NO. 01-1757

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

MARION R. STOGNER, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the California Supreme Court properly find that the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the previously-applicable statute of limitations, does not violate the Ex Post Facto Clause?

2. Did the California Supreme Court properly find that the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the statute of limitations, did not violate the Due Process Clause?

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OPINION BELOW

The opinion of the California Court of Appeal was filed on November 21, 2001. The appellate court rejected petitioner's ex post facto and due process arguments in the unpublished portion of the opinion, all of which is attached to the petition as Appendix A. The California Supreme Court's order denying review was filed on February 27, 2002. It is attached to the petition as Appendix B.

JURISDICTION

The decision of the California Supreme Court as to which petitioner seeks review was filed on February 27, 2002. The petition for writ of certiorari appears to have been timely filed on May 28, 2002, within 90 days of that decision. (Sup. Ct. Rule 13.3.)

This Court has jurisdiction under 28 U.S.C. §

1257(a).

CONSTITUTION AND STATUTES

United States Constitution, Article I, Section 10, Clause 1:

> "No state shall . . . pass any . . . ex post facto Law . . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

California Penal Code section 803(g).

STATEMENT OF THE CASE

In April 1998, petitioner was charged with two counts of committing lewd or lascivious conduct with a child under the age of 14 years in violation of California Penal Code section 288(a). Count One alleged lewd conduct against Jane Doe I between January 1, 1955 and September 30, 1964. Count two alleged lewd conduct against Jane Doe II between January 1, 1967 and September 27, 1973. Because the normally applicable statute of limitations had expired, the prosecution was commenced pursuant to Penal Code section 803(g), which provides that a complaint alleging the commission of a specified sex offense against a child may be filed within one year of the time the victim reports the crime to a law enforcement agency, provided the act involved substantial sexual conduct and there is independent evidence that clearly and convincingly corroborates the victim's allegation. (Pet. App. C.)

Petitioner demurred on the ground the statute of

limitations had expired and Penal Code section 803(g) violated the ex post facto provisions of the state and federal constitutions. The Superior Court granted the demurrer. The prosecution appealed and on October 14, 1999, the appellate court reversed the lower court's order denying the motion to reinstate the complaint. The Court held that it was bound by the California Supreme Court's decision in *People* v. *Frazer*, 21 Cal.4th 737, 763 (1999) which held that section 803(g) does not violate ex post facto. (Pet. App. D.)

Petitioner filed a petition for writ of certiorari in this Court, alleging that *Frazer* was wrongly decided. This Court denied that petition on October 2, 2000. (Pet. App. E.)

The complaint was reinstated but subsequently dismissed on motion of the prosecutor when he filed an indictment on March 14, 2001. The indictment charged petitioner with the same crimes as before and commenced the prosecution pursuant to Penal Code section 803(g). (Pet. App. A at 35; Pet. App. F.)

Petitioner demurred to the indictment. The trial court overruled the demurrer, and petitioner sought review in the state court of appeal. Citing *People v. Stogner*, 21 Cal.4th 737. That court held, in an unpublished portion of its opinion, that retroactive application of Penal Code section 803(g) does not violate ex post facto principles or deny a defendant due process of law. (Resp. App. A.)[1] The California Supreme Court denied review. (Pet. App. B.)

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[1]Respondent's Appendix A is a *complete* copy of the opinion of the First District Court of Appeal, Division Five. The copy of the opinion referenced as Petitioner's Appendix A contains the published portions of the opinion but does not contain the unpublished portions, including those pertaining to the ex post facto and due process claims which he now places before this Court.

REASONS FOR DENYING THE WRIT
ARGUMENT

I.

THE CALIFORNIA SUPREME COURT PROPERLY INTERPRETED *COLLINS V. YOUNGBLOOD,* 497 U.S. 37 (1990) TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE EX POST FACTO PRINCIPLES

Petitioner argued below that retroactive application of an extended statute of limitations, so as to revive an expired cause of action in a criminal case, violates the federal Ex Post Facto Clause. In *People v. Frazer*, 21 Cal. 4th 737 (1999), the California Supreme Court held otherwise, finding the claim meritless under the formula prescribed in *Collins v. Youngblood*, 497 U.S. 37 (1990) for determining when penal legislation triggers ex post facto protection. *Frazer*, 21 Cal.4th at 754-65.[2] The court of appeal in the instant case relied upon *Frazer* to reject petitioner's claim; the California Supreme Court summarily denied review. (Pet. App. A & B.)

Petitioner asserts that section 803(g) violates the federal proscription against ex post facto laws articulated in *Calder v. Bull*, 3 U.S. 386 (1798). (Pet. at 13-22.) Respondent respectfully disagrees.

The ex post facto clause prohibits four categories of laws, first articulated by Justice Chase in 1798: (1) a law that makes criminal and punishes an action done before the passing of the law that was innocent when done; (2) a law that aggravates a crime or makes it greater than it was when it was committed; (3) a law that changes the punishment for a crime and inflicts greater punishment than provided at the time of commission, and (4) a law that alters the legal rules of

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[2]The defendant in *Frazer* filed a petition for writ of certiorari. The State opposed. On May 15, 2000, this Court denied the petition. (99-1193)

evidence and receives less or different testimony than the law required at the time of commission of the offense in order to convict the offender. *Calder v. Bull*, 3 U.S. at 390. A review of each of these categories shows that petitioner's ex post facto challenge is unfounded.

A. *Calder* Category One [1]

Petitioner seems to argue that California Penal Code section 803(g)'s retroactive revival of the statute of limitations violates the ex post facto clause because it eliminates a defense--the opportunity to plead the previously expired limitations period as a bar to his prosecution. (Pet. at 13.) Pleading an expired limitations period is a defense in the general sense it is a defensive measure. However, as a bar to prosecution, it is distinguishable from a pure defense which defeats one or more of the elements of the crime. Only statutes withdrawing defenses related to the elements of the definition of the crime, or to matters which a defendant might plead as justification or excuse are prohibited by the ex post facto clause. *Collins v*. *Youngblood*, 497 U.S. 37, 50 (1990).

In *Youngblood*, this Court addressed a sex offender's claim that a new statute permitting an appellate court to reform an otherwise improper verdict, rather than requiring a new trial, could not be applied retroactively. The Court of Appeals had held he was entitled to relief, relying on

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[1]In his petition for writ of prohibition filed in the state court of appeal below, petitioner argued that section 803(g) violated the first, third and fourth prongs of the Ex Post Facto Clause but did not assert a challenge based on the second prong of the Ex Post Facto Clause. (Pet. App. C at 22-34.) He did not assert a challenge based on the second prong of the Ex Post Facto Clause in his petition for review either but asserts it here for the first time. (Pet. App. D at 30-40.)

Thompson v. Utah, 170 U.S. 343 (1898) in which this Court had held that procedural statutes cannot be retroactively applied unless they "'leave untouched all the substantial protections with which existing law surrounds the person accused of crime.'" *Id.* at 352, *quoted in Youngblood*, 497 U.S. at 40.

In reversing the Court of Appeals, this Court endorsed its earlier formulation of the law in *Calder v. Bull*, 3 U.S. 386, and *Beazell v. Ohio*, 269 U.S. 167 (1925), as "faithful to our best knowledge of the original understanding" of the Ex Post Facto Clause. *Youngblood*, 497 U.S. at 43.

In *Youngblood*, this Court overruled two prior decisions that misconstrued the scope of the ex post facto clause. In *Kring v. Missouri*, 107 U.S. 221 (1883), the Court had stated that the *Calder* list was non-exclusive, and it defined an ex post facto law to include, also, one that "in relation to the offence or its consequences, alters the situation of a party to his disadvantage." In *Thompson v. Utah*, 170 U.S. 343, the Court had stated that a law was ex post facto if, after commission of the crime, it deprived a defendant of a "substantial right involved in his liberty."

In *Kring*, the defendant had pleaded guilty to second-degree murder, pursuant to a plea agreement. After reversal of his conviction, because of an unlawful sentence, the state tried and convicted him of first-degree murder. At the time the crime was committed, Missouri law had provided that a plea of guilty to second-degree murder constituted an acquittal of first degree murder. This Court held the state's abrogation of the implied-acquittal rule after the crime was committed, but before Kring entered his plea, violated the Ex Post Facto Clause, because, in denying Kring the benefit of an implied acquittal to which he would previously have been entitled, the change in the law "altered the situation to his disadvantage." 107 U.S. at 235; *see Youngblood*, 497 U.S. at 47-49.

In *Youngblood*, the Court stated it could reconcile *Kring* with the definition of an ex post fact law it adopted if it were to say the change in state law had deprived Kring of a "defense" to which he previously had been entitled. 497 U.S. at 50. The Court explained, however, that by "defense" it

means something linked to the "legal definition of the offense." *Id.* Thus, for example, "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done." *Id.* at 49. The Court continued,

> The "defense" available to Kring under earlier Missouri law was not one related to the definition of the 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. . . . The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party of his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution.

Id. at 50. Accordingly, the Court expressly overruled *Kring*. *Id.*

In *Thompson v. Utah*, 170 U.S. 343, the defendant was initially convicted by a 12-person jury. A new trial was granted, but, in the meantime, Utah's law had changed, and Thompson was tried by an eight-person jury. The Court had reversed the conviction because retrial by a smaller panel had "materially alter[ed] the situation to Thompson's disadvantage." *Id.* at 352-53. The Court in *Youngblood* expressly overruled *Thompson* as well, stating that, while the right to a jury trial "is obviously a `substantial' one, . . . it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause." *Youngblood*, 497 U.S. at 50-52.

As an example of a case in which a defense could

not be denied without violating ex post facto principles, the Court in *Youngblood* cited *United States v. Hall*, 26 F.Cas. 84 (D. Pa. 1809). There, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo. As a legal excuse, the defendant argued a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo. *Youngblood*, 497 U.S. at 49. The Court explained,

> [A]ccording to the law in effect at the time Hall forfeited the cargo, an "unavoidable accident" was an affirmative defense to a charge of failing to deliver cargo. . . . [A] subsequent law imposing an additional requirement for the affirmative defense—
>
> —that the vessel or cargo actually *be lost at sea* as a result of the unavoidable accident—
>
> —would deprive Hall of a defense of his actions available at the time he sold the cargo and thus be an invalid ex post facto law.
>
> This analysis is consistent with the *Beazell* framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done. . . .

Id., original emphasis.

Applying *Youngblood* to this case, revival of the limitations period neither withdraws a defense related to the definition of the crime nor abolishes an affirmative defense of justification or excuse. Plainly, revival of the limitations period does not withdraw a defense related to the crime of committing lewd or lascivious acts with a child under 14. However, petitioner alleges that the statute of limitations

operates as a form of legislatively enacted excuse. (Pet. at 13.) Unlike justification or excuse, the statute of limitations does not put into issue the existence of any of the essential elements constituting the defendant's guilt of the charged offense. Rather, by pleading the statute of limitations, a defendant "simply asserts that by virtue of an extrinsic condition, not relating to the commission of the offense, but recognizing its commission, namely a statute of repose or limitation, he is not now subject to punishment for the crime which he admits having committed." *Osborn v. State*, 194 P.2d 176, 182 (Okla. 1948).

Thus, the California Supreme Court properly interpreted *Youngblood* to find petitioner's prosecution does not violate ex post facto principles.

B. *Calder* Category Three

Petitioner further asserts that the revival of the limitations period increases the punishment for a criminal act after the act was committed because the state may now punish him, whereas previously he could not be punished. (Pet. at 20.) Rather than looking at the Ex Post Facto Clause prohibitions as discreet considerations, petitioner appears to graft the "defense" prong onto the "punishment" prong. The defense prong, however, has no place in an analysis of the punishment prong. As to the latter, the proper question is simply whether the punishment *upon conviction* of the charged crimes is greater than that proscribed for those crimes at the time they were committed.

One of the primary purposes of the Ex Post Facto Clause is to prevent unforeseeable punishment. At the time the charged acts were alleged to have taken place, the punishment for the crime with which petitioner was charged was a term of one year to life (Stats. 1937, ch. 545, § 1). Hence, if petitioner is convicted, his punishment may not be greater or more burdensome than that which he reasonably should have foreseen at the time he committed the acts. Thus, if petitioner's punishment is not greater than a term of one year to life for each conviction, there will be no ex post

facto violation. At this time, however, petitioner's claim is premature.

C. *Calder* Category Four

Shortly after the state Supreme Court decided *Frazer,* this Court issued a decision in *Carmell v. Texas*, 529 U.S. 513 (2000), clarifying the scope of the Ex Post Facto Clause. This Court reiterated that, in addition to the three categories of laws principally discussed in *Youngblood*, the ex post facto clause also prohibits retroactive laws that alter the legal rules of evidence, and receive less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. In *Carmell* this Court explained, *Youngblood* had not "cast out th[is] fourth category," which had been articulated by Justice Chase in *Calder*. *Carmell, supra*, 529 U.S. at 537. Rather, *Youngblood* "eliminated a doctrinal hitch that had developed in [the] cases, which purported to define the scope of the Clause along an axis distinguishing between laws involving 'substantial protections' and those that are merely 'procedural,'" and it "held that it was a mistake to stray *beyond Calder's* four categories, not that the fourth category was itself mistaken." *Carmell, supra*, 529 U.S. at 539, original emphasis.

Significantly, while *Carmell* reinforced the continued viability of the fourth prong of the ex post facto clause, it did nothing to undermine the integrity of the discussion in *Youngblood* as it related to the other three prongs — and principally the "defense" prong — of the ex post facto clause. *Youngblood* remains a clear and unambiguous statement of the law as to the scope of the "defense" prong of the ex post facto clause, and the California Supreme Court properly articulated and applied that law in *Frazer*.

Petitioner argues that revival of the statute of limitations violates the fourth prong of the Ex Post Facto Clause. (Pet. at 20-22.) However, revival of the statute of limitations in petitioner's case did not alter the amount or

kind of evidence necessary to establish his guilt.

In *Carmell,* this Court examined a Texas statute that was amended to authorize conviction of certain sexual offenses based on a victim's testimony alone, whereas previously the law required both the victim's testimony and corroborating evidence. The amended statute was relied upon to convict the defendant of some sexual offenses on the victim's testimony alone, even though the offenses had been committed before the amendment's effective date. *Id.* at 530-31. The Texas statute fell squarely within the fourth *Calder* category because it "changed the quantum of evidence necessary to sustain a conviction." *Id*. at 530.

In contrast, Penal Code section 803(g) merely addresses when the state may prosecute certain criminal charges. It does not alter the elements of these offenses, or their punishment, or the amount or type of evidence required in order to convict the offender. *See Calder*, 3 U.S. (3 Dall.) at 390 (opn. of Chase, J.) Indeed, unlike an ex post facto law, in which "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" (*Carmell*, 529 U. S. at 533), Penal Code section 803(g) actually *increases* the procedural burdens on the government. Before a prosecution brought under section 803(g) can proceed, the government must show the offenses involved "substantial sexual conduct" and must produce "independent evidence that clearly and convincingly corroborates the victim's allegation." Cal. Pen. Code § 803(g)(2)(B).

In sum, petitioner's prosecution under section 803(g) does not violate the ex post facto clause and petitioner's claim (Pet. at 21) that this Court's analysis in *Carmell* undermines the legitimacy of *Frazer* is unavailing.[1]

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[1]Petitioner alleges certiorari is necessary to resolve "federal issues on which there are conflicts among federal and state courts" and then lists citations in a footnote. Pet. at 4, n. 3. However, these cases support the California Supreme Court's construction of *Youngblood*. *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992) [Court of Appeals rejected defendants' claim that extending the statute of limitations

I.I

THE CALIFORNIA SUPREME COURT PROPERLY APPLIED DECISIONS OF THIS COURT TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE DUE PROCESS PRINCIPLES

Petitioner argued below that retroactive application of California Penal Code section 803(g), so as to revive an expired cause of action, is prohibited by the federal Due Process Clause. In *People v. Frazer*, 21 Cal. 4th 737, the California Supreme Court rejected an identical substantive due process challenge, and it found the defendant's procedural due process claim not ripe for adjudication. *Frazer*, 21 Cal.4th at 765-75.

Petitioner argues legislative revival of a time-barred criminal action is fundamentally unfair. (Pet. at 22-30.) Respondent disagrees. Moreover, the California Supreme

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prior to its expiration violated the Ex Post Facto Clause]; *United States v. Brechtel*, 997 F.2d 1108, 1113 & n. 13 (5th Cir. 1993) [same]; *Christmas v. State*, 700 So.2d 262, 267-68 (Miss. 1997) [same]; *People v. District Court*, 834 P.2d 181, 200 (1992) [change in death penalty law was found to be ameliorative and did not provide a basis for an ex post facto challenge]; *United States v. Morgan*, 845 F.Supp. 934, 943 (D. Conn.1994) [extension of statute of limitations did not violate the Ex Post Facto Clause]; and *State v. Crawley*, 96 Ohio App.3d 149, 155 (1994) [retroactive application of a judicial decision did not violate the Ex Post Facto Clause]. Petitioner's reference to *State v. Cookman*, 324 Ore. 19, 920 P.2d 1086 (1996), also by footnote without any analysis, similarly fails to demonstrate a basis for certiorari. Pet. at 4, n. 4. In that case, the state supreme court held the revival of an expired cause of action violated the state Ex Post Facto Clause, which it interpreted as giving different protection than its federal counterpart.

Court's decision in *Frazer* does not conflict with decisions of this Court and requires no resolution by this Court.

The Due Process Clause is the source of three different kinds of constitutional protection. First, "it incorporates specific protections defined in the Bill of Rights . . . . Second, it contains a substantive component, sometimes referred to as `substantive due process,' which bars certain arbitrary government actions regardless of the procedures used to implement them. Third, it is a guarantee of fair procedure, sometimes referred to as `procedural due process,' which applies whenever the state seeks to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 337 (1986).

This Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115 (1992); *Albright v. Oliver*, 510 U.S. 266, 272 (1994). When a particular constitutional amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of `substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. at 813, *quoting Graham v. Connor*, 490 U.S. 386, 395 (1989).

This principle is applicable in the instant case. The Framers of the Constitution considered the matter of retroactive changes in the law, and they drafted the Ex Post Facto Clause of Article I, section 10, of the United States Constitution, to address it. That clause, which declares that "[n]o bill of attainder or ex post facto law shall be passed," provides an "explicit textual source of constitutional protection" against retroactive legislative changes in criminal law, and it is not to be supplemented through the device of "substantive due process." *See People v. Frazer*, 21 Cal. 4th at 772 n.31.

Moreover, this Court consistently has exhibited a

reluctance to use the Due Process Clause to interfere with a state's ability to control its criminal procedure. *See Medina v. California*, 505 U.S. 437, 445-46 (1992); *Spencer v. Texas*, 385 U.S. 554 (1967); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In *Dowling v. United States*, 493 U.S. 342 (1990), the Court declared that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Id.* at 352. Accordingly, the Court explained, it had defined very narrowly the category of infractions that violate the "fundamental fairness" component of the Due Process Clause. *Id.* Quoting *United States v. Lovasco*, 431 U.S. at 790, the Court stated that an action will be considered fundamentally unfair if it "violates those `fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define `the community sense of fair play and decency.'" *Dowling v. United States*, 493 U.S. at 353, citations omitted.

In *Medina v. California*, 505 U.S. 437, the Court articulated the proper analytical framework for determining the validity of a state criminal procedure under the Due Process Clause. First, a court looks to "historical practice," which is "probative of whether a procedural rule can be characterized as fundamental." *Id.* at 446, *citing Patterson v. New York*, 432 U.S. 197, 202 (1977). In *Medina*, the Court's historical analysis demonstrated reliance on the common law and on caselaw through the turn of this century. *Id.*; *see also Herrera v. Collins*, 506 U.S. 390 (1993). Contemporary practice, the Court noted, is "of limited relevance to the due process inquiry." *Medina v. California*, 505 U.S. at 447.

At common law, there was no limitation of time for prosecuting a crime. 21 Am.Jur.2d, Criminal Law, § 223, at 408. Then, as now, in the absence of a statutory limitation, a prosecution could be brought at any time following the commission of an offense. *See* 1 Wharton's Criminal Law, § 92, at 628 (15th ed. 1993); Black, *Statutes of Limitation and the Ex Post Facto Clause*, 26 Kentucky L.J. 41 (1937). By Blackstone's time, however, statutes of limitations were

common in criminal actions and could be pleaded in bar to a prosecution brought outside the period provided. *See* The American Students' Blackstone at 1007 (Chase's Blackstone 1884).

Sometime prior to 1881, "Mr. Bishop in his treatise on Statutory Crimes, section 266" suggested that "a criminal statute of limitations simply withholds from the courts jurisdiction over the offence after the specified period, and it is competent for the legislature to revive the old jurisdiction or create a new one, when the prosecution may proceed." *Moore v. State*, 43 N.J.L. 203, 213 (E & A 1881). To respondent's knowledge, it was not until 1860 that a court in this country first held a statute of limitations could not operate to revive offenses that were barred at the time of its enactment. *State v. Sneed*, 25 Tex. Supp. at 67; *see* 21 Am.Jur.2d, Criminal Law, § 224, at 411 and n.48, *citing Moore v. State*, 43 N.J.L. 203; *People v. Buckner*, 281 Ill. 340, 117 N.E. 1023 (1917), and *People ex rel. Reibman v. Warden of County Jail*, 242 App. Div. 282, 275 N.Y.S. 59 (1934).

Since that case in 1860, however, few cases have actually *held* that the revival of a prosecution after the expiration of a statute of limitations is prohibited by the constitution. Rather, by far the majority of cases have involved the extension of a statute of limitations, and any discussion about the revival of a prosecution was merely dicta.[2] Thus, it has only been relatively recently that courts

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[2]A number of these decisions explain the distinction between the extension of a statute of limitations and the revival of a right of prosecution after the expiration of a statute of limitations in terms of "vested right," that is, that the running of the statutory period "vests" in the criminal an indefeasible right not to be prosecuted——a sort of de facto grant of immunity. The best example of this view, and the apparent source for it, is the majority opinion in *Moore v. State*, 43 N.J.L. 203, which includes an extensive discussion of "vested rights" with reference to the

Due Process Clause. The majority, reasoning by analogy to "civil causes," in which the running of a statute of limitations has the effect of vesting title to property, concluded that "every reason which has pressed courts to ascribe finality to the limitation of civil remedies, when once it has attached, impels this court to predicate the same conclusiveness of the bar against criminal prosecutions." *Id.* at 212.

In dissent in *Moore*, Judge Van Sykel rebutted the majority's vested rights analysis and the analogy on which it rested. 43 N.J.L. at 229-56. Just as Judge Van Sykel's dissent from the majority's ex post facto holding anticipated the Supreme Court's opinion on the scope of that prohibition in *Collins v. Youngblood*, 497 U.S. 37, the principles he applied to test the majority's "vested rights" theory were consistent with those later set forth by the Supreme Court in *Albright v. Oliver*, 510 U.S. 266, and *Medina v. California*, 505 U.S. 437, to resolve due process claims. 43 N.J.L. at 240-55. For example, he explained,

> No one, I think, will assert that the preservation and continuation [of the right to assert the statute of limitations as a bar to prosecution] is comparable in importance to the state or to its citizens with the right of trial by jury, the privilege of the writ of *habeas corpus*, the exemption from cruel punishments and illegal searches, or the right of freedom from a second trial after acquittal. Yet, each and all of these vested rights, if not entrenched in the organic law, but arising only by statute, it cannot be doubted, might be swept away at the legislative will. They are beyond the reach of hostile legislation, not because they are vested rights, but for the reason that they are rights guaranteed by a law which is higher than the law-maker.

> Something more, then, must be done than to conclude that the defendant had by the lapse of the limitation a vested right to immunity, to justify the court in interposing between the law and the prisoner who has violated it; it must be shown that the vested right has a basis in the constitution itself, either by expression or by clear implication. Not only is there an entire absence of any such sanction for it, but the most diligent search which I have been able to give the subject has failed to find even a suggestion, by any text-writer, or in any judicial opinion, that the doctrine of vested rights has any existence in the law; except in its application to property.
>
> It may be that the right of the defendant, prior to the passage of the act of 1879, to set up the statute of limitations, is of such importance that it ought to have been unassailable, but the framers of our constitution having failed to put this restriction upon the legislature, the courts cannot do it, without in effect assuming to amend the constitution, to make it conform with judicial ideas of what ought to be.
>
> . . . . . .
>
> Adapting [Justice Chase's argument in *Calder* v. *Bull* [3 U.S. (3 Dall.) 386, that the ex post facto prohibition does not apply to contracts] to the present contention, it may with equal force be asked, why was the ex post facto clause engrafted upon the constitution, if the rights which the

have held a state may not revive a right of prosecution after the expiration of a statute of limitations, and those courts have been few in number. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

Moreover, the courts that have held the revival of a prosecution was unconstitutional did so by finding a violation of the Ex Post Facto Clause, not the Due Process Clause. Likewise, those cases that gratuitously remarked upon the constitutionality of the revival of a right of prosecution after the expiration of a limitations period based their comments upon the Ex Post Facto Clause. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

There is, thus, no settled, long-standing tradition with respect to the revival of a right of prosecution after the expiration of a statute of limitations. Hence, "historical practice" does not provide a basis for finding that the shelter provided by a statute of limitations is a fundamental right, so that a legislature is prohibited, as a matter of due process of law, from amending it to restore a state's right to prosecute a criminal defendant.

If, however, there is no historical basis for concluding the state procedure violates due process, *Medina v. California*, 505 U.S. 437, requires a court to make a second inquiry. Here, the court inquires "whether the rule transgresses any recognized principle of fundamental fairness in operation." *Id.* at 448, *citing Dowling v. United States*, 493 U.S. at 352.

The most well-known expression of the statement

> criminal may at any time have under existing laws, were deemed to be vested rights entitled to the same protection accorded to vested rights of property?
>
> It is obvious that it was never supposed that such a principle could be invoked to support immunity for crime.

43 N.J.L. at 250-51.

that reviving an expired cause of action is fundamentally unfair is Judge Learned Hand's statement in *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928). It is important, however, to read that statement carefully.

In *Falter*, the defendants argued the extension of a statute of limitations, prior to the expiration of the statute, constituted an ex post facto law. 23 F.2d at 425. Judge Hand rejected their claim, explaining,

> Perhaps they would be right, if the earlier statute had once run in their favor. But the period had not run, and the argument is, and must be, that any change after the commission of the crime, and while the time is running, is within the constitutional prohibition. . . .
>
> In *Mallett v. North Carolina*, 181 U.S. 589 [] (1901), it was held that the allowance of an appeal to the prosecution was constitutional, and *Beazell v. Ohio*, 269 U.S. 167 [], laid it down generally that the question was one of degree and depended upon whether the result was "harsh and oppressive." Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the sta[t]e forgives it.

Falter v. United States, 23 F.2d at 425-26.

First, it is important to recognize the victims in *Falter* were not sexually abused children who, by their very nature, differ from the victims of other crimes. Moreover, it is significant that Judge Hand's comment was made in the context of an ex post facto analysis. It was the Ex Post Facto Clause, and not the Due Process Clause, that was alleged by the *Falter* defendants to have been violated by the amendment to the statute of limitations, 23 F.2d at 425, and it was to that allegation that Judge Hand responded. Indeed, both cases he cited, *Mallett* and *Beazell*, involved claims based on the Ex Post Facto Clause; neither made mention of the Due Process Clause. Additionally, the phrase "harsh and oppressive," which Judge Hand quoted from *Beazell*, did not support his subsequent statement that reviving a prosecution was "unfair and dishonest." In *Beazell*, the Supreme Court had stated that "laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive . . . ." 269 U.S. at 170. It is for that reason that laws in violation of the Ex Post Facto Clause are proscribed by the Constitution. As discussed previously, however, a law reviving an expired prosecution does not fall within that category.

Judge Hand's statement about the unfairness of reviving a prosecution has been accepted by subsequent courts with little or no analysis or question. But it is not a sufficient basis upon which to find the application of Penal Code section 803(g), to revive a prosecution "transgresses any recognized principle of fundamental fairness in operation." *Medina v. California*, 505 U.S. at 448.

Fairness, as guaranteed by due process, "is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." *Snyder v. Massachusetts*, 291 U.S. at 116. Given the unique nature of child molestation cases, retroactive application of California Penal Code section 803(g) does not, *as a matter of law*, violate fundamental fairness. As the state court recognized,

in a particular case, retroactive application of the statute may offend due process if the defendant is able to make a factual showing sufficient to prove retroactive application affects the accuracy or fairness of a determination of his guilt or that it obviates or avoids procedures that are necessary for preventing miscarriages of justice. *People v. Frazer*, 21 Cal. 4th at 773-75, *discussing United States v. Lovasco*, 431 U.S. at 796. That question, however, is not presented in this case. *See People v. Frazer*, 21 Cal. 4th at 775.[3] *People v. Frazer*, 21

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[3]Citing *William Danzer & Co. v. Gulf & S.I.R.., Co.*, 268 U.S. 633 (1925), petitioner asserts that a criminal statute of limitations creates a substantive right (in contrast to a remedy, or procedural right, which was at issue in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945)) and that retroactive legislation which extinguishes that right violates federal due process. (Pet. at 29, n. 25.) While *Danzer* and its progeny "analyzed the constitutionality of retroactive time bar statutes by drawing the substance versus procedure distinction, a more recent line of Supreme Court cases commands [the courts] to employ a different analysis." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1075 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), *discussing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), and *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). The recent cases "together stand for the proposition that the Due Process Clause of the Fifth Amendment allows retroactive application of either federal or state statutes as long as the statute serves a legitimate legislative purpose that is furthered by rational means." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d at 1076. Accordingly,

> . . . [T]he analysis used by the Court in *Danzer*, *Chase*, and *Campbell* is outdated and no longer valid for purposes of analyzing the

> constitutionality of retroactive legislation. The relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means.

Id.; *Wesley Theological Seminary v. United State Gypsum Co.*, 876 F.2d 119, 122 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). Thus, petitioner's reliance on *Danzer* is misplaced.

Moreover, in rejecting defendant Frazer's substantive due process claim, the California Supreme Court found that Penal Code section 803(g) serves a rational purpose. The Court explained,

> Of course, substantive due process principles preclude arbitrary and capricious legislation even where no fundamental right or liberty interest is at stake. Contrary to what defendant claims, section 803(g) is not unconstitutional under this deferential standard insofar as the statute "revives" previously time-barred prosecutions. Indeed, as the legislative history suggests, the statute is based on the assumption that past and future sex crimes against children, even though subject to corroboration by independent evidence, would otherwise go unpunished given the difficulty young victims experience remembering and reporting such events, and their emotional vulnerability at the hands of adult perpetrators, including those in positions of trust. The means chosen

Cal. 4th at 773. Thus, retroactive application of Penal Code section 803(g) does not violate due process.

> by the Legislature—
> —allowing prosecution within one year of the official report, inserting express retroactivity and revival provisions, and requiring independent corroboration—
> —seem particularly well suited to addressing the serious concerns underlying section 803(g).

CONCLUSION

For the foregoing reasons, respondent respectfully urges this Court to deny the petition for writ of certiorari

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Respectfully submitted,

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