) rule. The point being that whether or not it violates the *Ex Post Facto* Clause as it is understood today, the meaning of that Clause as it was understood in 1985 has been incorporated into the Statute of Limitations by the Legislature's passage of 805.5. Even if not violative of *ex post facto*, taking this substantial right as it was defined in 1985 violates due process.

dismay and even shock at prosecutions after prolonged delay.[44]

Thus by allowing 803(g) to operate retroactively, the Legislature and the courts break the solemn compact between government and citizen and destroy the dignity inherent therein.[45] By enacting 803(g) the State has reneged on its agreement to its citizens and deprived Petitioner of a substantive right he has held for over twenty years. *Cf. People v. Quartermain*, 16 Cal.4th 600, 618-620 (1997) (breach of a promise not to use defendant's statement to impeach was fundamentally unfair and denied him due process of law). Instead, 803(g) allows the State to actively mislead with notice that is unfair.[46] California has advised all citizens that

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[44] *United States v. Irvine*, 98 U.S. 450 (1878) stated "It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office." *Barker v. Municipal Court*, 64 Cal.2d 806 (1966)."The thought of ordering [defendant] to trial on this charge after a lapse of twenty years shocks the imagination and conscience." *Id.* In *Adams v. Wood*, 6 U.S. 336, 342 (1805), Chief Justice Marshall expressed the same concerns, stating it would be "utterly repugnant to the genius of our laws to allow such an action to lie at any distance of time." (internal quotations omitted.)

[45] In the context of unlawful searches this Court has acknowledged: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence...." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

[46] The Due Process Clause also protects the interest in fair notice and repose that may be compromised by retroactive legislation; "a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application" (*Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)), "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *See Marks v. United States*, 430 U.S. 188, 191-192 (1997); *Rabe v. Washington*, 405 U.S. 313 (1972) (*per curiam*); *Bouie v. City of*

they need not keep up their guard, nor need prepare or preserve defenses. The citizenry has been informed that finally, there is no need to fear an attack on our fundamental rights from our government, righteous or not.

"Our Government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 455 (1928) (Brandeis, J., dissenting) (overruled on other grounds). "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. Having surrendered its right to prosecute by way of a statute of limitation, (*State v. Cookman*, 127 Or.App. 283 (1994) ; 873 P.2d 335; *State v. Dufort* (1992) 111 Or.App. 515, 519; 827 P.2d 192; *State v. Hodgson*, 108 Wash.2d 662, 667 (1987); 740 P.2d 848), the state may not renege on that promise years afterwards, when memories may have faded and evidence may have been destroyed." *Frazer, supra*, 21 Cal.4th at 780 (Kennard J., dissenting).

There are due process limits on arbitrary governmental behavior in revoking its promises of protection such as when the government confers a substantive right and then arbitrarily revokes it. *See Raley v. Ohio*, 360 U.S. 423, 425-26 (1959) (when defendants were assured of the right to remain silent by a legislative committee and then held in contempt for asserting it, this was "an indefensible sort of entrapment by the State.") While the Constitution does not guarantee defendants that they will be free from the prosecution after a fixed period of time, California, has conferred this very right via statute. *See Hicks v.*

Columbia, 378 U.S. 347, 353-54 (1964); *United States v. Lanier*, 520 U.S. 259 (1997).

Oklahoma, 447 U.S. 343, 346 (1980). "[T]he failure of the state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment preserves against arbitrary deprivation by a state." *Id.*

If 803(g) is allowed to stand it will eliminate an important substantive right that destroys the cause of action according to both California and United States Supreme Court precedents.[47] It has destroyed a matter of substance rather than of form. *See Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945). Therefore, forcing Petitioner to forfeit the substantive right to raise this bar is in and of itself a violation of due process.

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[47] *Chase Secs. Corp v. Donaldson*, 325 U.S. 304 (1945), construed the critical inquiry for due process analysis to be to determine how "the state court...construed the relationship between its limitation acts and the state law creating the asserted liability." *Chase,* 325 U.S. at 312, n 8. Indeed in only a limited line of civil cases has the statute of limitations been deemed subject to retroactivity, and only where the underlying right was conclusively shown not to have been destroyed. *See Campbell v. Holt,* 115 U.S. 620 (1885).

But where the right is statutorily created and is given a fixed period of time in which the remedy must be pursued, the United States Supreme Court has agreed the right itself is destroyed when the limitations period expires, and depriving an accused of this limitations defense by way of retroactive legislation does violate the due process clause. *See William Danzer & Co. v. Gulf & S.I.R., Co.*, 268 U.S. 633 (1925). *Chase* itself recognized this important distinction, noting *Danzer* and *Davis* stand for the proposition that retroactive legislation will result in a due process violation "where a statute in creating a liability also puts a period after its expiration...." *Chase*, 325 U.S.at 312 n. 8.

There are no common law crimes in California; all crimes are created by way of statute. Cal. Pen. Code, § 6; *see also In re Brown,* 9 Cal.3d 612, 624 (1973). California has similarly created a limitations period on certain classes of crimes, including Penal Code § 288. Thus depriving Petitioner of his limitations defense violates due process.

At no point in our history has the opposite rule been shown to exist. *See People v. Frazer*, 21 Cal.4th 737, 777 (1999) (Kennard, J., dissenting).[48] The societal benefits of the Statute of Limitations also underscore a more basic societal sense of fair play and decency (*Rochin v. California*, 342 U.S. 165, 172 (1952)) in not making promises only to break them retroactively years later.

California has stated in no uncertain terms that their power to prosecute has ended. Simultaneously, they have decided that Petitioner has been conferred thereby a substantial right. His liberty interest is then inviolate.[49] The State has retained no power upon which

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[48] "Today, California becomes the only jurisdiction, state or federal, to permit 'revival' prosecutions under an extended statute of limitations enacted after the expiration of the original statute of limitations. All other jurisdictions that have addressed the issue have concluded or assumed that these prosecutions violate article I, section 10, clause 1 of the federal Constitution, which provides that '[n]o state shall pass any ... ex post facto law ...'." *Frazer*, 21 Cal.4th at 777 (Kennard J., dissenting) (citations omitted).

[49] The State would have this Court ignore the history of both California and the United States in this regard. Rather they would equate the Petitioner's clearly defined substantive rights and liberty interest with nothing more than vague economic interest type cases.

However, even if the court were to engage in a balancing test, the result should still favor Petitioner. *Frazer* proffered the following justification for the legislation: the difficulty by alleged victims in remembering the wrongs themselves, and/or the "emotional vulnerability at the hands of the perpetrators." *People v. Frazer*, 21 Cal.4th 737, 773 (1999). Such justifications may well sustain an increase in the limitations period in prospective cases, however this justification ignores that society by its use of Statutes of Limitations has *already* taken into account that the passage of time will naturally void even sympathetic claims. Indeed, to the extent that some perpetrators of crimes will escape punishment holds true for all crimes subject to a Statute of Limitations and has *always* been a cost society has been willing to incur in exchange for the benefits of repose. Moreover, because Penal Code section 803(g) is not limited in any fashion to victims who have repressed the wrongs done them, and might therefore claim recent discovery of the harm, or who might

it can infringe Petitioner's liberty interest. "In our society liberty is the norm." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

"The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986). This Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); quoting *U.S. v. Salerno*, 481 U.S. 739, 750 (1987).

CONCLUSION

For all the foregoing reasons, relief should be granted and the prosecution dismissed.

Dated this 16th day of January, 2003

Respectfully submitted,

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Martinez, California 94553
(925) 646-1740
Counsel for Petitioner

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otherwise be prevented from pressing the claim by the alleged perpetrator, any person can trigger the provisions of Penal Code section 803(g) at *any* time *they* choose, regardless of their own knowledge or ability to press the claim or length of delay.