No. _____

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

PETITION FOR WRIT OF CERTIORARI

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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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PETITION FOR WRIT OF CERTIORARI

Defendant Marion Reynolds Stogner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, Division 5 decided November 21, 2001, and which was denied review by the California Supreme Court on February 27, 2002.

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 A. The California Supreme Court's order of February 27, 2002, denying discretionary review is attached as Appendix B. 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. A. The California Supreme Court denied discretionary review on February 27, 2002. App. B. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a)

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Article I, section 10, clause 1, provides: "No State shall … pass any … Ex Post Facto Law…"

The United States Constitution, Amendment XIV, states: "No State shall … deprive any person of life, liberty, or property, with out due process of law…"

STATEMENT OF THE CASE

A. Procedural Background and History

In April 1998, a criminal complaint was filed charging Petitioner with two counts of a lewd act upon a child under California Penal Code section 288(a), alleged to have been committed 25 to 43 years earlier. (Appendix C.) Count one alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count two alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. 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).[1]

Petitioner successfully demurred to the complaint on the ground 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 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*, A084772 (Cal.App. October 14, 1999). (Appendix D.)

This Court denied discretionary review. *Stogner v. California*, No. 99-8895 (October 2, 2000) (Appendix E.) However at the time of the denial, no California court had adjudicated Petitioner's 805.5 claim, nor had

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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 .

they 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 on motion of the prosecutor when they filed an indictment. (Appendix F.) That indictment, filed March 14, 2001, again charges Petitioner with two counts of child molestation on two separate victims, Jane Doe I and Jane Doe II, alleging conduct between the dates of the alleged occurrence now ranging between 1955 and 1964 and between 1964 and 1973, respectively. Again the indictment alleged that the charges could be prosecuted under section 803(g).

Petitioner demurred, asserting that prosecution was barred, that no cause of action was stated, and that 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) to his case. (Appendix G.) 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 its published opinion ultimately ruled against him. *See Stogner v. Superior Court*, 93 Cal.App.4th 1229 (2001) (App. A). A request for rehearing was denied. (Appendix H.) The California Supreme Court denied discretionary review. (App. B.)

B. Presentation Of The Federal Claims In State Court

Both of the federal claims presented in this petition were decided in an opinion on the merits which constituted a final judgment rendered by the highest state court, the California Supreme Court. Petitioner raised both of the federal claims in his appeal to the California Court of Appeal, specifying the federal nature

of the claims and relying on federal constitutional authority. Petitioner's Brief on the Merits at 20-32 [Ex Post Facto]; *id.* at 32-44 [Due Process]. Both claims were raised in Petitioner's petition for review in the California Supreme Court.

REASONS FOR GRANTING THE WRIT

(Rules 10, 14.1 (h))

This case presents important federal issues on which there are conflicts among federal and state courts.[3] These issues require resolution of interpretive differences of Constitutional dictates. Each side in this debate bases its reason on the opinions of this Court. Ultimately the Writ should be granted because it involves decisions that should no longer be postponed particularly in light of the increased litigation surrounding these matters.[4] 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.

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, available to

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[3] *See e.g., People v. Frazer*, 21 Cal.4th 737, 757 (1999); *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992);*United States v. Brechtel*, 997 F.2d 1108, 1113 & n.13 (5th Cir. 1993); *Christmas v. State*, 700 So.2d 262, 267-68 (Miss. 1997); *People v. District Court*, 834 P.2d 181, 200 (1992); *United States v. Morgan*, 845 F.Supp. 934, 943 (D. Conn. 1994), *aff'd on other grounds*, 51 F.3d 1105 (2nd Cir.), *cert. denied*, 516 U.S. 861 (1995); *State v. Crawley*, 96 Ohio App.3d 149, 155 (1994) *cert. denied* 115 S.Ct. 1999 (1995).

[4] Oregon has attempted to pass a similar statute, declared unconstitutional in *State v. Cookman* (1994) 127 Or.App. 283.

[5] California has created Limitations Statutes for most, but not all crimes.

all accused of any such wrongdoing by the State. It places an absolute limit on the State's ability to exercise its power to prosecute an action. It bars California's courts from exercising fundamental jurisdiction over the subject and the subject matter.

Although California created this rule, they now seek to upset it. California seeks to retroactively destroy this right and prosecute Petitioner Marion Reynolds Stogner, by Indictment for conduct barred from prosecution by the Statute of Limitations for over twenty-five years.

Based on California Penal Code Section 803(g), the State claims that the scourge of child molestation legislatively compels and constitutionally permits the 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); *cf People v. Frazer*, 21 Cal.4th 737 (1999). They have claimed the power to destroy a bar effectively in place since the State's foundation. They have rewritten their own rules[6] to retroactively cast out Petitioner from legislation designed through Section 805.5 to specifically reaffirm his particular right.

The State's claim of power to legislate retroactively is against the nature of criminal Statutes of Limitations.[7] In California the Statute is a basic and required element of the prosecution's case. The State

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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 section 803(g) see Appendix A, Court's ruling Stogner written decision.

[7] *People v. Frazer* at 777 (Kennard , J. dissenting).

circumvents their inability to overcome the law by altering it after the fact. The California Supreme and Appellate Courts, through their decisions in *Frazer* and *Stogner* have upheld these laws in a manner which retroactively vests jurisdiction in themselves, cedes power to the State to Prosecute, and forfeits Petitioner's rights. The State's actions retroactively destroying this right violates the Ex Post Facto and Due Process Constitutions of the United States and California and all sense of fairness and finality contained therein.

For if California, through its legislative and judicial branches, 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.

California has thus far been successful in forcing a forfeiture to that which all have agreed could not be forfeited. They have passed into law a rule of uncertainty that other states are adopting. It is therefore respectfully requested that the matter be fully and fairly adjudicated under established 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.

The history of Statutes of Limitation in California dates back to the state's foundation. In California, Statutes of Limitations were first enacted in 1851, the same year California became a state. They were later codified by the California legislature in 1872. *Frazer*, 21 Cal.4th at 793. Since their introduction, the availability of the Statute as a complete defense has been made abundantly clear. *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. *People v. Zamora*, 18 Cal. 3d 538, 547 (1976); *People v. Chadd* 28 Cal.3d 739, 756 (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 *and the defendant* 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 326 (emphasis added). In that same term the California Supreme Court recognized that "To allow defendant 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, (1999) (upholding the jurisdictional aspect of Statutes of Limitation and declining to create a forfeiture rule).

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.[8] It prevents or bars prosecution, judgment, and punishment. *People v. Miller*, 12 Cal. 291, 294 (1859) ("If all the allegations in the indictment be true, the

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[8] Frazer, while finding that statutes of limitation are acts of legislative grace, never explored the nature of the right. 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 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).

party is not punishable.") It is never forfeited and even a plea of guilty does not waive it. *See People v. McGee*, 1 Cal.2d 611 (1934).

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). It 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 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*. (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. James* 85 Cal. 86 (1890); *People v. Cunningham*, 99 Cal.App.2d 296 (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 (*People v. Zamora*, 18 Cal.3d 538 (1976), or if submitted to the jury, to an acquittal. *People v. Doctor*, 257 Cal.App.2d 105 (1967). As the California Supreme Court recognized in *Serna v. Superior Court*, 40 Cal.3d 239 (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). *Ex Parte Vice*, 5 Cal.App. 153, 155 (1907). Thus California has long

recognized that the running of the Limitations period is a legal bar to prosecution. *People v. Asavis*, 27 Cal.App.2d 685 (1948).

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 (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 (1934). Even where the court has already obtained jurisdiction over the subject and subject matter by way of a greater crime, a defendant does not cede jurisdiction to the court over a lesser crime absent a knowing and intelligent and express waiver specifically to that effect. *See People v. Cowan*, 14 Cal.4th 367 (1996). 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).

Petitioner asserts that the powerful nature of this right is best defined by the many decisions that have spoken of it. For it is not only in the varied ways that it can be raised, but its relationship to other constitutional protections that the importance of this right is illuminated.

The Courts have consistently explained Statute of Limitations by comparison and in relationship to established Constitutional rights and principles expressing the need for fairness and finality. So true are its dictates that it replaces the Fifth Amendment as a bar to self incrimination. *See Brown v. Walker*, 161 U.S. 591 (1896).

"Statutes of limitation reflect a legislative construction of the speedy trial guarantee." *Serna v. Superior Court*, 40 Cal.3d 239 (1985). It serves as a bridge between the Due Process Clause and Speedy Trial

Right. *See United States v. Marion*, 404 U.S. 307 (1971). It stands in the way of overly stale prosecutions where the Speedy Trial Right does not apply. *Id*. Created to serve several purposes, (*see People v. Zamora*, 18 Cal.3d 538 (1976)), one of the primary ones is "to foreclose the potential for inaccuracy and unfairness that stale evidence and dull memories may occasion in an unduly delayed trial." *United States v. Levine*, 658 F.2d 113, 127 (3rd Cir. 1981) (italics omitted). Thus the Statute of Limitations has been used as a yardstick to measure post accusation delay for Speedy trial and due process purposes. *See Serna v. Superior Court*, 40 Cal.3d 239 (1985).

It also functions like double jeopardy in that it prevents prosecution in exactly the same way when raised. "The statement of former acquittal is no different in law than a statement that the statute of limitations had run on the crime, the result of both being that defendant could not thereafter be prosecuted for the offense whether originally guilty or not. The humane purpose designed by the legislature to be brought about by the statute of limitations affords immunity and protection to the citizen who thereby is free, and the public authorities who for three years failed to file a presentment for the alleged crime are thereafter precluded from pursuing him in a criminal prosecution." *People v. Hoffman*, 132 Cal.App. 60, 62-63 (1933); *People v. McGee*, 1 Cal.2d 611, 613 (1934); *United States v. Oppenheimer*, 242 U.S. 85 (1916) ("it cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empanelled....")

It shares the Fourth Amendment's concern for security, preventing seizures of the person that are

without reasonable or probable cause. *See People v. Hoffman*, 132 Cal.App. 60, 63-64 (1933) ("This being the nature of the proceeding of which defendant complains, it cannot be the law that to secure his right he must resort to the trouble, delay, and expense incident to appeal from the void judgment when by a motion made in the trial court it would be expected that his rights would be fully protected and his release from imprisonment promptly follows..") *See also Ex Parte Vice*, 5 Cal.App. 153, 157 (1907) (granting the habeas petition on the grounds that where the statute of limitations had run there existed no reasonable or probable cause to hold the petitioner.)[9]

Its import is such that it differs from many constitutional rights only in that, unlike them it cannot be forfeited by a failure to assert such, as in the case of jeopardy. *See People v. Williams*, 21 Cal. 4th 335, 418 (1999). Unlike several Constitutional Rights it cannot be waived, except in the limited circumstances where the court has gained jurisdiction over a greater crime and thus can, at the defendant's pleasure only, entertain instructions or a plea agreement to an otherwise time barred lesser included instruction or plea agreement to a time barred lesser offense. *Id*.

It is this important right that a defendant can neither waive nor forfeit that the State of California by legislative fiat has taken from Petitioner by way of this retroactive legislation.

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[9] Only *Ex Parte Blake*, 155 Cal. 586 (1909) declared, in dicta, that the Statute of Limitations was merely a matter of defense to be affirmatively plead which did not change the fundamental principle that when shown it resulted in acquittal. Regardless, any perceived controversy created by *Ex Parte Blake* was laid to rest when McGee overruled it. *People v. McGee*, 1 Cal.2d 611, 613 (1934) Williams recently reaffirmed the jurisdictional rule. *People v. Williams*, 21 Cal.4th 335 (1999).

A. Issue One: Ex Post Facto

Petitioner asserts, by this Writ, that he is entitled to rely on a defense, complete since 1976, that the State of California is attempting to revoke retroactively. The State does this by redefining the elements of the offense, altering the rules of evidence, and thereby, enlarging the class of crimes there under, seeking punishment where none could be had. Petitioner asserts this violates the Calder categories under the Ex Post Facto Clause.

B. Issue Two: Due Process

The State seeks to forfeit 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 finds 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. Taking 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 the United States Courts have agreed is conclusively and presumptively unfair. *United States v. Marion*, 404 U.S. 307, 322 (1971); *People v. Zamora*, 18 Cal.3d 538 (1976).

ARGUMENT

A. Ex Post Facto

1. *Calder* Categories One and Two

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. By law Petitioner has been entitled to an acquittal.[10] The deprivation contravenes the prohibition against ex post facto legislation because it eliminates a defense that negates an element the prosecution must prove to sustain a conviction. The defense also operates as a form of legislatively enacted excuse.[11] The abolishment of the statute of limitations

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[10] In California, a Statute of Limitations in a criminal case creates a substantive right, which renders a court wholly without 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. *People v. McGee*, 1 Cal.2d 611 (1934); *Chambers v. Gallagher*, 177 Cal. 704, 708 (1918) ("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). "[W]hen the statute of limitation has run, the power to proceed in the case is gone." *McGee* 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.

[11] 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 blameworthy, that is he can no longer be prosecuted or punished, even when his conduct would otherwise be "criminal." Similarly the definition would

therefore implicates both the first and second *Calder* categories.

Collins v. Youngblood, 497 U.S. 37 (1990) is often cited for the proposition that only certain defenses, those negating an element of the crime or operating as an excuse or justification for the crime charged, are encompassed within the first and second *Calder* categories. *See* footnote 3, *supra.* Although the *Collins* Court was not specific, one can assume that a defense that negates an element of the crime charged or justifies or excuses conduct implicates the first[12] and the second *Calder* categories. *See Collins* at 49-50. In the first instance, eliminating an element that the prosecution must prove to sustain a conviction effectively makes evidence that would result in acquittal now worthy of a conviction. Whether viewed as eliminating an element or a defense, 803(g) essentially enlarges or aggravates the crime by encompassing others, like Petitioner, who, prior to 803(g) had not been within its reach.

The Court does not elaborate what defenses were included in those labels and which ones were excluded. 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 improper sentences did not offend the ex post facto clause. *Collins*, 497 U.S. at 52. Defendant Youngblood had

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include defendants who have been pardoned, granted amnesty, immunity, or have already been placed in jeopardy.

[12] Although in California, the statute of limitations is an element that the prosecution must prove to make its case, it also provides a form of immunity or amnesty if raised at the commencement of prosecution. Consider *State v. Keith,* 63 N.C. 140 (1869), a law revoking amnesty was held to be an unconstitutional ex post facto law as it made conduct that before the passing of the law was not criminal, criminal. *See In Re Bray*, 97 Cal.App.3d 506, 512 (1979) (discussing *State v. Keith*.)

argued that he was entitled to a new trial under a law in existence at the time he was sentenced and that the new law had unconstitutionally removed his right to a new trial, a "substantial protection." *Id.* at 44. However the retroactive law simply did not violate any of the four *Calder* categories. It did not make "an action, done before the passing of the law, and which was innocent when done, criminal." It did not aggravate the crime "or make it greater than it was, when committed." It did not change the punishment, and inflict "a greater punishment, than the law annexed to the crime, when committed." Finally, it did not alter the legal rules of evidence, receiving less, "or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder v. Bull*, 3 U.S. 386, 390 (1798); *see also Carmell v. Texas*, 529 U.S. 513, 539 (2000).[13]

In rendering its decision, the *Collins* Court rejected Youngblood's argument that the retroactive law had deprived him of a "substantial protection." *Collins v. Youngblood*, 497 U.S. 37, 44 (1990). The Court took note of the fact that this phrase had been linked with the ex post facto analysis in the past, *id.* at 45-48, and decided that it should not be "read to adopt without explanation an undefined enlargement of the Ex Post Facto Clause. *Id.* at 47. The Court came to this conclusion in discussing, *inter alia*, *Kring v. Missouri*, 107 U.S. 221 (1883), a case the defendant Youngblood had relied on to argue his position. *Id.* at 47-50.

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[13] 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." 269 U.S. 167, 169-70 (1925].

Kring was about "defenses" in the sense that the defendant argued he had a complete defense to the greater included offense because he had previously plead to the lesser included. The case was about the collateral consequences of a plea. Defendant Kring, originally charged with first-degree murder, argued that entering a plea of guilty to the lesser-included offense of murder in the second degree guaranteed him an acquittal of murder in the first degree under the law in effect at the time he committed his offense, *but that had been changed* by the time of his plea. *Kring v. State of Missouri*, 107 U.S. 221, 222 (1883) (emphasis added). In essence, Kring's position was that he had a complete defense to murder in the first-degree and the new law, an amendment to the state constitution, was unconstitutionally subjecting him to a charge of which he was acquitted. *Id*.

Kring's argument persuaded the Court at the time and it ruled in his favor. *Kring* at 235. In so doing, the Court stated that if a law in relation to its offenses or consequences, alters the situation of a defendant to his disadvantage, it was an ex post fact law. *Id.*

The *Collins* Court found this definition to exceed the scope of the ex post facto clause as originally intended and to be the cause of confusion in lower courts. *Collins* at 47, 50. The Court explained that the constitutional amendment at issue in *Kring*, did not violate any of the *Calder* categories and thus defendant did not have a "defense" in the traditional sense of the word:

> The "defense" available to Kring under earlier Missouri law was not one related to the definition of a crime, *but was based on the law regulating the effect of guilty pleas*. Missouri had not changed any of the elements of the

> crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge; *it had changed its law respecting the effect of a guilty plea to a lesser included offense.*
>
> *Id*. at 50 (emphasis added.)

Again, *Collins* was not a case about pretrial or trial defenses. Neither *Collins* nor *Kring* addressed whether the government could abolish an absolute defense that had arisen under legislative enactment at the time the crime was allegedly committed and before prosecution was initiated. Moreover *Kring* had nothing to do with a trial or the rights attendant to it. *Kring* concerned the collateral consequences of a plea. It was wrongly decided because it didn't fall within the *Calder* categories, not because *Calder* limits types of defenses.

This Court has never addressed whether and to what extent the government can remove a complete defense that succeeds in both negating an element of a crime in which the prosecution bears the burden of proof and operating as an excuse to a charged crime. The definition supplied in *Collins* was an illustration in response to defendant Kring's procedural posture as opposed to a strict limit on the *Calder* definitions.

Nonetheless, the California appeals court relied on the California Supreme Court's interpretation of *Collins* to deny Petitioner's claim that abolition of a complete defense, violates the Ex Post Facto Clause. *People v. Stogner*, No. A084772 (Cal.App., First Appellate District, October 14, 1999) *citing People v. Frazer*, 21 Cal.4th 737, 763 (1999). The California Supreme Court denied Petitioner's review.

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." *Frazer* at 760. The court reasoned that its conclusion was warranted by notice and reliance, the primary aim of the Ex Post Facto clause.[14] *Id.* 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 'elements' of proscribed conduct, or involving 'excuse or justification' for its commission. *Frazer*, 21 Cal.4th 737, 760 (1999).

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.

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[14] 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 fn.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 fn..21 (2000).

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 that defines a crime 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 an element that the prosecution must prove beyond a reasonable doubt. [CALJIC No. 2.91] (6th ed. 1996.) Likewise, statutes of limitations in California are not part of the definition of proscribed conduct but are an element of a relevant offense[15] 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*.

This Court has recently underscored the thrust of the ex post facto prohibition: "There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, 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 v. Texas*, 529 U.S. 513, 533 (2000).

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[15] 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* California Penal Code section 955 (West 1985.)

While California has made the molestation of children a crime, it has also made prosecution subject to the statute of limitations. When the time runs, the defendant holds a complete defense to prosecution. This defense negates an element of the crimes charged, proof of which is borne by the prosecution. This defense also operates as an excuse. There is no merit to an argument that purports to 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.

2. *Calder* Category Three

By permitting a court to punish Petitioner, where previously he could not be punished, the third *Calder* category is violated as well. Whether this result is due to a bar on prosecution, a failure to state a cause of action, a lack of jurisdiction, or merely the "restoration" of a remedy makes little difference, construing the section as retroactive violates *Calder's* third category; for under the current regime, Petitioner may be punished for what was, previously, not punishable. As applied to the Petitioner, Penal Code section 803(g) runs afoul of the third *Calder* category as well.

3. *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 satisfy 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.

In *Carmell v. Texas*, 529 U.S. 513 (2000) this Court reaffirmed the existence of the fourth *Calder* category, (*id*. at 537-38), and reestablished its position among those prohibitions which may *not* be evaded. *Collins v. Youngblood*, 497 U.S. 37, 46 (1990).

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* at 756.

Frazer, perhaps, could not have been expected to anticipate this Court's reaffirmation of the fourth *Calder* category in *Carmell*. 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 decide Petitioner's claim.

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.

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, 757 fn. 7 (2000.)

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

Petitioner's due process rights are violated when his substantive rights are abridged, his completed defense annihilated, applicable presumptions removed and he is forced to face trial conclusively considered by the state and federal courts as unfair. *See United States v. Marion*, 404 U.S. 307 (1971); *People v. Zamora*, 18 Cal.3d 538 (1976).

Although none of the evidence has changed, 803(g) alters the applicable rules so that the long passage of time is insufficient for Petitioner to 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 resists 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. *Carmell v. Texas*, 529 U.S. 513 (2000); *see also Montana v. Egelhoff*, 518 U.S. 37 (1956).

Penal Code Section 803(g) subtlety, 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 prosecutions chance of conviction. *Carmell v. Texas*, 529 U.S. 513 (2000).[16]. 803(g) does not in any way afford greater protection to Petitioner rather it increases his burden. Prior to section 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[17]

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[16] 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 International Shoe Co. v. State of Washington*, 326 U.S. 310, 316. (1945)..

[17] "While due process does not 'ba[r] States from making changes ... that have the *effect* of making it easier for the prosecution to obtain

Rendering proof that these facts exist insufficient to bar prosecution, 803(g) makes a mockery out of the right to present evidence on an issue firmly rooted in American jurisprudence.[18]

Penal Code Section 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[19] which has been in place since the State's foundation and which was well

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convictions,' *McMillan v. Pennsylvania*, 477 U.S. at 89, n.5 (1986)79 (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); *Montana v. Egelhoff*, 518 U.S. 37, 68 (1996); (O'Connor, J., dissenting.)

[18] "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. *Crane v. Kentucky*, 476 U.S. 683, 687 (1986) quoting *California v. Trombetta*, *467 US 479, 485*, (1984). "Our primary guide in 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)

[19] In California cases the passage of the statutory time has also been deemed akin to such an immunity. *People v. Snipe*, 25 Cal.App.3d 742 (1972), 747; *see People v. Hoffman*, 132 Cal.App. 60, 63 (1933)), or an "amnesty." *In re Gustavo M.* 214 Cal.App.3d 1485 (1989), 1494. *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.")

understood to have this meaning of finality under American criminal jurisprudence.

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 (1805), Chief Justice Marshall noted that "not even treason can be prosecuted after a lapse of three years" *see also Pendergast v. United States*, 317 U.S. 412 (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 (1896); *Hale v. Henkel*, 201 U.S. 43 (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 *Ex Parte Louis Cohen*, 104 Cal. 524 (1894).

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 even be compelled to speak. It is this understanding, deeply rooted in our traditions and consciousness that 803(g) seeks to wrench from its historical and constitutional context.

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. *Cf. 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. *Cf.*

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) ; *People v. Cowan*, 14 Cal.4th 227 (1996); *People v. Williams*, 21 Cal.4th 335 (1999); *People v. Frazer*, 21 Cal.4th 737 (1999).

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[20] and statutory interpretation. It is true that "[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, 7111 (1974) ("A court should apply the law in effect at the time it renders its decision"). *People v. Haskins* 177 Cal.App.2d 84, 87 (1960) (Amendments may be construed as legislative reaffirmances of existing law). [21]

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[20] "(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." Chamberlain, The Doctrine of Stare Decisis: Its Reasons and Its Extent, p. 26 (1885).

[21] 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. *Lynch v. Superior Court*, 33 Cal.App.4th 1223, 1227 (1985); *People v. Eitzen*, 43 Cal.App.3d 253, 265-267(1974); *Sobiek v Superior Court*, 28 Cal.App.3d 846, 849-850 (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

They have ignored well established precedent that has expressed concern, dismay and even shock at prosecutions after prolonged delay.[22]

Thus by allowing 803(g) to operate retroactively, the Legislature and the courts break the solemn compact between government and citizen and destroys the dignity inherent therein. 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. *See 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)t allows the state to actively mislead with notice that is unfair.[23] California has advised all citizens that

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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.

[22] *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 lots, 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; 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

[23] 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 statutes prospective application under the Clause may not suffice to warrant its retroactive application (citation*): Landgraf v. USI Film Products*, 511 U.S. 244,

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.

Now California seeks to retract its word. It should not be permitted to do so. "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 (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. *Id.* 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 (1987), 667; 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 (J. Kennard, 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, e.g.,* Raley v. Ohio (1959) 360 U.S. 423, 425-26 [3 L.Ed.2d 1344], where the U.S. Supreme Court held that

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

when the defendants were assured of the right to remain silent by a legislative committee and then 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. 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 against arbitrary deprivation by a state."

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.[24] It has destroyed a matter of substance rather than of form. *See Guaranty Trust Co. of New York*, 326 U.S. 99. Therefore, forcing

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24 *Chase Securities Corp v. Donaldson*, 325 U.S. 304 (1945), in 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, fn 8.

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. *William Danzer & Co. v. Gulf & Ship Island R., Col*., 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 fn. 8.

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

Petitioner to forfeit the substantive right to raise this bar is in and of itself a violation of due process. *People v. McGee* 1 Cal.2d 611 (1934).

Moreover this issue is one civilized society has deemed fundamental as demonstrated by the long history reflecting its finality as well as the fact that no other jurisdiction has approved such a criminal statute "revival." The above notions of fair play that underpin 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.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated this 28th day of May, 2002

Respectfully submitted,

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APPENDIX A

Court of Appeal, First District, Division 5, California.

Marion Reynolds STOGNER, Petitioner,
v.
The SUPERIOR COURT of Contra Costa County,
Respondent;
The People, Real Party in Interest.

No. A094828.

Nov. 21, 2001.
Certified for Partial Publication. [FN*]

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, parts II, III and IV of this opinion are not certified for publication.

Review Denied Feb. 27, 2002.

Defendant demurred to indictment charging her with two counts of a lewd act upon a child committed 25 to 43 years earlier. The Superior Court, County of Contra Costa, No. 010398-6, Laurel Lindenbaum, J., overruled defendant's demurrer, allowing case to proceed to trial. Defendant sought relief. On alternative writ of mandate, the Court of Appeal, Simons, J., held that the statute providing a one year period for prosecution of child molestation charges following a report by a victim who had reached adulthood creates an exception to, and is not controlled by, statute that would bar prosecution by limiting time for prosecution of crime for which the statute of limitations expired before January 1, 1985.

Affirmed.

****39*1231** William W. Veale, Contra Costa County Alternate Defender, RobertoNájera, Contra Costa County Deputy Alternate Defender, Counsel for Petitioner.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Stan M. Helfman, Christopher J. Wei, Deputy Attorneys General, Counsel for Real Party in Interest.

SIMONS, J.

In this proceeding, we revisit the question whether petitioner Marion Reynolds Stogner may be prosecuted for child molestations allegedly committed between 1955 and 1973. In an earlier decision, we concluded that prosecution was not barred by ex post facto or due process principles. (*People v. Stogner* (Oct. 14, 1999, A084772) [nonpub. opn.].) Today we determine that prosecution is not precluded as a matter of statutory interpretation.

PROCEDURAL HISTORY

In April 1998, a criminal complaint was filed charging petitioner with two counts of a lewd act upon a child (Pen.Code, [FN1] § 288, subd. (a)) committed 25 to 43 years earlier. Count one alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count two alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. The complaint acknowledged on its face that the limitations period for the ***1232** offenses had expired, but alleged that the charges could be prosecuted pursuant to section 803, subdivision (g) (hereafter § 803(g)).

FN1. All undesignated section references are to the Penal Code.

Effective January 1, 1994, section 803(g) extended the limitations period for certain sex offenses

to one year 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 **40 the age of 18. [FN2] Petitioner successfully demurred to the complaint on the ground that section 803(g) constitutes an ex post facto law, prohibited by the federal and state Constitutions. The district attorney then moved, unsuccessfully, in superior court to reinstate the complaint. On the People's appeal to this court, we reversed the trial court's order pursuant to the Supreme Court's holding in *People v. Frazer* (1999) 21 Cal.4th 737, 88 Cal.Rptr.2d 312, 982 P.2d 180, that section 803(g) is not unconstitutional as an ex post facto law. (*People v. Stogner, supra,* A084772.)

> FN2. Subdivision (f) of section 803, enacted in 1989, provides a one year period for prosecution of child molestation charges following a report by a child. Section 803(g), in contrast, covers victims who have reached adulthood.

The complaint was reinstated in superior court but subsequently dismissed on motion of the prosecutor because the prosecutor had obtained a grand jury indictment. That indictment, filed March 14, 2001, again charges petitioner with two counts of child molestation (§ 288, subd. (a)) on two separate victims, Jane Doe I and Jane Doe II, allegedly committed between 1955 and 1964 and between 1964 and 1973, respectively. Again the indictment alleges that the charges may be prosecuted pursuant to section 803(g).

Petitioner demurred to the indictment, asserting, inter alia, that section 805.5 bars application of section 803(g) to this case. Petitioner now seeks relief from the trial court's order overruling his demurrer and allowing the case to proceed to trial. We issued an alternative writ of mandate and stayed the pending trial date. By issuing an alternative writ of mandate, we "necessarily

determined that there is no adequate remedy in the ordinary course of law and that [this] case is a proper one for the exercise of our original jurisdiction. [Citations.]" (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 773, 87 Cal.Rptr. 839, 471 P.2d 487, judg. vacated on other grounds (1971) 403 U.S. 915, 91 S.Ct. 2224, 29 L.Ed.2d 692.)

DISCUSSION

I. STATUTE OF LIMITATIONS

At the time the offenses were allegedly committed (from 1955 to 1973), the statute of limitations specified a three-year period for prosecution of ***1233** most felonies, including child molestation. (Former § 800, enacted by Stats. 1872; variously amended, as relevant here, from 1880 to 1972, repealed and replaced by § 800, Stats.1984, ch. 1270, § § 1, 2, p. 4335.) Consequently, under the law then in effect, prosecution of petitioner would have been barred after 1976. [FN3]

> FN3. Effective January 1, 1981, the limitations period for a violation of section 288 was extended to five years. (Stats.1980, ch. 1307, § 2, p. 4422.) On January 1, 1982, it was extended to six years. (Stats.1981, ch. 1017,§ 1.5, p. 3926; Stats.1982, ch. 583, § 1, p. 2544.) Under the case law existing at the time, the limitations period could not constitutionally be extended once the initial period had expired. (*Sobiek v. Superior Court* (1972) 28 Cal.App.3d 846, 849-850, 106 Cal.Rptr. 516, now disapproved by *People v. Frazer, supra*, 21 Cal.4th at p. 765, 88 Cal.Rptr.2d 312, 982 P.2d 180.) Even if the extension had applied, of course, it would have been inconsequential; the limitations period would have expired as of 1979.

In 1984 the statutory scheme covering limitations

periods (§ 799 et seq.) was repealed and replaced by a new statutory scheme, which increased the limitations period for some felonies. (Stats.1984, ch. 1270, § 2, p. 4335 (the 1984 amendment).) The limitations period for child molestation, however, remained at six years from the date of commission. (§ 800.)

When the 1984 amendment was enacted, one of its provisions, former section 806, subdivision (c)(1), provided that the new **41 law was not applicable to offenses for which prosecution was already time-barred. In 1986, former section 806, subdivision (c)(1), was amended and renumbered as section 805.5. (Stats.1986, ch. 248, § 161, p. 1264.) [FN4] As the California Law Revision Commission explained, "Subdivision (c)(1) limits retroactive application that would have the effect of lengthening the statute of limitation to reflect the constitutional *ex post facto* prohibition where the statute of limitation has already run on the operative date." (Recommendation Relating to Statutes of Limitation for Felonies (Jan.1984) 17 Cal. Law Revision Com. Rep. (1984) p. 324, italics in original.) Consequently, in the present case, because the previously-set limitations period applicable to petitioner's offenses had expired in 1976 (or perhaps 1979), the statutory scheme adopted in 1984 would not have permitted prosecution of them.

> FN4. 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. [¶] (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." (Italics added.)

Effective, January 1, 1994, section 803(g) extended the limitations period beyond six years for certain sexual offenses committed against minors so long as the prosecution commenced within one year following a report to ***1234** law enforcement authorities by the victim. The crime must have involved "substantial sexual conduct," and the victim's allegation must be corroborated by independent evidence. [FN5]

> FN5. As originally enacted, section 803(g) provided in pertinent part: "Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. This subdivision shall apply only if both of the following occur: [¶] (1) The limitation period specified in Section 800 or 801 has expired. [¶] (2) the crime involved substantial sexual conduct ... and there is independent evidence that clearly and convincingly corroborates the victim's allegation...." (Stats.1993, ch. 390, § 1, p. 2226.) In 1996 the statute was amended to change, among other things, the opening phrase of section 803(g) so that it now reads: "Notwithstanding any other limitation of time described in this *chapter* ...." (Italics added.)

In 1996, after several Court of Appeal decisions had declined to apply section 803(g) retroactively to cases where the applicable statute of limitations had already expired, the Legislature amended section 803(g) to declare that "[t]his subdivision applies to a cause of

action arising *before, on, or after January 1, 1994,* the effective date of this subdivision, and if the complaint is filed within the time period specified in this subdivision, *it shall revive any cause of action barred by Section 800 or 801.*" (Stats.1996, ch. 130, § 1 (the 1996 amendment) [Assem. Bill No.2014, adding § 803(g)(3)(A)], italics added.) [FN6] As the ****42** Legislative Counsel's digest explained, the 1996 amendment makes the one-year time limitation "apply to a cause of action arising before, on, or after the effective date ..., thereby reviving and extending already expired statute of limitations periods." (Legis. Counsel's Dig., Assem. Bill No.2014 (1995-1996 Reg. Sess.)) Thus, when the Legislature amended section 803(g) in 1996, it viewed the ex post facto issue far differently from the way it had in 1984, when the predecessor to section 805.5 was enacted: revival of an expired limitations period was not considered unconstitutional.

> FN6. Before the 1996 amendment to section 803(g), the Supreme Court had granted review in five cases on the issue whether section 803(g) applied when the limitations period had already run. (*People v. Maloy* (S049313); *People v. King,* 59 Cal.Rptr.2d 669, 927 P.2d 1173 (1996); *People v. Sowers,* 51 Cal.Rptr.2d 83, 912 P.2d 534 (1996); *People v. Richard G.*, 45 Cal.Rptr.2d 206, 902 P.2d 224 (1995); *People v. Regules*, 46 Cal.Rptr.2d 749, 905 P.2d 418 (1995).) On April 24, 1997, the Supreme Court dismissed review in all those cases in light of the legislative amendment. (See *People v. Frazer, supra,* 21 Cal.4th at pp. 745-746, 88 Cal.Rptr.2d 312, 982 P.2d 180, fns. 5, 6, & 8.) The Attorney General's request for judicial notice of the orders dismissing review is unnecessary and accordingly denied.

Section 803(g) was further amended in 1997, but

the changes do not affect our analysis here. (Stats.1997, ch. 29, § 1.) It bears noting, however, that the amendment left intact the language allowing criminal charges to be filed in cases that were time-barred before 1994. (See generally *People v. Frazer, supra,* 21 Cal.4th at pp. 747-749, 88 Cal.Rptr.2d 312, 982 P.2d 180.)

***1235** The question before us is whether the Legislature's expressed intent to apply section 803(g) to offenses committed before January 1, 1994, and to "revive any cause of action barred by Section 800 or 801" operates to allow prosecution of petitioner for the offenses committed between 1955 and 1973. We conclude that it does.

We begin our analysis with *People v. Frazer,* in which the Supreme Court examined whether section 803(g) applies when the statute of limitations had expired before the effective date of section 803(g), January 1, 1994. In *Frazer,* the crimes were allegedly committed in 1984 and the statute of limitations had expired in 1990, but the parties did not dispute that section 803(g) applied. Nevertheless, the court discussed in some detail the application of the statute. We quote pertinent portions of the court's analysis: "At no point has section 803(g) restricted the amount of time that may pass between commission of the crime and commencement of the prosecution.... [¶] ... [¶][N]othing in section 803(g) provides that the crime must be committed, or that the limitations period in section 800 or 801 must expire, *after* January 1, 1994, in order for the extended one-year period to apply. The 1996 amendment left no doubt that section 803(g) applies even where the existing statute of limitations expired before January 1, 1994. [¶] ... [¶][T]he Legislature was highly familiar with the various Court of Appeal opinions filed in 1995 and 1996 that declined to apply section 803(g) where 'the previously applicable statute of

limitations had expired prior to January 1, 1994, (the effective date of Section 803(g)).' (Assem. Floor Analysis, Assem. Bill No.2014 (1995-1996 Reg. Sess.) June 21, 1996, p. 1.) The legislative record identified these Court of Appeal decisions by name and original published citation, and summarized the statutory and constitutional analysis each used to reach this conclusion. (*Id.* at pp. 1-2; Sen. Com. on Crim. Procedure,Analysis of Assem. Bill No.2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 7 9.)[¶] According to the legislative record, the primary reason for amending section 803(g) in 1996 was to repudiate these Court of Appeal decisions insofar as they had construed the statute in such a restrictive manner. The 1996 amendment sought to 'clarify,' through express 'retroactivity' and 'revival' provisions, that section 803(g) permitted charges to be filed within one year of the victim's report, even where prosecution of the crime was otherwise ****43** time-barred before January 1, 1994. (Sen. Com. on Crim. Procedure, Analysis of Assem. Bill No.2014 (1995- 1996 Reg. Sess.) June 3, 1996, pp. 5-7; Sen. Floor Analysis, Assem. Bill No.2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 2-4.)[¶] ... [¶] Thus, consistent with allegations in the complaint, section 803(g) serves as an exception to section 800 in the present case." (*People v. Frazer, supra,* 21 Cal.4th at pp. 752-753, 88 Cal.Rptr.2d 312, 982 P.2d 180, italics in original.)

The court then went on to consider the constitutionality of such a broad extension of the statute of limitations, and the court concluded that ***1236** section 803(g) is not an ex post facto law insofar as it applies to cases for which the statute of limitations had already expired. (*People v. Frazer, supra,* 21 Cal.4th at pp. 754-765, 88 Cal.Rptr.2d 312, 982 P.2d 180.)

[1] In the case before us, the statute of limitations had expired not only prior to the enactment of section

803(g) but even prior to the enactment of the entire chapter (ch. 2, tit.3, pt. 2) of the Penal Code in which section 803(g) sits. Petitioner argues that section 803(g) cannot be applied to him because section 805.5, subdivision (c)(1), makes the entire chapter inapplicable to crimes for which the statute of limitations expired before January 1, 1985. We must decide whether, properly interpreted, section 803(g) is an exception to section 805.5 or governed by it.

[2][3][4] In construing section 803(g), we are guided by familiar rules of statutory interpretation. "The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] ... Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" (*In re Luke W.* (2001) 88 Cal.App.4th 650, 655, 105 Cal.Rptr.2d 905.)

The opening phrase in section 803(g) seems designed to make it an exception to other provisions in the same chapter, including section 805.5: "Notwithstanding any other limitation of time described in this chapter ...." (§ 803(g)(1).) Petitioner, however, argues that the opening phrase of section 803(g) does not refer to section 805.5, because the latter does not describe a limitations period; it merely addresses the

applicability and operative date of the chapter. We decline to make such a fine distinction. Section 805.5, subdivision (c)(1), states that, as to offenses for which prosecution is time-barred by the limitations periods applicable before January 1, 1985, the previous limitations periods apply. (See fn. 4, *ante*.) Section 803(g), in turn, sets a one-year-from-date-of-report limitations period, "notwithstanding any other limitation of time." On its face, then, section 803(g) creates an exception to other limitations periods, even those limitations periods referred to in section 805.5 that had expired before January 1, 1985.

[5][6][7] Even if petitioner's interpretation of the initial clause in section 803(g) is reasonable, we believe that the Legislature intended to eliminate all constraints on the effect of section 803(g), except those contained in that ***1237** subdivision. Section 803 (g) ****44** was obviously designed to preclude child molesters from escaping punishment merely because the molestation was revealed after the victim became an adult and after the limitations period had elapsed. Certainly the Legislature was aware that children who are the victims of sex crimes often cannot recognize or effectively assert their victimization until they have reached adulthood. Moreover, victims of sex crimes may be more likely to delay reporting because they are afraid of reprisals or fearful that they will not be believed. The legislative purpose behind section 803(g) was to prevent sex offenders from reaping the benefits of their victim's immaturity and psychological trauma, and the legislative history plainly indicates that section 803(g) was intended to create an exception to the statutes of limitations. (See, e.g., Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) Apr. 13, 1993, pp. 2-3; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) July 13, 1993, pp. 2-3.)

[8] Furthermore, the 1996 amendment to section 803(g) was intended to maximize the impact of the statute by ensuring that the prosecution's ability to file charges is "revive[d]" regardless of the passage of time between the commission of the crime and the commencement of prosecution, as long as the charges are filed within one year of the victim's report. "Sex crimes committed against children are the most heinous of offenses. Unfortunately, many don't bring the crime to the attention [of] law enforcement until many years later, when the statute of limitations has already expired. Children become double victims--first victimized by the perpetrator and again by the judicial system. This measure will *guarantee* them their day in court." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill. No.2014 (1995-1996 Reg. Sess.) Apr. 9, 1996, p. 1 [according to the author], italics added.)

[9] The Legislature intended to override the Court of Appeal decisions that had refused to apply section 803(g) retroactively to crimes for which the statute of limitations had expired. (*People v. Frazer, supra,* 21 Cal.4th at pp. 752-753, 88 Cal.Rptr.2d 312, 982 P.2d 180.) There is no hint in the legislative history that less than complete retroactivity was intended, so long as charges were filed within one year of the victim's report. Yet petitioner's interpretation of sections 803(g) and 805.5 would accomplish a significant constraint. We reject it.

We recognize that in *Lynch v. Superior Court* (1995) 33 Cal.App.4th 1223, 1228, 39 Cal.Rptr.2d 414, disapproved on the ex post facto issue in *People v. Frazer, supra,* 21 Cal.4th at page 765, 88 Cal.Rptr.2d 312, 982 P.2d 180, the court took a contrary view and concluded that section 805.5, subdivision (c)(1), makes section 803(g) inapplicable to crimes for which the statute of limitations had expired as of January 1, 1985. However, the court's discussion was cursory and did not

***1238** address the precise points presented in the briefing before us. Furthermore, as the Supreme Court noted in *Frazer,* the Legislature's primary reason for amending section 803 (g) in 1996 was to repudiate certain Court of Appeal decisions that had declined to apply the statute retroactively. (*People v. Frazer, supra,* at p. 753, 88 Cal.Rptr.2d 312, 982 P.2d 180.) Among those decisions identified by the Legislature was *Lynch v. Superior Court, supra,* 33 Cal.App.4th 1223, 39 Cal.Rptr.2d 414, which was described as holding "that application of Section 803(g) ... violated constitutional ex post facto principles, and is prohibited as a matter of statutory construction in light of Penal Code Section 805.5...." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill No.2014 (1995-1996 Reg. Sess.) Apr. 9, 1996, p. 2.) The language of the 1996 amendment to section 803(g), added as a ****45** response to and a repudiation of *Lynch,* providing that the subdivision applies even to offenses committed before January 1, 1994, and that the subdivision "shall revive any cause of action barred by Section 800 or 801" (§ 803(g)(3)(A)), could not be more explicit in reflecting the Legislature's intent to override the existing limitations periods for those offenses for which prosecution is time-barred.

In light of the evident legislative purpose, we construe the beginning phrase of section 803(g)--"[n]otwithstanding any other limitation of time described in this chapter"--to reflect an intent to supersede section 805.5 insofar as it affects limitations periods. Although we are cognizant of the principle that statutes should be read in harmony with each other whenever possible, we cannot accept petitioner's argument that section 803(g) should be read as subordinate to section 805.5. In our view, section 803(g) creates an exception to section 805.5 and is not controlled by it.

Finally, interpreting the relationship between sections 803(g) and 805.5 as petitioner suggests would

serve no apparent legislative purpose. As noted above, when originally enacted as part of a package of statutes, section 805.5 served the Legislature's goal of avoiding a conflict with the ex post facto clause by precluding prosecution of any offense for which the statutory period had run. With the enactment of section 803(g), however, the Legislature's goal changed, and section 805.5 played no role in the efforts to extend the limitations periods and revive molestation charges that would otherwise be time-barred. [FN7]

> FN7. The operative date of section 805.5 is January 1, 1985. When enacted, section 805.5 applied to a chapter that did not include section 803(g). Given the specificity of section 805.5 regarding its operative date, we read it as applying to the chapter enacted in conjunction with it and not to subsequent legislation.

In any event, even under petitioner's view that section 805.5 governs the application of section 803(g), section 805.5 would not affect all prosecutions ***1239** equally. Section 805.5 would bar prosecution of any molestation that was already time-barred as of January 1, 1985, i.e., one that was committed prior to January 1, 1979, more than six years before the chapter's operative date. But section 805.5 would have no effect on offenses committedafter January 1, 1979; the charges would be revived by section 803(g). Thus, under petitioner's interpretation, a complaint filed in 1994, after section 803(g) took effect, could have properly charged an offense committed in 1979, a then 15 year old offense, but not one committed in 1978. [FN8] A complaint filed in 2001 could likewise charge a molestation which occurred in 1979, now 22 years after the fact. In 2009, a 30 year old offense could be prosecuted. Petitioner's interpretation of section 805.5 would impose a limitations period based simply on the date of the occurrence of the offense--a factor unrelated

to the traditional reasons for limitations periods.

> FN8. This is true because a three-year statute of limitations applied to molestation offenses committed in 1978 and 1979. That period was lengthened to five years, effective January 1, 1981, and six years, effective January 1, 1982. (See fn. 3, *ante*.) The 1978 offense was, therefore, time-barred before the effective date of section 805.5, while the 1979 offense was not.

In crafting an appropriate length of a limitations period, the Legislature balances competing interests. On the one hand, a statute of limitations protects an accused from the consequences of charges grown stale with age: unreliable memories, dead or missing witnesses, and lost or contaminated physical evidence. (Recommendation Relating to Statutes of Limitation for Felonies (Jan.1984) 17 Cal. Law Revision Com. Rep., *supra,* p. 308.) At ****46** the same time, the Legislature also considers the nature and seriousness of the offense. [FN9] Section 803(g) reflects a reasonable legislative concern for certain crimes where delayed reporting is common and serves to revive otherwise time-barred charges for a brief period after the victim's report is made. We can discern no logical reason why the Legislature would retain a limitations period based not on the age of the offense, but on its date of occurrence. We do not believe the Legislature intended this result, and we refuse to impose it. [FN10]

> FN9. Some offenses may be prosecuted at any time without regard to a limitations period. (§ 799.) Other offenses must be prosecuted within the prescribed limitations period, but the limitations period does not commence to run until the offense was discovered. (§ 803, subds.(c) & (e).)

FN10. In light of our conclusion, we summarily reject petitioner's argument that section 803(g) revives only causes of action "barred by Section 800 or 801" and that this language must refer only to the version of sections 800 and 801 in effect when section 803(g) took effect (Jan. 1, 1994), not the version that had been repealed when the predecessor to section 805.5 took effect (Jan. 1, 1985). This argument presumes that section 805.5, subdivision (c)(1), controls, but we have rejected that premise. In any event, the language of section 803(g) upon which petitioner relies seems to have been included in the statute solely to clarify that the one-year-from-date-of-report limitations period extends the time for prosecution and does not cut short the longer periods provided in sections 800 and 801.

We recognize, of course, that the effect of our holding today is to make possible the prosecution of offenses reaching far back in time. We observe, ***1240** however, that the express requirement in section 803(g) for a greater quantum of evidence provides some protection against the erosion of memories and evidence caused by the passage of time.

II.-IV. [FN**]

FN** See footnote *, *ante*.

DISPOSITION

The alternative writ is discharged, the stay is lifted, and the petition is denied.

We concur: JONES, P.J. and STEVENS, J.

APPENDIX B

Court of Appeal, First Appellate District, Division Five – No. A094828
S103297

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARION REYNOLDS STOGNER, Petitioner,

v.

SUPERIOR COURT OF CONTRA COSTA COUNTY, Respondent;

THE PEOPLE, Real Party in Interest

Petition for review DENIED.

Supreme Court
FILED
February 27, 2002
Frederick K. Olrich, Clerk
Deputy

GEORGE
Chief Justice

APPENDIX C

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF CONTRA COSTA
DELTA JUDICIAL DISTRICT

THE PEOPLE OF THE STATE CALIFORNIA,	NO. 110032-0 OF DA NO. X 98 000097-6

VS.

COMPLAINT – FELONY

MARION REYNOLDS STOGNER, DEFENDANT./	01) PC 288(a) 02) PC 288(a)

The undersigned states, on information and belief, that MARION REYNOLDS STOGNER, Defendant, did commit a felony, to wit:

Violation of PENAL CODE SECTION 288(a) (LEWD AND LASCIVIOUS ACT UPON CHILD), committed as follows, to wit:

On or about January 1, 1955 through September 30, 1964, at Antioch, in Contra Costa County, the Defendant, MARION REYNOLDS STOGNER, did willfully, unlawfully, lewdly and feloniously commit a lewd and lascivious act upon and with the body of Jane DOE I, who was a child under the age of fourteen years, with the intent to arouse, appeal to and gratify the lust, passion and sexual desires of Jane DOE I and of the Defendant, MARION REYNOLDS STOGNER.

STATUTE OF LIMITATION (PC 803)

It is further alleged, that the crime alleged in Count One above, can be prosecuted pursuant to Penal Code section 803(g), in that:

On February 19, 1998, Jane Doe I reported to a law enforcement agency that she, while under the age of 18 years, was the victim of sexual crimes as specified in Penal Code section 803(g), to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, oral copulation;

There is independent evidence that clearly and convincingly corroborates the allegations in Count One, to wit, the statement of another victim (Jane DOE II) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count Two, below.

COUNT TWO:

The undersigned further states, on information and belief, that MARION REYNOLDS STOGNER, Defendant, did commit a felony, to wit:

Violation of PENAL CODE SECTION 288(a) (LEWD AND LASCIVIOUS ACT UPON CHILD), committed as follows, to wit:

On or about January 1, 1967 through September 27, 1973, at Antioch, in Contra Costa County, the Defendant, MARION REYNOLDS STOGNER, did willfully, unlawfully,

lewdly and feloniously commit a lewd and lascivious act upon and with the body of Jane DOE II, who was a child under the age of fourteen years, with the intent to arouse, appeal to and gratify the lust, passion and sexual desires of Jane DOE II and of the Defendant, MARION REYNOLDS STOGNER.

STATUTE OF LIMINATIONS (PC 803)

It is further alleged, that the crime alleged in Count One above, can be prosecuted pursuant to Penal Code section 803(g), in that:

On February 19, 1998, Jane Doe II reported to a law enforcement agency that she, while under the age of 18 years, was the victim of sexual crimes as specified in Penal Code section 803(g), to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, oral copulation;

There is independent evidence that clearly and convincingly corroborates the allegations in Count One, to wit, the statement of another victim (Jane DOE II) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count One, above.

COMPLAINANT REQUESTS THAT DEFENDANT(S) BE DEALT WITH ACCORDING TO LAW. I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: April 17, 1998 AT MARTINEZ, CALIFORNIA

_____
C. FORSYTH

COMPLAINANT

_____
BRIAN S. BAKER/dh
DEPUTY DISTRICT ATTORNEY
CONTRA COSTA COUNTY SHERIFF

APPENDIX D

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Appellant A084772

v.

MARION REYNOLDS STOGNER,
Defendant and Respondent. (Contra Costa County Super. Ct. No. 9816224)

The sole question raised in this People's appeal is whether the Legislature's effort to revive the prosecution of certain sex offenses for which the limitations period has already expired (Pen. Code,§ 803, subd. (g)) is unconstitutional as an ex post facto law. In accordance with the recent decision in People v. Frazer (1999) 21 Cal.4th 737, we reverse the trial court's order denying the prosecution's motion to reinstate the complaint.

PROCEDURAL HISTORY

In April 1998, a criminal complaint was filed charging defendant with two counts of a lewd act upon a child (Pen. Code, § 288, subd. (a)) committed 25 to 43 years earlier. Count I alleged lewd conduct upon Jane Doe I between January 1, 1955, and September 30, 1964. Count II alleged lewd conduct upon Jane Doe II between January 1, 1967, and September 27, 1973. The complaint acknowledged on its face that the limitations period for the offenses had expired, but the complaint alleged that the charges could be prosecuted pursuant to Penal Code section 803, subdivision (g) (hereafter section 803(g)).

Section 803(g), enacted in 1994, extends the limitations period for certain sex offenses to one year following a report to a law enforcement agency by a person of any age that he or she has been the victim of "substantial" sexual misconduct while under the age of 18.25 Defendant demurred to the complaint on the ground that section 803(g) constitutes an ex post facto law prohibited by the federal and state Constitutions. After the magistrate sustained the demurrer, the district attorney moved in superior court to reinstate the complaint. The motion was denied, and the People now appeal from the order denying that motion.

DISCUSSION

Our Supreme Court has rejected the argument that section 803(g) constitutes an impermissible ex post facto law. In the court's words: "Statutes regulating the time at which a future criminal prosecution may be filed do not implicate the manner in which criminal conduct is defined and punished at the time it occurs—the sole concern of the ex post facto clause." (People f. Frazer, supra, 21 Cal.4th at p. 763.) Moreover, the court further concluded that section 803(g) is not unconstitutional in the abstract as a violation of substantive or

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[25] Section 803(g) presently provides in pertinent part as follows: "(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. [¶] (2) This subdivision applies only if both the following occur: [¶] (A) The limitation period specified in Section 800 or 801 has expired. [¶] (B) The crime involved substantial sexual conduct...and there is independent evidence that clearly and convincingly corroborates the victim's allegation.....(3)(A) This subdivision applies to a cause of action arising before, on, or after January 1, 1994,...and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs:...(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision."

procedural due process principles under the federal and state Constitutions. (21 Cal.4th at pp. 765-775.)

Because we are bound by that ruling, we are compelled to reverse the trial court's order.[26] We observe, however, that the Supreme Court in Frazer left open the possibility of a due process claim in an appropriate case. The courts have long recognized that unreasonable delay between the time the offense is committed and an accusatory pleading is filed may violate a defendant's rights to a fair trial and due process of law under the federal and state Constitutions. (People v. Morris (1988) 46 Cal.3d 1, disapproved on other grounds in In re Sassounian (1995) 9 Cal.4th 535, 543, fn. 5, & 545, fn. 6, & cases cited in Morris at p. 37.) The Frazer court concluded that a determination of unconstitutional preaccusation delay can be made only upon consideration of the particular circumstances in an individual case. (Frazer, supra, 21, Cal.4th at pp. 774-775.) The case before it having arisen on demurrer, the court found the defendant's claim not ripe for adjudication and declined to decide whether the 12-year lapse between the alleged commission of the offense and the filing of the criminal complaint violated the defendant's procedural due process rights. (Id. At p. 775.)

In the present case, too, defendant's constitutional claim was addressed below on demurrer, and we have no information about the particular circumstances of the case. Whether precomplaint delay is unjustified and prejudicial is a question of fact for the trial court. (People v. Dunn-Gonzalez (1996) 47 Cal.App.4th 899, 911-912.) Accordingly, we will leave it to the trial court to examine in an appropriate proceeding the reasons for the 25-to-43-year delay and the resulting damage to defendant's ability to refute the charges.

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[26] In his respondent's brief on appeal, defendant raises for the first time a new constitutional argument that section 803(g) violates the separation of powers doctrine. Because that issue was not raised either by defendant below or by the People on appeal, we decline to address the issue.

DISPOSITION

The order denying the motion to reinstate the complaint is reversed.

_____
Jones, P.J.

We concur:

_____
Haning, J.

_____
Stevens, J.

A084772

APPENDIX E

Supreme Court of the United States

Marion Reynolds STOGNER, petitioner,
v.
CALIFORNIA.

No. 99-8895.

Oct. 2, 2000.

Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

APPENDIX F

GARY T. YANCEY, District Attorney
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Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THECOUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA,	No. DA NO. X 98 000097-6
v.	INDICTMENT
MARION REYNOLDS STOGNER, DEFENDANT./	PC 288(a) PC 288(a)

The Grand Jury of the County of Contra Costa hereby accuses
MARION REYNOLDS STOGNER, defendant, of the crime of a felony, a violation of PENAL CODE SECTION 288 (LEWD ACT UPON CHILD UNDER AGE 14), committed as follows:

On or about January 1, 1955 through September 30, 1964, at Antioch, in Contra Costa County, the Defendant, MARION REYNOLDS STOGNER, did willfully, lewdly, and unlawfully commit a lewd and lascivious act upon and with the body of Jane Doe I, a child who was under the age of fourteen

years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the Defendant and Jane Doe I.

JURISDICTIONAL ALLEGATION
STATUTE OF LIMITATIONS
MINOR SEXUAL ASSAULT CRIME

It is further alleged, that the crime alleged in Count One above, can be prosecuted pursuant to Penal Code section 803(g), in that:

On February 19, 1998, Jane Doe I reported to a law enforcement Agency that she, while under the age of 14 years, was the victim of sexual crimes as specified in Penal Code Section as specified in Penal Code Section 803(g) to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, oral copulation and vaginal penetration;

There is independent evidence that clearly and convincingly corroborates the allegations in Count One, to wit, the statement of another victim (Jane Doe II) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count Two below.

COUNT TWO:

The Grand Jury of the County of Contra Costa further accuses MARION REYNOLDS STOGNER, Defendant, of the crime of felony, a Violation of PENAL CODE SECTION 288 (LEWD ACT UPON CHILD UNDER AGE 14), committed as follows:

On or about January 1, 1964 through September 27, 1973, at Antioch, in Contra Costa County, the Defendant,

MARION REYNOLDS STOGNER, did willfully, lewdly, and unlawfully commit a lewd and lascivious act upon and with the body of Jane Done II, a child who was under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the Defendant and Jane Doe II.

JURISDICTIONAL ALLEGATION
STATUTE OF LIMITATIONS
MINOR SEXUAL ASSAULT CRIME

It is further alleged, that the crime alleged in Count Two above, can be prosecuted pursuant to Penal Code Section 803(g), in that:

On February 18, 1998, Jane Doe II reported to a law enforcement agency that she, while under the age of 14 years, was the victim of sexual crimes as specified in Penal Code Section 803(g), to wit, 288;

The limitation period specified in Sections 800 and 801 has expired as to the charged crime;

The crime involved substantial sexual conduct as defined in Section 1203.066(b), to wit, sodomy, vaginal penetration, and oral copulation;

There is independent evidence that clearly and convincingly corroborates the allegations in Count Two, to wit, the statement of another victim (Jane Doe I) alleging that she is a victim of similar crimes perpetrated by defendant as alleged in Count One, above.

GARY T. YANCEY
District Attorney

Dated: 3/13/01

JOHN C. COPE

at Martinez, California — Deputy District Attorney

* * * * *

A TRUE BILL

Dated: 3/13/01

_____

at Martinez, California — Foreman of the Grand Jury of the County of Contra Costa, State of California

* * * * *

Names of witnesses examined before the Grand Jury on finding the foregoing indictment:

1) MARGARET VAUGHN
2) CONNIE KILDARE
3) DETECTIVE CHRIS FORSYTH

APPENDIX G

SUPERIOR COURT OF CALIFORNIA,
MARTINEZ

DA: WILSTED CRIMINAL DEPT CALENDAR
PO: ANDERSSON 04/19//2001 8:30
04/16/2001

JUDGE L. LINDENBAUM DEPARTMENT 031
16:16

CLERK CHERTKOW/MOYER
REPORTER: D. EASTRIDGE

NBR---DEFENDANT---CASE/DEFN---ROC---
ATTORNEY-TIME

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034 STOGNER, MARION REYNOLDS 010398-6 01
MOTION 1:30

DOB: 06/13/1928 CHARGES: +PC 288(a)
DEMUR-RENEWED/TB

CUSTODIAL STATUS: OR

SET 05/01/01

APPENDIX H

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5

MARION REYNOLDS STOGNER,
Petitioner,

v.

THE SUPERIOR COURT
OF CONTRA COSTA COUNTY
Respondent;
THE PEOPLE,
Real Party in Interest

A094828
Contra Costa County No. 0103986

BY THE COURT:

The petition for rehearing is denied.

Date: December 17, 2001 JONES, P.J. P.J.