No. 01-1757

In The
Supreme Court of the United States

MARION REYNOLDS STOGNER,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of California, First Appellate District

BRIEF FOR THE RESPONDENT

BILL LOCKYER, Attorney General
MANUEL M. MEDEIROS, Solicitor General
ROBERT R. ANDERSON, Chief Assistant Attorney General
W. SCOTT THORPE, Special Assistant Attorney General
KELLY E. LEBEL, Deputy Attorney General
JANET GAARD, Special Assistant Attorney General,
Counsel of Record
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5284
Fax: (916) 322-2630

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does a California statute that retroactively changes the statute of limitations, so as to revive a previously-expired cause of action in a criminal case, on its face, violate the *Ex Post Facto* Clause?

2. Does a California statute that retroactively changes the statute of limitations, so as to revive a previously-expired cause of action in a criminal case, on its face, violate the Due Process Clause?

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STATEMENT OF THE CASE

A. Statutory Background

The California Penal Code generally provides that the prosecution of an alleged child molester must be commenced within a fixed number of years after the crime was committed. Cal. Pen. Code §§ 800, 801. In 1994, the California Legislature enacted California Penal Code section 803(g), thereby adding an exception to the statutory scheme.

Section 803(g) provides that, notwithstanding the normally-applicable statute of limitations, a complaint alleging the commission of a specified sex offense against a child may be filed within one year of the date the victim reports the crime to a California law enforcement agency if certain conditions are met. First, the crime must have involved substantial sexual conduct, which is defined to mean vaginal penetration or rectal penetration by a penis or a foreign object, oral copulation, or mutual masturbation. Cal. Pen. Code §§ 803(g)(2)(B), 1203.066(b). Second, charges may be filed only if there is "independent evidence that clearly and convincingly corroborates the victim's allegation." Cal. Pen. Code § 803(g)(2)(B). "No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial," and "[i]ndependent evidence does not include the opinions of mental health professionals." *Id*.

Following the enactment of section 803(g), several state court of appeal decisions held that it could not be applied to cases in which the normally-applicable statute of limitations had expired prior to January 1, 1994, the effective date of the provision. Some of these courts held the Legislature had not intended section 803(g) to be

applied retroactively; others opined it would violate *ex post facto* principles. Still other courts found no statutory or constitutional bar to applying the statute retroactively. *See People v. Frazer*, 21 Cal. 4th 737, 745-46 & nn.5-8, 982 P.2d 180 (1999) (discussing history of the provision), *cert. denied*, 529 U.S. 1108 (2000).

In 1996, the California Legislature responded to those courts that were reluctant to apply the statute retroactively. By nearly unanimous vote, the Legislature amended section 803(g) to expressly state its intention that the law be applied retroactively. The amendment also made explicit the Legislature's intent to revive previously-expired causes of action if the requirements of section 803(g) were met. *See People v. Frazer*, 21 Cal. 4th at 746-47; *see also infra* notes 6 and 7 and accompanying text.

Three years later, in *People v. Frazer*, 21 Cal. 4th 737, the California Supreme Court addressed the questions of whether retroactive application of section 803(g), on its face, violated the *Ex Post Facto* Clause or the Due Process Clause of the United States Constitution or the California Constitution. That Court held that retroactive application of the statute was not barred as a matter of either federal or state constitutional law. A retroactive change in the statute of limitations, the court found, does not fall within one of the four proscribed categories of laws that violates *ex post facto* principles. The expiration of a statute of limitations also confers no fundamental right, and, because California Penal Code section 803(g) is well-suited to addressing the serious concerns that prompted the statute, it does not violate substantive due process. The defendant's protection from the prejudicial loss of evidence, if any, the court held, would come from procedural due

process guarantees.[1] This Court declined to review that decision. 529 U.S. 1108.

B. Factual and Procedural Background

In 1998, during the course of an investigation of petitioner's son, who was suspected of sexually abusing his stepdaughter, the police interviewed petitioner's daughter. She said she was not surprised by the allegation, because that brother had molested her as a child. She also reported, for the first time, that her father, the petitioner, had molested her as a child. The investigation led the police to petitioner's other daughter, who also reported, for the first time, that petitioner had molested her as a child. The victims reported that petitioner had subjected them to acts of oral copulation, sodomy, intercourse, and digital penetration. (Contra Costa County Indictment No. 010398-6, Reporter's Transcript (hereafter RT) 36-116.)

Within three months of the victims' reports, the State of California charged petitioner with two counts of lewd or lascivious conduct with a child under the age of 14 years, in violation of California Penal Code section 288(a). (RT 37.) The first count alleged petitioner molested his older daughter between January 1, 1955 and September 30, 1964; the second count alleged he molested his younger

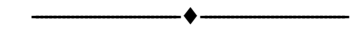
[1] Subsequently, the California Supreme Court held that a second amendment to the statute, enacted in 1997, to permit the refiling of previously-dismissed cases under narrowly-defined circumstances, Cal. Pen. Code, § 803(g)(3)(B), in some instances violates the separation of powers clause of the California Constitution. *People v. Bunn*, 27 Cal. 4th 1, 37 P.3d 380 (2002); *People v. King*, 27 Cal. 4th 29, 37 P.3d 398 (2002). That provision is not in issue in this case.

daughter between January 1, 1967 and September 27, 1973. Because the normally-applicable statute of limitations had expired, the prosecution was commenced pursuant to California Penal Code section 803(g). (J.App. A at 1-4.)

Petitioner demurred, arguing that retroactive application of section 803(g) violates the *ex post facto* provisions of the state and federal constitutions. The trial court sustained the demurrer, and the People appealed. (J.App. B at 5-6.) The California Court of Appeal reversed, holding it was bound by the California Supreme Court's decision in *People v. Frazer*, 21 Cal. 4th 737. (J.App. B. at 6-8.) After the California Supreme Court denied discretionary review, petitioner filed a petition for writ of certiorari in this Court, alleging that *Frazer* was wrongly decided. This Court denied the petition. *Stogner v. California*, 99-8895.

The complaint was reinstated, but it subsequently was dismissed on the People's motion because the prosecutor had obtained a grand jury indictment. (J.App. G at 21.) The indictment, filed in March 2001, charged petitioner with the same crimes as charged in the complaint, and it alleged the prosecution was commenced pursuant to California Penal Code section 803(g). (J.App. D.)

Petitioner demurred to the indictment. The trial court overruled the demurrer (J.App. E), and petitioner sought review in the California Court of Appeal. In an unpublished portion of its opinion, that court, again, held that it was bound by *Frazer*, and it denied petitioner's claim. (J.App. F.) The court denied petitioner's motion for rehearing, and the California Supreme Court denied review. (J.App. H, I.)



SUMMARY OF THE ARGUMENT

California Penal Code section 803(g) retroactively changes – and effectively extends – the statute of limitations applicable to specified acts of child molestation. This sensible piece of legislation, designed to address a serious societal problem, violates neither the *Ex Post Facto* Clause nor the Fourteenth Amendment Due Process Clause of the United States Constitution.

1. The *Ex Post Facto* Clause was adopted in response to egregious acts of political retribution in common law England. As explained by Justice Chase in *Calder v. Bull*, 3 Dall. 386 (1798), its purpose was to protect against four specified categories of laws. Over the ensuing two centuries, this Court has repeatedly affirmed the four *Calder* categories as the exclusive definition of the *Ex Post Facto* Clause's protections. The retroactive extension of a statute of limitations does not fall within any of those categories.

A law comes under the first *Calder* category when it declares to be a crime conduct that was not prohibited at the time it was committed. Such a law, which can operate by changing the legal definition or elements of existing offenses, punishes a citizen for conduct he had no reason to believe was prohibited. A statute of limitations does not fit within this category because it has no bearing on the definition of the offense as established by the elements of the crime. By pleading the statute of limitations, a defendant simply asserts that, by virtue of an extrinsic condition unrelated to the commission of the offense, he cannot be prosecuted for the crime. It bears absolutely no relation to guilt or innocence, which is the concern of the first *Calder* category. Petitioner seeks to overcome this reasoning by arguing that, as a matter of California law, the

statute of limitations is an element of criminal offenses. To the contrary, the California Supreme Court recently and definitively held it is not.

Petitioner also relies on *Collins v. Youngblood*, 497 U.S. 27 (1990), where this Court explained that a law may violate the first *Calder* category if it deprives a person charged with a crime of a defense available at the time the act was committed. The Court made clear in *Collins*, however, that the *Ex Post Facto* Clause is not violated any time a State withdraws a defense or alters the situation of the defendant to his or her disadvantage. Rather, the Court reaffirmed that the types of defenses covered by the first *Calder* category are those that would change the definition or elements of the charged crime or involve an excuse or justification for the underlying conduct. A statute of limitations, though a defensive measure, is unrelated to the definition of a crime or its elements. It is unlike true defenses, such as self-defense or heat of passion, which transform what would have been a criminal act into something that is not criminal or is of a lesser criminal nature.

Nor does section 803(g) fall within the remaining *Calder* categories. The second and third categories prohibit laws that affect punishment, either by creating a punishment or by making an existing punishment more severe. A change in the statute of limitations, standing alone, simply has no bearing on how a crime will be punished.

The fourth *Calder* category prohibits laws that alter the legal rules of evidence and receive less, or different, testimony than the law required at the time the crime was committed, in order to convict the offender. A change in the statute of limitations does none of those things. It merely

regulates the time at which a crime, defined and punished elsewhere, may be charged. Even if applied retroactively, such a change does nothing to alter the State's evidentiary burden to prove the defendant's guilt by establishing beyond a reasonable doubt all the elements of the charged crimes as they existed when the crime was committed. The quantum and kind of proof required to establish the defendant's guilt, and all questions that may be considered by the trier of fact in determining guilt or innocence remain the same. In *Carmell v. Texas*, 529 U.S. 513 (2000), this Court explained that the fourth category is a mirror image of the first category. And just as section 803(g) does not fall within the first category, it also does not fall within the fourth category.

A holding that section 803(g) violates the *Ex Post Facto* Clause would not serve any of the clause's purposes. First, individuals quite obviously do not rely on statutes of limitations when they commit crimes. Second, no showing has been made that the California Legislature vindictively targeted petitioner or a class of defendants when it enacted section 803(g). Third, and finally, the provision does not implicate constitutional fairness concerns. Statutes of limitations are a form of legislative grace based on "necessity and convenience," whose "operation does not discriminate between the just and the unjust claim." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). By retroactively extending the limitations period, California has provided a heightened degree of justice to both the accused and accuser.

2. A retroactive change in the statute of limitations, then, does not violate any of the four *Calder* categories, and so is not proscribed by the *Ex Post Facto* Clause. That clause provides the explicit textual source of constitutional

protection against retroactive changes in the law. Accordingly, the *Ex Post Facto* Clause, and not the more generalized notion of substantive due process, must be the guide for assessing petitioner's claim. *See Albright v. Oliver*, 510 U.S. 266 (1994). Independent scrutiny of that claim under the Due Process Clause is foreclosed.

Even if petitioner's claim were separately analyzed under this Court's substantive due process jurisprudence, it would fail. The expiration of a statute of limitations confers no fundamental right or liberty interest; it is simply a public policy about the privilege to litigate. An inviolate right to repose after the statute of limitations has expired, such that a previously-existing cause of action cannot be revived, is not deeply imbedded in our Nation's history and tradition. And although a change in the statute of limitations may affect settled expectations, it is not so implicit in the concept of ordered liberty that neither liberty nor justice would exist if it were permitted. Hence, it does not deny a defendant due process of law unless there is not a rational basis for the law.

California Penal Code section 803(g) was enacted in response to two significant concerns identified by the California Legislature: the need to convict and punish those who sexually abuse children; and the need to prevent the victimization of more children. Section 803(g), which extends the statute of limitations in specified circumstances, is narrowly drawn to effectuate the significant purposes it was designed to serve. The statute, on its face, does not violate the Due Process Clause.

Instead, a defendant may find protection in the procedural component of the Due Process Clause. If he believes he has been prejudiced by a change in the statute

of limitations, he may challenge the prosecution by making a factual showing that the change affects the accuracy or fairness of a determination of his guilt. Any procedural due process claim petitioner may have, however, is not ripe for adjudication.

ARGUMENT

I. A RETROACTIVE CHANGE IN THE STATUTE OF LIMITATIONS THAT REVIVES A PREVIOUSLY-EXPIRED CAUSE OF ACTION IN A CRIMINAL CASE DOES NOT, ON ITS FACE, VIOLATE THE *EX POST FACTO* CLAUSE

Article I, section 10, of the United States Constitution expressly prohibits the states from enacting *ex post facto* laws. This prohibition derives from English common law, well known to the Framers, which drew heavily upon the authoritative exposition of Richard Wooddeson, one of the great scholars of the common law. *Carmell v. Texas*, 529 U.S. 513, 521-22 (2000); *Calder v. Bull*, 3 Dall. 386, 391 (1798). Wooddeson classified *ex post facto* laws by dividing them into three general categories: those respecting the crimes themselves; those respecting the legal rules of evidence; and those affecting punishment, either by creating a punishment or by making an existing punishment more severe. 2 R. Wooddeson, A Systematical View of the Laws of England 621, 624-40 (1742) (Lecture 41) (hereinafter Wooddeson); *Carmell*, 529 U.S. at 523 & n.11.

The proscription stems from the excesses of colonial rulers in using retrospective legislation as a means of political warfare and retribution. *Calder v. Bull,* 3 Dall. at 388-89. It serves "to assure that legislative Acts give fair

warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). It also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.* at 29; *see also Miller v. Florida*, 482 U.S. 423, 429-30 (1987) (citing *Calder,* 3 Dall. at 389). "The latter purpose has much to do with the separation of powers; like its textual and conceptual neighbor the Bill of Attainder Clause, the *Ex Post Facto* Clause aims to ensure that legislatures do not meddle with the judiciary's task of adjudicating guilt and innocence in individual cases." *Carmell v. Texas*, 529 U.S. at 566 (Ginsburg, J., dissenting) (citing *Weaver*, 450 U.S. at 29 n.10). And, by protecting against legislative abuses, the Clause serves "fundamental justice." *Carmell,* 529 U.S. at 531 n.21.

Shortly after the Constitution was ratified, in *Calder v. Bull*, Justice Chase catalogued the types of criminal laws that implicate the core concern of the *Ex Post Facto* Clause:

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

3 Dall. at 390. This formulation "correlated precisely" to Wooddeson's categories, *Carmell v. Texas*, 529 U.S. at 523,

and it has repeatedly been endorsed by this Court as the "exclusive definition of *ex post facto* laws," *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Fletcher v. Peck*, 6 Cranch 87, 138 (1810)); *see Carmell*, 529 U.S. at 537-39.

Petitioner asserts that a retroactive change in the statute of limitations violates all four *Calder* categories. (Pet. Br. 6-31.) *Amici curiae* in support of petitioner claim it transgresses the first and fourth categories. (NACDL Br. 5-15.) To the contrary, a change in the statute of limitations, even if applied retroactively so as to revive a previously-expired cause of action, does not fit within any of the four *Calder* categories of proscribed *ex post facto* laws. Nor would barring a retroactive change in the statute of limitations serve any of the purposes of the *Ex Post Facto* Clause.

A. A Retroactive Change in the Statute of Limitations Does Not Violate the First *Calder* Category

The first *Calder* category addresses the universally condemned action by the government of criminalizing conduct that was innocent when done. A retroactive change in the statute of limitations, even if applied so as to revive a previously-expired cause of action, does not do that. Instead, the statute of limitations simply acts as a bar to prosecution, without regard to guilt or innocence.

1. The First *Calder* Category Covers Only Laws That Make Illegal An Act That Was Legal When Committed

According to Blackstone, a law is *ex post facto* when "after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime." 1 W. Blackstone, Commentaries 46, *quoted in Collins v. Youngblood,* 497 U.S. at 44; *Calder,* 3 Dall. at 396 (Paterson, J.). "Here it is impossible, that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it; and all punishment for not abstaining, must, of consequence be cruel and unjust." 1 W. Blackstone, Commentaries 46, *quoted in Calder*, 3 Dall. at 396 (Paterson, J.); Chafee, Three Human Rights in the Constitution of 1787, at 96 (1956). This historical reference was discussed by the Framers during debates on the *Ex Post Facto* Clause, and it was deemed an authoritative source of the technical meaning of the term in *Calder*. *Collins v. Youngblood,* 497 U.S. at 44 (citing *Calder*, 3 Dall. at 391 (Chase, J.) and *id.* at 396 (Paterson, J.)).

Justice Chase explained that the "very nature of our free *Republican* governments" is "that no man should be compelled to do what the laws do *not* require; *nor to refrain from acts which the laws permit*." *Calder*, 3 Dall. at 388. Accordingly, it would be an abuse of power for a legislature to enact a "law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law." *Id.* A legislature may declare new crimes and establish rules of conduct for its citizens in future cases, and they may command what

is right, and prohibit what is wrong, "but they cannot change *innocence* into *guilt*." *Id.*

Justice Chase noted that the Parliament of Great Britain had exercised the power to pass *ex post facto* laws, under the denomination of bills of attainder or bills of pains and penalties. *Calder*, 3 Dall. at 389. As an example of the first category of these laws, which made innocent acts criminal, Justice Chase, like Wooddeson before him, cited the case of the Earl of Strafford in 1641. *Id*. at 389 & n.1; Wooddeson, at 629. Being forced to find a way to dispose of the Earl, Charles I, by bill of attainder, assembled blunders and misdemeanors into a package called "accumulative treason," and then sent the Earl to his death. Wooddeson, at 629-33; *see* Chafee, Three Human Rights in the Constitution of 1787 at 109-13. This law, said Justice Chase, declared acts to be treason "which were *not* treason, when committed," *Calder,* 3 Dall. at 388, and such a law was an *ex post facto* law, in that it "*created . . . the crime* for the purpose of conviction," *id*. at 391 (emphasis added).

A modern example is provided in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), which involved a due process challenge to the judicial creation of a retroactive crime. In *Bouie*, two African-American students were convicted of criminal trespass for participating in a sit-in demonstration in the restaurant area of a store, which was reserved exclusively for whites. Although they were given no notice that the restaurant was reserved for whites when they entered, they were later informed by the police and asked to leave. They refused. In affirming their convictions, the State's high court expanded its construction of the State's criminal trespass statute to cover not only the entry onto another's property after receiving

notice not to do so, but also the act of remaining after receiving notice to leave. *Id.* at 348-49. The students claimed that by applying such a construction to affirm their convictions, the State had punished them for conduct that was not criminal at the time they committed it. *Id.* at 349-50. This Court agreed. "If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of *ex post facto* laws would clearly invalidate the convictions." *Id.* at 362.

The first *Calder* category is concerned with "the criminal quality attributable to an act" as related to "the legal definition of the offense" at the time it occurs. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). What a legislature may not do is create a new substantive offense by altering the elements that describe the criminal act itself so as to create a crime where there was none before. California did not do so when it enacted Penal Code section 803(g).

2. Retroactive Changes in Statutes of Limitations Do Not Make Illegal Conduct That Was Legal When Committed

a. Under California Law, A Statute of Limitations is Not An Element of the Offense

Petitioner attempts to bring his case within this definition by casting the statute of limitations as an element of a criminal offense under California law. (Pet. Br. i, 13-15, 23-24.) The California Supreme Court, the final arbiter of state law, has said it is not. In that court's words, "the statute of limitations is not an 'element' of the offense insofar as the 'definition' of criminal conduct is

concerned." *People v. Frazer*, 21 Cal. 4th at 760 n.22; *see also People v. Crosby*, 58 Cal. 2d 713, 723-24, 375 P.2d 839 (1962) (quoting *People v. McGill,* 10 Cal. App. 2d 155, 159, 51 P.2d 433 (1935)).

Indeed, if the filing of criminal charges within the statute of limitations were an element of the crime, a defendant could be found guilty only if the prosecution established that fact by proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 361-62 (1970). Under California law, however, while the prosecution has the burden of proving that a prosecution was initiated within the statutory period, it need do so only by a preponderance of the evidence. *People v. Zamora,* 18 Cal. 3d 538, 565 n.27, 557 P.2d 75 (1976).

That statutes of limitations are not elements of offenses under California law is hardly surprising. A statute of limitations "operates to preclude the imposition of criminal liability on defendants, notwithstanding a showing that they committed criminal acts." *United States v. Scott*, 437 U.S. 82, 111 (1978) (Brennan, J. dissenting). It is a "nonexculpatory defense," which "bars conviction of an offender even though he may be entirely culpable." 2 Robinson, Criminal Law Defenses, Nonexculpatory Defenses, § 202(b), at 465 (1984), *quoted in People v. Frazer*, 21 Cal. 4th at 758 n.20. By pleading the statute of limitations, a defendant simply asserts that by virtue of an extrinsic condition, which is unrelated to the commission of the offense, he is not subject to prosecution for the crime. And as this Court has explained, "a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word." *Scott*, 437 U.S. at 98 n.11.

Accordingly, this Court has long observed that statutes of limitations are not an element of criminal offenses. *United States v. Cook,* 84 U.S. 168, 181 (1872); *see also Toussie v. United States,* 397 U.S. 112, 115 (1970); *Pendergast v. United States*, 317 U.S. 412, 418 (1943).

The crimes with which petitioner is charged are set forth in California Penal Code section 288. As the California Supreme Court has explained, "[S]ection 288 was enacted in 1901, and the elements defining criminal conduct under what is now subdivision (a) have remained the same for decades. The crime has long involved any touching of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." *People v. Frazer*, 21 Cal. 4th at 758-59 (quotation marks and citations omitted). At no time during the charged period was the touching of an underage child with the intent of arousing the sexual desires of the actor or the child an innocent act, and nothing in California Penal Code section 803(g) changes that. This simply is not a case in which an action "indifferent in itself," 1 W. Blackstone, Commentaries 46, was only later declared to be a crime.

It is true that in California statutes of limitations are, in many respects, jurisdictional in nature and may therefore be raised by defendants for the first time on appeal. *See People v. Williams*, 21 Cal. 4th 335, 337-38, 981 P.2d 42 (1999) (reaffirming general rule that defendant does not waive the statute of limitations by failing to raise it before trial court); *Cowan v. Superior Court*, 14 Cal. 4th 367, 370, 926 P.2d 438 (1996) (permitting defendant to "expressly waive the statute of limitations when . . . the waiver is for his benefit"). But that is utterly beside the point. Statutes of limitations are no more elements of

crimes than are facts bearing on venue, personal jurisdiction, and subject matter jurisdiction – which are not elements of crimes in California or, to our knowledge, in any jurisdiction in the United States. For this reason, the California Supreme Court observed in *People v. Frazer* that "the manner in which California courts have characterized criminal statutes of limitations outside the *ex post facto* context" is not relevant to whether "the statute of limitations is an 'element' of the offense insofar as the 'definition' of criminal conduct is concerned." 21 Cal. 4th at 760 n.22.

b. A Statute of Limitations Is Not the Type of Affirmative Defense That Implicates the First *Calder* Category

In *Collins v. Youngblood*, 497 U.S. 37, this Court explained that the *Ex Post Facto* Clause may be violated if the state "deprives one charged with crime of any defense available according to law at the time when the act was committed." *Id*. at 42 (quoting *Beazell v. Ohio.,* 269 U.S. at 170). The Court made clear, however, that the withdrawal of affirmative defenses does not constitute a discrete, additional category of prohibited *ex post facto* laws. Rather, the rule regarding defenses is "linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.'" *Collins,* at 50 (quoting *Beazell,* at 169-70). As to the former, the Court specified the breadth of the prohibition: a defense may not retroactively be withdrawn if that would change the definition or elements of the charged crime or if the defense involves an excuse or justification for the underlying conduct. *Collins,*

at 50. A statute of limitations is not the type of defense within the scope of that prohibition.

1. In *Collins v. Youngblood*, Youngblood was convicted in a Texas court of aggravated sexual abuse and sentenced by the jury to life in prison and a $10,000 fine. On collateral review, a state district court held that the sentence was void because Texas law did not permit the imposition of a fine in addition to imprisonment, and the Texas Court of Criminal Appeals had previously held that appellate courts lacked the authority to reform such a verdict. While the State's appeal of the state district court's decision was pending, the Texas legislature enacted a law giving appellate courts that power. Under that authority, the Texas Court of Criminal Appeals reformed Youngblood's verdict by deleting the fine, and it denied his request for a new trial. On federal habeas corpus review, the court of appeals held that retroactive application of the new Texas law violated the *Ex Post Facto* Clause. 497 U.S. at 39-40. This Court reversed.

In reaching its holding, the Court overruled two of its prior decisions, and it clarified *ex post facto* doctrine. The Court previously had ruled that whereas the *Ex Post Facto* Clause was not violated by mere "procedural" changes in the law, it was violated when the state deprived a defendant of "substantial protections with which the existing law surrounds the person accused of crime," *Duncan v. Missouri,* 152 U.S. 377, 382-83 (1894), or if it arbitrarily infringed upon "substantial personal rights," *Malloy v. South Carolina,* 237 U.S. 180, 183 (1915). In *Collins*, the Court concluded that the phrases "procedural," "substantial protections," and "personal rights" confused the inquiry. 497 U.S. at 45. The proper inquiry is simply whether the

retroactive state law falls within one of the *Calder* categories. *Id.* at 41-52. The Court therefore overruled *Thompson v. Utah,* 170 U.S. 343 (1898), which had relied on the concept of "substantial protections," and *Kring v. Missouri,* 107 U.S. 221, 228-29 (1882), which had held that any change that "alters the situation of a party to his disadvantage" violates the *Ex Post Facto* Clause. *Collins,* 497 U.S. at 37-52.

The Court's discussion of *Kring* is particularly pertinent to the present case. In *Kring*, the defendant had pleaded guilty to second-degree murder, pursuant to a plea agreement. After his conviction was reversed on appeal because of an unlawful sentence, the state tried and convicted Kring 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. 107 U.S. at 221-24. This Court held that Missouri'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 "alter[ed] the situation to his disadvantage." *Id.* at 235.

In *Collins*, the Court stated that *Kring* might be reconcilable with later cases if the change in Missouri law were viewed as depriving Kring of a "defense" to which he previously had been entitled. 497 U.S. at 50. The Court stated, however, that "defenses" protected by the *Ex Post Facto* Clause are defenses linked to the "legal definition of the offense." *Id.* The "defense" available to Kring under earlier Missouri law was not one related to the definition of the crime. Missouri had not changed any of the elements of

the crime of murder or the matters that might be pleaded as an excuse or justification for the conduct underlying the charge. The holding in *Kring,* then, could not stand. *Id.* at 50.

As an example of a case in which a defense could *not* be withdrawn without violating *ex post facto* principles, this Court cited *United States v. Hall*, 26 F. Cas. 84 (D. Pa. 1809). *Collins*, 497 U.S. at 49. 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 asserted that 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. The Court explained that according 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 later-enacted law, which imposed 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 have deprived Hall of a defense of his actions available at the time he sold the cargo. It was, therefore, an invalid *ex post facto* law. *Id.* As this Court explained, a law that abolishes an affirmative defense of justification or excuse contravenes the *Ex Post Facto* Clause because it expands the scope of a criminal prohibition after the act is done. *Id.*

The Court in *Collins* concluded that the Texas statute allowing reformation of improper verdicts did not withdraw a defense bearing on the "definition" or "elements" of the charged crime, or a defense involving "an excuse or justification for the conduct underlying such a charge." 497 U.S. at 50. Hence, the statute did not violate the *Ex Post Facto* Clause. Likewise, the withdrawal of a statute of

limitations "defense" does none of these things, and so it is not prohibited.

2. Asserting that a limitations period has expired is certainly a defense in the general sense that it is a defensive measure. More particularly, however, it is a matter in bar of prosecution, which is unrelated to the definition of a crime, *see supra* Part I.A.2.a, and is not pleaded as a nullification of one or more of its elements or as an excuse or justification for its commission. It is, thus, distinguishable from a "pure" defense, which defeats an element of the crime. Because it has nothing to do with the structure of the crime or its elements, a statute of limitations is not the type of "defense" that implicates the first *Calder* category.

In addition, an *ex post facto* violation exists only when the accused is deprived of a defense "available according to law at the time when the act was committed." *Collins*, 497 U.S. at 42, 52; *Beazell v. Ohio*, 269 U.S. at 169-70; *see also Carmell v. Texas,* 529 U.S. at 537. A defense in this sense only encompasses circumstances that existed at the time the crime was committed, which exonerate or mitigate the accused's actions. The statute of limitations is not a defense available at the time the act is committed, nor can it ever be, because it does not relate to the circumstances surrounding the crime, but only relates to the passage of time.[2]

[2] *See United States v. Brechtel*, 997 F.2d 1108, 1113 (5th Cir. 1993); *United States v. Knipp,* 963 F.2d 839, 843-44 (6th Cir. 1992); *United States v. Bischel*, 61 F.3d 1429, 1435-36 (9th Cir. 1995); *Clements v. United States*, 266 F.2d 397, 399 (9th Cir. 1959); *see also Proctor v. Cockrell*, 283 F.3d 726, 736 (5th Cir. 2002) (upholding statute retroactively shifting

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Although a statute of limitations provides a potential bar to prosecution at a later date, it is "available" only to the extent that, if the State fails to prosecute within a specified period of time, the defendant may invoke it to prevent his prosecution. The incipient nature of a statute of limitations defense at the time the crime is committed makes evident the fundamental difference in purpose and effect between it and a defense of the type described in *Collins*. A statute of limitations has no effect on the criminal nature of an act; a person who is successful in asserting a statute of limitations bar is just as much a criminal as he or she was the day the act was committed. In contrast, "pure" defenses, such as self-defense and heat of passion, are available at the time the crime is committed. Because they relate to an element of the defense, if successful they transform what otherwise would have been a criminal act into something that is not criminal or is of a lesser criminal nature when applied to the defendant.[3]

It is well-settled by both state and federal courts that the statute of limitations may be extended during its term without running afoul of the *Ex Post Facto* Clause. *See People v. Frazer*, 21 Cal. 4th at 760-65 & n.25 (collecting

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the burden of proof to the defendant to establish the statute of limitations as a defense).

[3] Likewise, the State could not retroactively abolish the defense of mistaken identification. Identity, meaning the doing of the criminal act by the defendant, is an essential element of any crime. *United States v. Garcia-Rosa*, 876 F.2d 209, 224 n.12 (1st Cir. 1989); *see United States v. Danzey*, 594 F.2d 905, 911-14 (2d Cir. 1979); *e.g. People v. Hall*, 28 Cal. 3d 143, 158-59, 616 P.2d 826 (1980). Petitioner is therefore wrong in asserting that the State's position would permit legislation that retroactively abolishes that defense. (Pet. Br. 23-24)

cases). But if a statute of limitations is a defense available at the time of the crime within the meaning of the *Ex Post Facto* Clause, then an extension of the statute of limitations prior to its expiration is just as much a violation of *ex post facto* principles as is the revival of an action by a change in the statute of limitations. Neither an extension nor a revival violates the *Ex Post Facto* Clause, however, because in neither case does the new expanded statute of limitations retroactively affect the criminal nature of the act. California Penal Code section 803(g) regulates the time during which child sexual abuse, defined and punished elsewhere in the Penal Code, may be charged; it does not impermissibly withdraw a "defense" within the meaning of the *Ex Post Facto* Clause.

3. Recently, in *Carmell v. Texas*, 529 U.S. 513, the Court examined *Collins* and said nothing to undermine or narrow the holding in *Collins* with respect to the types of defenses protected by the *Ex Post Facto* Clause. The Court in *Carmell* rejected the State's claim that *Collins* had "effectively cast out the fourth *Calder* category." *Id.* at 537-39. To the contrary, held the Court, *Collins* is properly understood as having "eliminated a doctrinal hitch" that had developed in the cases, namely, the dichotomy discussed above between "procedural" changes and changes with respect to "substantial protections." *Id*. at 539. And in eliminating that hitch, stated the Court in *Carmell*, *Collins* reestablished that *Calder*'s four categories are the bounds of the *Ex Post Facto* Clause's protections, beyond which it is a mistake to stray. *Id*.

Carmell did not express any disapproval of the result or reasoning of *Collins* (apart from describing as "cryptic" *Collins*' discussion of the fourth *Calder* category). 529 U.S. at 538. The Court approved of *Collins*' overruling of *Kring*

and *Thompson*, *id.*, and it approved of *Collins*' refusal to create new categories of *ex post facto* laws, *id*. at 539. *Collins*' treatment of defenses remains good law, and it defeats petitioner's contention that section 803(g) contravenes the first *Calder* category.

B. A Retroactive Change in the Statute of Limitations Does Not Violate the Second or Third *Calder* Category

Petitioner's claim that a retroactive expansion of the statute of limitations violates the second and third *Calder* categories (Pet. Br. 25-30) merits little discussion. Those categories prohibit laws that affect punishment, either by creating a punishment or by making an existing punishment more severe. *Carmell*, 529 U.S. at 523 & n.11 (discussing Wooddeson, at 638-39).[4] A change in the statute

[4] Wooddeson placed in the former category those laws "making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of laws." Wooddeson, at 638; *Carmell*, 529 U.S. at 523 n.11. As examples of this category, he cited the bills passed by Parliament that banished Lord Clarendon in 1669 and Bishop Atterbury in 1723. Wooddeson, at 638-39. These were considered "innovation[s] . . . not incurred in the ordinary course of laws" because banishment, at those times, was not a form of penalty that could be imposed by the courts. *Carmell*, 529 U.S. at 523 n.11 (quoting Wooddeson at 639, and citing 11 W. Holdsworth, A History of English Law 569 (1938), and Craies, The Compulsion of Subjects to Leave the Realm, 6 L. Q. Rev. 388, 396 (1890)). Justice Chase cited the same two examples. *Calder,* 3 Dall. 389 n.3.

For an example of a law that fell into the latter category, Wooddeson cited an act passed in Charles the Second's reign against the persons who assaulted and wounded Sir John Coventry, declaring assaults accompanied by personal mutilation a capital felony without benefit of clergy. Wooddeson, at 639. The so-called "Coventry Act" did not displace the common law of mayhem, which had been punishment

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of limitations, standing alone, simply has no bearing on how a crime will be punished, and this is true whether or not the change is applied retroactively.

C. A Retroactive Change in the Statute of Limitations Does Not Violate the Fourth *Calder* Category

There also is no basis for petitioner's contention that California has run afoul of the fourth *Calder* category, which prohibits "Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Calder,* 3 Dall. at 390. *Carmell* confirmed that category's continuing existence, but it said nothing that would make the category applicable here.

The paradigmatic example of an act falling within the fourth category is the case of Sir John Fenwick. *Carmell*, 529 U.S. at 526-31. After James II was deposed by King William III in the Revolution of 1688, Fenwick and others who remained loyal to James plotted against William. Before their plan could be carried out, one of the conspirators disclosed the plot to William. With the exception of Fenwick, who went into hiding, the conspirators were apprehended, tried, and convicted of treason. During their

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by mutilation, but it provided an increased penalty for intentional maiming and, for the first time, extended the crime to include disfigurement if intentional. Perkins and Boyce, Criminal Law, at 238-43 (3d ed. 1982). Justice Chase used this same example. *Calder*, 3 Dall. at 389 n.4.

trials, it became apparent that there were only two witnesses who could prove Fenwick's guilt. By an act of Parliament, two witnesses were necessary to convict a person of treason. Fenwick's wife succeeded in bribing one of the two witnesses against Fenwick to leave the country; without him, Fenwick could not be convicted under the statute in effect. After the witness's absence was discovered, Parliament passed, and the King signed, a bill making the two-witness bill inapplicable. Fenwick was convicted on the testimony of only one witness, and he was beheaded. *Carmell*, 529 U.S. at 526-31; *Calder,* 3 Dall. at 389 n.2. Parliament's act, according to Justice Chase, violated *ex post facto* principles because it "change[d] the rules of evidence, for the purpose of conviction." *Calder,* 3 Dall. at 391. This Court reaffirmed that conclusion in *Carmell*, in which it stated, "the pertinent rule altered in Fenwick's case went directly to the general issue of guilt, lowering the minimum quantum of evidence required to obtain a conviction." 529 U.S. at 534.

In *Carmell*, the Court reviewed the retrospective application of a Texas law pertaining to sex offenses. Under the law in effect at the time of the defendant's alleged acts, a defendant could not be convicted of specified offenses based upon the testimony of a victim unless the victim's testimony was corroborated by other evidence or the victim informed another person of the offense within six months of its commission. An exception to this requirement applied if the victim was under the age of 14 years. The law further established a sufficiency of the evidence rule respecting the minimum quantum of evidence necessary for conviction. If the statute's requirements were not met (for example, by introducing only the uncorroborated testimony of a 15-year-old victim who did

not make a timely outcry), a defendant could not be convicted and the court was required to enter a judgment of acquittal. After the defendant's alleged crimes were committed, Texas amended the law to extend the child victim exception to victims under 18 years of age. As to four of the charged counts, the amendment was critical; those counts rested solely on the testimony of the victim, who was 14 or 15 years old when they were alleged to have occurred. 529 U.S. at 517-20.

This Court concluded that the circumstances of Carmell's case paralleled those of Fenwick's case. *Carmell*, 529 U.S. at 530. Like that act of Parliament, the Texas amendment violated the *ex post facto* prohibition because it "changed the quantum of evidence necessary to sustain a conviction." *Id.* at 530; *see also id*. at 531, 532-33, 546. The Court explained,

> 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. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. . . .

Id. at 532-33 (citation and footnote omitted). The Court concluded that "[t]he relevant question is whether the law affects the quantum of evidence required *to convict*." *Id.* at 551. The answer was yes with respect to the Texas statute at issue in *Carmell*.

When asked in relation to a law that changes the statute of limitations, the answer is no. A change in the statute of limitations does nothing to alter the State's evidentiary burden to prove the commission of the charged offense; it simply regulates the time at which a crime defined and punished elsewhere may be charged. The State still must prove the defendant's guilt by establishing all the elements of the charged crimes that it would have had to prove at the time they were alleged to have been committed, and it still must do so by proof beyond a reasonable doubt. *See People v. Frazer*, 21 Cal. 4th at 760. "The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same." *Beazell v. Ohio*, 269 U.S. at 170. Hence, this is not the type of law that impermissibly attempts to rectify a "deficiency of legal proof" in violation of the fourth *Calder* category. Wooddeson, at 633-34, *quoted in Carmell*, 529 U.S. at 523-24 n.12. Indeed, it is for these same reasons that this also is not the type of law that violates the first *Calder* category, of which it is a "mirror image." *Carmell*, 529 U.S. at 533.

D. The Purposes of the *Ex Post Facto* Clause Are Not Implicated by a Retroactive Change in a Statute of Limitations

As noted at the outset, the *Ex Post Facto* Clause serves to assure that legislative acts give fair warning of

their effect so that individuals may rely on their meaning until explicitly changed, to restrain arbitrary and potentially vindictive legislation through which the legislature would meddle with the judiciary's task of adjudicating guilt and innocence in individual cases, and to ensure "fundamental justice." To hold that a retroactive application of a change in the statute of limitations, as set forth in California Penal Code section 803(g), violates the *Ex Post Facto* Clause would serve none of these purposes.

First, any person in California who committed a lewd act with a child under the age of 14 years during the time period covered by the charged offenses had ample notice that the conduct in which he engaged was illegal and punishable under California law. Moreover, it defies common sense to believe that a person might have committed that crime with the idea in mind that he could escape liability by avoiding apprehension until the expiration of the then-applicable statute of limitations. Even could such an offender sensibly be imagined, there is nothing unjust in disappointing that expectation by changing the period during which he can be prosecuted.

Second, there is no indication that the California Legislature intended to single out either petitioner or any class of defendants for vindictive or arbitrary treatment. Instead, Penal Code section 803(g) was a thoughtful and narrowly tailored response to evidence that young victims of sexual abuse often delay reporting the crimes, leaving their perpetrators free to prey on other innocent children. *See People v. Frazer*, 21 Cal. 4th at 744, 773; *see also infra* Part II.B.2.

Finally, petitioner's generalized claim of unfairness (Pet. Br. 7) is wide of the mark. Any defendant would

presumably find it unfair for the legislature to enact a statute that operates retrospectively to disadvantage him. Yet, as discussed above, this Court has expressly held that the *Ex Post Facto* Clause is not violated merely because a retroactive law "alters the situation of a party to his disadvantage." *Collins,* 497 U.S. at 50 (quoting *Kring v. Missouri,* 107 U.S. at 228-29). To the extent one may consider such laws "unfair" or "unjust," "they do not implicate the same *kind* of unfairness" implicated by the four *Calder* categories. *Carmell*, 529 U.S. at 533 n.23. 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, and is not supported by later cases." *Collins,* 427 U.S. at 50. "Moreover, while the principle of unfairness helps explain and shape the [*Ex Post Facto*] Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force." *Carmell,* 529 U.S. at 533 n.23.

Further weakening petitioner's unfairness argument is the nature of statutes of limitations themselves. Statutes of limitations are an optional form of "legislative grace," which reflect a pragmatic determination that the interests of the State are best served by forgoing prosecution in some cases. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). In this Court's words, "Statutes of limitations find their justification in necessity and convenience rather than in logic." *Id.* "They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim." *Id*.[5]

[5] Petitioner's *amici curiae* contend that *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), supports his contention that a retroactive extension of a statute of limitations is the

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Petitioner also fails to recognize that fairness is a relative concept, *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934), and "justice, though due to the accused, is due to the accuser also," *id.* at 122. "There are few in our society who would argue that child sexual abuse does not cause serious problems for its victims. In addition to physical injury, the psychological effects of victimization on children are far-reaching, negative, and complex." U.S. Department of Justice, When the Victim is a Child, at 15 (1985); *see also infra* Part II.B.2. Victims individually, and society as a whole, are entitled to see the perpetrators of child sexual abuse found accountable and punished. And the children who will become victims of child sexual abuse if perpetrators are allowed to remain free deserve the State's protection. *See infra* Part II.B.2. Fairness to petitioner provides no basis upon which to expand the scope of the *Ex Post Facto* Clause beyond the four *Calder* categories in order that he may avoid prosecution.

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sort of unfair legislation barred by the *Ex Post Facto* Clause. (NACDL Br. 20-22.) That decision, however, addressed only the narrow question whether, in light of the statutory presumption against retroactivity, a statute that "essentially create[d] a new cause of action" under the False Claims Act should be construed as applying retroactively. *Id.* at 950. The Court held it should not. *Id.* at 952. The Court in *Hughes Aircraft Co.* did not apply the doctrine of constitutional doubt or otherwise premise its decision in any way on constitutional concerns.

II. A RETROACTIVE CHANGE IN THE STATUTE OF LIMITATIONS THAT REVIVES A PREVIOUSLY-EXPIRED CAUSE OF ACTION IN A CRIMINAL CASE DOES NOT, ON ITS FACE, VIOLATE THE DUE PROCESS CLAUSE

A. The *Ex Post Facto* Clause, Not the More Generalized Notion of Substantive Due Process, Governs the Constitutional Inquiry

The Due Process Clause of the Fourteenth Amendment 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. *Daniels v. Williams*, 474 U.S. 327, 337 (1986). Petitioner, referencing a "fundamental right of liberty" (Pet. Br. 33) and "the substantive nature of the right" (Pet. Br. 40), asks this Court to find that a retroactive change in the statute of limitations in a criminal case violates substantive due process. This contention fails at the threshold because the Due Process Clause cannot be read to provide greater protections against *ex post facto* laws than the *Ex Post Facto* Clause itself.

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. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). The Court recently reiterated this principle in *Sattazahn v. Pennsylvania*, 537 U.S. ___ (2003), in which it stated that "[a]t bottom, petitioner's due-process claim is nothing more than his double-jeopardy claim in different clothing,"

and it declined his "invitation to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause," *id*. at ___ (slip op. at 14-15).

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, to address it. That clause speaks to the circumstances under which penal laws, "whatever their form," may be "altered by legislative enactment, after the fact, to the disadvantage of the accused." *Beazell v. Ohio,* 269 U.S. at 170. It provides an "explicit textual source of constitutional protection" against retroactive legislative changes in criminal law, and so it is not to be supplemented through the device of "substantive due process." *Graham v. Connor*, 490 U.S. at 395. There is no reason for this Court to turn away from this prior jurisprudence, and to create a new due process right that duplicates a right that is readily identifiable in the Constitution's text and overlaid with case law governing its scope.

B. A Change in the Statute of Limitations Does Not Deny a Defendant Substantive Due Process

Petitioner's due process claim fares no better when analyzed in light of this Court's substantive due process precedents. The substantive content of the Due Process Clause "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Washington v. Glucksberg*, 521 U.S. 702,

719-20 (1997). Protected are those fundamental rights that are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg,* 521 U.S. at 720-21 (citations and quotation marks omitted).

The Court has "always been reluctant to expand the concept of substantive due process." *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992); *Albright v. Oliver*, 510 U.S. at 271-72 (observing that defendant's claim of a substantive due process right to be free of prosecution without probable cause was "markedly different" from those matters – relating to marriage, family, procreation, and the right to bodily integrity – that, for the most part, have been accorded this protection). By extending constitutional protection to an asserted right or liberty interest, the Court, to a great extent, places the matter outside the arena of public debate and legislative action. *Washington v. Glucksberg,* 521 U.S. at 720. It appears, however, that petitioner would have this Court do just that, and find that a criminal defendant has a new fundamental right, protected by the Due Process Clause, in retaining the benefit of an expired statute of limitations against subsequent attempts to amend the time during which criminal charges may be filed. The Court should decline that suggestion.

1. The Expiration of a Statute of Limitations Confers No Fundamental Right or Liberty Interest

In *Chase Securities Corporation v. Donaldson*, this Court held that the shelter of a statute of limitations, "which represent[s] a public policy about the privilege to

litigate," has "never been regarded as what now is called a 'fundamental' right," 325 U.S. at 314, and retroactive application of a change in the statute of limitations does not, per se, violate the Due Process Clause, *id*. at 314-16 (discussing *Campbell v. Holt*, 115 U.S. 620 (1885)). The Court affirmed this holding in *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976). Petitioner attempts to distinguish these cases by asserting that in California a criminal statute of limitations creates a substantive right, in contrast to a remedy or a procedural right, which was at issue in *Chase*. (Pet. Br. 49-50 & n.47.) This contention is meritless.

a. For a time, this Court did distinguish between civil statutes of limitations, involving only procedural rights, and statutes of repose, involving substantive rights. *Compare Chase,* 325 U.S. 305, *with William Danzer & Co. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633 (1925). But this Court's more recent line of cases directs a different approach.

In *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1 (1976), the Court rejected a due process challenge to legislation that created a new liability upon coal mine operators for illnesses to miners for work done long before the legislation. Even though the effect of the legislation was to impose a new duty or liability based on past acts, the Court held, the burden was on the one complaining of a due process violation to establish that the legislature had acted in an arbitrary and irrational manner. *Id.* at 15-16. And in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the Court upheld a statute imposing liability on employers for withdrawal from pension plans, even though the statute applied to employers who withdrew before the statute was enacted.

Relying on *Turner Elkhorn,* the Court held that legislation imposing liability retroactively need only be supported by a rational legislative purpose. *Id.* at 728-30. These cases and their progeny direct that retroactive application of a statute will not be found to violate due process if it serves a legitimate legislative purpose that is furthered by rational means. *See also Eastern Enters. v. Apfel*, 524 U.S. 498, 524-28 (1998); *United States v. Carlton*, 512 U.S. 26, 30-31 (1994); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). In other words, whether a change in a statute of limitations is a matter of procedure or substance, whether it affects a right or a remedy, neither liberty nor justice is sacrificed by a change that permits the filing of cases after the expiration of the previously-existing statute of limitations.

As this Court has made clear, "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 16 (citations omitted). "Moreover, the detrimental reliance principle is not limited to retroactive legislation. An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process." *United States v. Carlton*, 512 U.S. 33-34.

b. In *Chase*, the Court explained that a defendant "may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Id.* Nothing

in the history of statutes of limitations in criminal cases justifies a different conclusion here.

At common law, there was no limitation of time for prosecuting a crime. 21 Am. Jur. 2d Criminal Law § 291, at 346 (1998); 1 Wharton's Criminal Law § 92, at 628 (15th ed. 1993); *see United States v. Marion*, 404 U.S. 307, 317 (1971). 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* 21 Am. Jur. 2d Criminal Law § 291, at 346. Although federal and state statutes regulating the time for bringing criminal charges have existed since the adoption of the United States Constitution, "their popularity in this country has been viewed as somewhat of a mystery." *People v. Frazer*, 21 Cal. 4th at 770 n.30.

Sometime prior to 1881 "Mr. Bishop in his treatise on Statutory Crimes, section 266," stated 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." *See Moore v. State*, 43 N.J.L. 203, 213 (1881). To our knowledge, it was not until 1881 that a court in this country disagreed with Mr. Bishop and held that a legislature could not retroactively extend a statute of limitations without violating the federal *Ex Post Facto* Clause. *Id.* at 214-25. In the ensuing 120 years, with the exception of recent cases construing California Penal Code section 803(g), it appears there have been only two cases in which the courts reached the same conclusion, and both of those were decided in the past 20 years. *See People v. Frazer*, 21 Cal. 4th at 765 & nn.27, 28 (collecting cases).

There is no settled, long-standing tradition with respect to the retroactive extension of a statute of limitations in criminal cases. Hence, "historical practice" does not provide a basis for finding that the shelter provided by a statute of limitations is a fundamental right or liberty interest, so that a legislature is prohibited by the Due Process Clause from amending it to restore a state's right to prosecute a criminal defendant. *Compare, e.g., Washington v. Glucksberg*, 521 U.S. at 723 ("To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.").

In the context of civil law, this Court has found retroactive extensions of statutes of limitations to be consistent with the Due Process Clause, and the reasons underlying those decisions compel the same result in criminal cases. It cannot be said that California Penal Code section 803(g), on its face, deprives a defendant of a fundamental right that is both "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Washington v. Glucksberg,* 521 U.S. at 720-21 (citations and quotation marks omitted). Hence, it does not deny a defendant due process unless there is not a rational basis for the law. *See id.* at 722.

2. California Penal Code Section 803(g) Serves a Legitimate State Interest That Is Furthered By Rational Means

Petitioner has not claimed, nor could he successfully, that California Penal Code section 803(g) fails to serve a legitimate legislative purpose that is furthered by rational means.

a. Beginning in the late 1980's, lawmakers across the country became increasingly aware that young victims often delay reporting sexual abuse. *People v. Frazer*, 21 Cal. 4th at 744. The California Legislature responded by enacting California Penal Code section 803(g) in 1994. *Id*. at 744-47. The statute "was 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." *Id*. at 773.

Two years later, after several courts held the law was not intended to be applied retroactively, the Legislature reexamined the issue, when a bill was introduced to expressly make the law apply retroactively. *People v. Frazer*, 21 Cal. 4th at 745-47 & n.7. The legislative analysis noted the justification for the bill: "Because many victims do not bring the crime to the attention of law enforcement until many years later, when the statute of limitations has already expired, their molesters go unpunished. This bill appropriately allows law enforcement to seek justice and ensure other children do not become victims in the future." Analysis of A.B. 2014 (Boland) for Cal. Asm. Comm. on Public Safety hearing, April 9, 1996, at 3.[6] The bill became law by a vote of 100 to one. A.B. 2014 (Boland), 1995-96 Sess.; Ch. 130, Stats. 1996.[7]

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[6] Available at http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_2001-2050/ab_2014_cfa_960408_114032_asm_comm.html.

[7] California Assembly vote available at http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_2001-2050/ab_2014_vote_960624_0110PM_asm_floor.

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The California Legislature's assumptions in making Penal Code section 803(g) apply retroactively are supported by significant scientific literature. The majority of victims of childhood sexual abuse in retrospective surveys had never told anyone of the abuse during their childhood. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, Child Abuse and Neglect 173, at 181 (1992). Rates of non-disclosure run between 33 percent and 92 percent for women, and between 42 percent and 85 percent for men, and these numbers may be conservative. Lyon, *Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation*, in Conte, Critical Issues in Child Sexual Abuse, at 114 (Sage Publications 2002). Delays in reporting were most likely when the offender was related to the child, when the abuse was more serious than fondling, and when compliance was obtained through threat or manipulation. *Id*. at 116. The most commonly reported reason for non-disclosure by child molestation victims was fear: fear of being harmed or punished, fear of harm to a loved one, or fear of harm to the perpetrator. In addition, many child abuse victims wanted to forget the abuse, thought no one would believe them, feared negative reactions from family members, and had feelings of guilt, self-blame, stigmatization, and isolation. *Id*. at 117-20.

Most published studies indicate that a history of sexual abuse is associated with subsequent psychological dysfunction in adulthood. Briere & Runtz, *Post Sexual Abuse Trauma: Data and Implications for Clinical Practice*, 2 Journal of Interpersonal Violence, at 367-79 (1987).

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html; California Senate vote available at http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_2001-2050/ab_2014_vote_960620_1044AM_sen_floor.html.

Adult survivors are more anxious, have more disassociative and somatic symptoms, and suffer lower self-esteem. They also are at significantly higher risk of developing depression, various anxiety disorders, substance abuse disorders, and sexual dysfunction. High rates of sexual abuse are found in the histories of patients diagnosed with conversion reactions, suicidal tendencies, self-mutilation, multiple personality disorder, borderline personality, chronic pelvic pain, and women with eating disorders. Childhood sexual abuse also is found in the history of a large percentage of adolescent prostitute and runaways. A sizable minority of sexual abuse victims develop post-traumatic stress disorder. 1 Myers, Evidence in Child Abuse and Neglect Cases, § 4.2 at 221-23 (2d ed. 1992); Urquize & Capra, *The Impact of Sexual Abuse: Initial and Long-Term Effects*, What If the Victim is Male? The Assessment and Treatment of the Sexually Maltreated Male (Lexington Books, 1990); Browne & Finkelhor, *Initial and Long-Term Effects: A Review of the Research*, A Sourcebook on Child Sexual Abuse (Sage Publications, 1986).

Significantly, child molesters pose a substantial risk of reoffending throughout their lives. *See* Hanson, et al., *Long-Term Recidivism of Child Molesters*, Journal of Consulting and Clinical Psychology, Vol. 61, No. 4, at 646-52 (1993). In one long-term study, 42 percent of the offenders were reconvicted for sexual crimes, violent crimes thought to be associated with sexual offenses, or both. Although the greatest risk appeared to be during the first five to 10 years, 23 percent of the recidivists were reconvicted more than 10 years after they were released from prison. The authors noted it was likely the reconviction rates underestimated the rate of reoffending, since it is widely recognized that only a fraction of sexual offenses

against children results in the offender's conviction. *Id.* Another long-term study showed the recidivism rate for new sexual offenses was 52 percent, with the approximate underestimation of recidivism being around 20 percent for sexual offenses. Prentky, et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, Law and Human Behavior, Vol. 31, No. 6, at 651 (1997).

The vulnerability of child sexual abuse victims, the difficulties they experience in reporting the crimes, and the recidivistic nature of their perpetrators are evidenced in prosecutions that have been commenced pursuant to California Penal Code section 803(g). Unfortunately, the testimony of petitioner's daughters, given at the grand jury hearing in this case, is not atypical.

Petitioner's older daughter testified that he began molesting her as far back as she could remember, when she was no older than five. (RT 107-08.) He orally copulated her, digitally penetrated her, had intercourse with her, and had her orally copulate him. (RT 109-10.) For a time, the acts occurred on an almost-daily basis, but they became less frequent as she grew into her late teens. (RT 111-13.) At about that time, she became aware that petitioner was sexually abusing her sister, who was nine years younger than she. (RT 96, 114-15.) She did not tell anyone about the abuse because she was afraid of her father, she did not believe anyone would help her, and she felt dirty. (RT 115-16.) Later, after she got away from the abuse, she did not want it to infect her new life. (RT 116.)

Petitioner's younger daughter testified that he began molesting her when she was four or five years old. When she saw him masturbating, he told her to orally copulate him, which she did. (RT 44-45.) She did not tell anyone

because she was scared. (RT 45.) Thereafter, he sexually abused her two or three times a week. Initially, he sodomized her, which made her feel like she was "being ripped open," and he played with her vagina, and his fingernails made her feel "like a razor blade was cutting [her] vagina." (RT 45-46.) As she got older, he had intercourse with her. (RT 47.) At 16, when she became pregnant by petitioner or her brother, who also had begun molesting her, she moved out and had an abortion. (RT 47-48.)

She had not reported the crimes because petitioner told her it was a secret, she was terrified of him, and she thought it was "a normal way of life." (RT 56-57, 68.) Even after she moved out, she was afraid to tell anyone, and she did not think she would be believed. (RT 57, 61.) She also wanted to pretend everything was normal in her life and that she had wonderful parents. (RT 60.) She did not report the molestations until she was an adult, when she was told that her brother had been molesting his stepdaughter, whom petitioner also had tried to molest. (RT 51-55.) She finally disclosed the abuse because she believed it necessary to protect other children. (RT 70.) After her disclosure, the police contacted her sister, who admitted petitioner had abused her also. Had the police not contacted her, the older sister would not have reported the crimes. (RT 116-17.)[8]

Thus, California Penal Code section 803(g) focuses on two concerns: the need for society in general, and the victims of substantial sexual abuse in particular, to see

[8] Petitioner has not been convicted of these crimes, of course, but they are the factual basis for the grand jury's indictment.

child sexual abusers convicted and punished for their crimes; and, perhaps more important, the need to stop perpetrators of substantial sexual abuse of a child from victimizing more children. Neither of these problems could have been adequately addressed by a prospective change in the statute of limitations.

b. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, 458 U.S. at 757. The California Legislature reasonably determined that the policies underlying statutes of limitations needed to yield to these more compelling considerations.

The statute is narrowly drawn to effectuate the significant purposes it was designed to serve, while protecting against oppressive use. It is strictly limited to permit prosecution of only the most serious types of sexual abuse of a child: vaginal penetration or rectal penetration by a penis or a foreign object; oral copulation; and mutual masturbation. Cal. Pen. Code §§ 803(g)(2)(B), 1203.066(b). Following receipt of a report from the victim, the State must investigate and file charges promptly, because any prosecution must be initiated within one year of the victim's report. Cal. Pen. Code § 803(g)(1). Charges may be filed only if there is "independent evidence that clearly and convincingly corroborates the victim's allegation." Cal. Pen. Code § 803(g)(2)(B). "No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial," and "[i]ndependent evidence

does not include the opinions of mental health professionals." *Id.*

In addition, a defendant has the protection afforded by procedures in California law to protect the defendant in any prosecution brought under an exception to the normally-applicable statute of limitations. *See People v. Zamora*, 18 Cal. 3d at 561-65 & nn.25-26; *People v. Crosby*, 58 Cal. 2d 713. Among those are the right of the defendant to contest the evidence at a pretrial hearing before a neutral judge, who cannot sustain the prosecution unless he or she finds the State has carried its burden of establishing the requirements of California Penal Code section 803(g) have been met. *See Zamora*, 18 Cal. 3d at 563 n.25; *Crosby*, 58 Cal. 2d at 725.

Penal Code section 803(g) serves not just a legitimate, but a compelling, state interest, which is furthered by rational means. In fact, the means chosen by the California Legislature were so carefully tailored to respond to that compelling interest that the statute survives even strict scrutiny. The statute, on its face, does not deny a defendant due process of law.

C. Petitioner's Right to A Fair Trial is Protected by Procedural Due Process

For the reasons discussed above, the lifting of a statute of limitations so as to restore a right of prosecution that was lost by the mere passage of time does not, per se, deny a defendant due process of law. That does not mean the Due Process Clause does not provide a criminal defendant some measure of protection. That protection, however, comes by way of the procedural, rather than the substantive, component of the clause.

Petitioner implies, for example, that a defendant charged pursuant to California Penal Code section 803(g) will be unable to get a fair trial because his ability to obtain reliable evidence will be impaired, as will be his ability to demonstrate the significance of that evidence, in the abstract. (Pet. Br. 43.) He has no cause for worry. A defendant who believes he or she has been prejudiced by a change in the statute of limitations, whether or not it is applied retroactively, may challenge the prosecution by making a factual showing that the change in the statute of limitations 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, thereby entitling him or her to dismissal of the charges. *See United States v. Lovasco,* 431 U.S. 783, 796 (1977); *People v. Frazer*, 21 Cal. 4th at 773-75. Speculative loss of evidence is insufficient, however; as this Court has noted, "proof of actual prejudice" to the defense is necessary to prevail on a due process claim. *Lovasco*, 431 U.S. at 789; *United States v. Marion*, 404 U.S. at 324.

This aspect of the Due Process Clause also addresses the concerns expressed by petitioner and his *amici curiae* that a criminal defendant may have relied, to his detriment, on the expiration of the statute of limitations by, for example, giving self-incriminating testimony in the belief that he could not be prosecuted. (Pet. Br. 39; NACDL Br. 26-27.) *Raley v. Ohio*, 360 U.S. 423 (1959), is on point. There, the defendants refused to answer questions put to them by the Ohio Un-American Activities Commission, which actively misled them into believing they could assert the privilege against self-incrimination. This Court held that to convict a citizen for exercising a privilege that the State clearly told him was available to him would be to

sanction the most indefensible form of entrapment, in violation of the Due Process Clause. *Id*. at 425-26, 438.

Because of the procedural posture of the case, which is before this Court on the basis of his demurrer, petitioner has not demonstrated prejudice. Hence, any procedural due process claim he may have is not ripe for adjudication. But the availability of the protections afforded by the procedural component of the Due Process Clause are more than adequate to protect his right to a fair trial.

CONCLUSION

The judgment of the Court of Appeal of California should be affirmed.

Respectfully submitted,

BILL LOCKYER, Attorney General
MANUEL M. MEDEIROS, Solicitor General
ROBERT R. ANDERSON, Chief Assistant Attorney General
W. SCOTT THORPE, Special Assistant Attorney General
KELLY E. LEBEL, Deputy Attorney General
JANET GAARD, Special Assistant Attorney General,
Counsel of Record
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5284
Fax: (916) 322-2630