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IN THE SUPREME COURT OF THE UNITED STATES

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MARION REYNOLDS STOGNER, :

Petitioner :

v. : No. 01-1757

CALIFORNIA :

- - - - -X

Washington, D. C.

Monday, March 31, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:16 a.m.

APPEARANCES:

ROBERTO NAJERA, ESQ., Alternate Deputy Defender, Martinez, California; on behalf of the Petitioner.

JANET GAARD, ESQ., Special Assistant Attorney General, Sacramento, California; on behalf of the Respondent.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the United States, as amicus curiae supporting the Respondent.

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1 P R O C E E D I N G S

2 (11:16 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 01-1757, Marion Reynolds Stogner v.
5 California.

6 Mr. Najera.

7 ORAL ARGUMENT OF ROBERTO NAJERA

8 ON BEHALF OF THE PETITIONER

9 MR. NAJERA: Thank you. Mr. Chief Justice, and
10 may it please the Court:

11 Petitioner comes before the Court asking one
12 thing and one thing only, that the State of California be
13 bound by its decrees and its laws that have guided it
14 throughout the history of California, that the State and
15 the Federal Government be bound by the laws of the land
16 that have been in place essentially since the State's
17 foundation.

18 Since early on in this country's history, Chief
19 Justice Marshall looked at a matter similar and said it
20 would be repugnant to the genius of our laws to allow the
21 prosecution to continue after the statute of limitations
22 had expired.

23 Such has been the law that only a few times in
24 the history of this Nation has any State had the
25 trepidation to attempt to revive an expired cause of

1 action in a criminal matter. In each such instance, the
2 States have been -- the State has not been permitted to do
3 so. In each such instance, such as in State v. Sneed,
4 Moore v. State, and other such cases --

5 QUESTION: Were those State law cases and State
6 constitutional cases?

7 MR. NAJERA: They were, Your Honor. And --
8 however, as I said, in Adams v. Wood, it involved a
9 Federal matter and it involved a matter that we might
10 consider equally repugnant. It had to do with the
11 prosecution of an individual who was involved in the slave
12 trade and laws that prohibited that. However, the attempt
13 to punish that occurred after the statute had run, and Mr.
14 Chief Justice Marshall indicated in that particular case
15 that even if the case had been treason, it could not be
16 prosecuted, for under the Federal law, treason was only
17 prosecutable for a 3-year period.

18 QUESTION: Did he base his decision, the one
19 that you're referring to, on the Ex Post Facto Clause?

20 MR. NAJERA: No, Your Honor. He based it on the
21 law that the statute of limitations in that case, the
22 Federal law had in fact called for an expiration of the
23 cause of action, and the Court there decided that, no, it
24 could not be prosecuted. But no, he did not decide it on
25 the ex post facto basis, Your Honor.

1 As the Court knows, we raise two issues here,
2 the Ex Post Facto Clause and the Due Process Clause, and I
3 would like to point out that the two clauses, while they
4 both deal with arbitrariness and unfairness, are not
5 coextensive and that similarly, in addressing the matter,
6 neither is petitioner's claim as to each, for under the Ex
7 Post Facto Clause, we are not looking at to whether or not
8 rights have vested. Such is not a concern of the Court
9 for ex post facto concerns.

10 However, in this particular case, Mr. Stogner
11 has been vested with a right. The State of California has
12 given him a substantive right, a defense that is neither
13 waivable nor forfeitable.

14 QUESTION: We've said in Graham against Connor
15 that if a provision of the Constitution speaks directly to
16 a subject matter, such as I think the Ex Post Facto Clause
17 does to your case here, then we don't go to substantive
18 due process. We analyze it just under that provision.

19 MR. NAJERA: That is correct, Your Honor.
20 However, as I indicated, the two claims are -- are not
21 necessarily coextensive, and I would like to point the
22 Court out to the case of Sacramento v. Lewis. There, the
23 Court may recall, involved a high-speed chase. The police
24 were after individuals on a motorcycle. The motorcycle
25 crashed. There was in that case no Fourth Amendment claim

1 because no seizure had occurred of the person prior to the
2 crash taking place. The Court, nevertheless, was able to
3 analyze that case under the substantive due process
4 principles because it fell outside of the Fourth
5 Amendment.

6 Here we clearly believe that the case falls well
7 within the -- the Ex Post Facto Clause. However, should
8 the Court decide otherwise, it strikes me that it should
9 not render this Court impotent to examine the matter as a
10 substantive due process. It seems --

11 QUESTION: That -- that would render the rule
12 quite pointless. I mean, the rule is if it is analyzable
13 under -- under a very specific provision of the
14 Constitution and is not valid under that one, you then
15 don't move on to analyze it under another one. And -- but
16 you're saying unless you win under the narrow one, it's
17 not over. If you lose under the narrow one, you then can
18 go on to the Due Process Clause.

19 MR. NAJERA: Well --

20 QUESTION: That doesn't make it much of a --
21 much of a safeguard, it seems to me.

22 MR. NAJERA: Well, Justice Scalia, as I've
23 indicated, the causes are not -- are not absolutely
24 coextensive. We have in this case a vested right. The
25 State of California has guaranteed to the petitioner the

1 right that he be free from prosecution, the right that he
2 be free from conviction, and the right that he be free
3 from punishment. This is vested to him under State law.
4 As such, that can be analyzed, whether or not the Court
5 deems it sufficient, under the Ex Post Facto Clause. As
6 the Court said in Weaver, we are not concerned under the
7 Ex Post Facto Clause with vested rights. That's not
8 necessary for analysis under the Ex Post Facto Clause. It
9 is an additional factor that the Court certainly should
10 and, we urge, must consider under the Due Process Clause.

11 If I may continue, analyzing the matter first
12 under the Ex Post Facto Clause, I think the first question
13 perhaps that should be addressed is whether or not this is
14 a rule of evidence and whether or not it falls within
15 Calder four. Clearly this is a rule of evidence as the
16 State of California has defined it. It is a rule of
17 evidence because it is required of any finder of fact,
18 whether it be a judge sitting pretrial examining the
19 matter as a demurrer or in analyzing the matter as
20 sufficiency of evidence under Penal Code 995.

21 QUESTION: But it doesn't -- it doesn't go to
22 the kind of evidence necessary to prove the substantive
23 offense certainly.

24 MR. NAJERA: Yes. I -- I would beg to differ,
25 Your Honor. And the reason is, is California has injected

1 the statute of limitations into every offense in which it
2 applies. In such cases it becomes a material ingredient
3 of the offense, and in such cases the prosecution is
4 barred if that material ingredient is not proven by the
5 prosecution. And if the matter should proceed to trial, a
6 jury must acquit if the prosecution is not able to
7 overcome its burden in that particular case.

8 QUESTION: But that -- that simply says there is
9 another substantive element there. It doesn't say what
10 rule of evidence you follow to decide how that was made
11 out.

12 MR. NAJERA: It does, Your Honor, in this
13 respect. If the evidence comes before a jury, for
14 example, and the evidence shows that the prosecution is
15 barred, that no public offense is stated, the jury must
16 acquit. It is a rule that guides the jurors, as much as
17 it would guide a court, in deciding what must be done with
18 the particular facts. If the facts before the court show
19 that the case is barred, then the prosecution cannot
20 continue. The jurors must acquit. It -- it would seem to
21 me to be one of the most clear rules of evidence and
22 applicable throughout, not just to California and not just
23 to the Federal Government --

24 QUESTION: Suppose you have a -- a case in which
25 the statute of limitations has not yet expired, and the

1 legislature then extends it. And it's during the extended
2 period that the prosecution has brought it. Is there an
3 ex post facto violation there?

4 MR. NAJERA: I believe not, Your Honor, and the
5 reason I believe not is that what is promised by the
6 statute of limitations is not any particular number of
7 years. Rather, what is promised --

8 QUESTION: And how does that fit in with the
9 description you just gave of -- about the evidence?

10 MR. NAJERA: Because the evidence that must be
11 shown by the prosecution is that the case has not been
12 barred. That does not depend on any particular number of
13 years. It depends --

14 QUESTION: Well, but that's the ultimate
15 conclusion they gave. The case I put to you is either
16 barred or it isn't. We have to find the answer to that
17 before we know whether there's evidence. I -- I just -- I
18 just don't understand your theory.

19 MR. NAJERA: The case is barred only when the
20 statute has run. One can liken it to a conditional
21 promise.

22 QUESTION: But why isn't any evidence in -- in
23 one case or the other in the hypothetical I put?

24 MR. NAJERA: Because the evidence of -- of an
25 extended statute of limitations doesn't go to whether or

1 not the case is barred. The evidence is still the same.
2 The case has not yet run.

3 QUESTION: Except it does if you're -- if you're
4 right on your theory.

5 MR. NAJERA: I am right on my theory because the
6 -- the State is in fact barred from proceeding, and the
7 evidence that would come before the --

8 QUESTION: Let me ask you another question on
9 the ex post facto lawsuit. Suppose the State has a
10 savings clause and it reserves to itself the right to
11 extend any statute of limitations. What result there if
12 the State then extends the statute?

13 MR. NAJERA: I believe if there is --

14 QUESTION: And this was -- and then this in
15 effect at the time the crime was committed, this general
16 power in the State to extend.

17 MR. NAJERA: I believe if the State has reserved
18 the right to extend a statute of limitations before the
19 statute has expired, then there is no ex post facto
20 problem. I believe that the problem occurs --

21 QUESTION: Well, then you're not arguing for
22 very much here. The -- the States -- all the States can
23 just pass this statute and -- and that's the end of this
24 case.

25 MR. NAJERA: Well, it's not the end of this

1 particular case because the statute has, in fact, run.

2 Certainly a State is permitted to set statute of
3 limitations, decide the terms and conditions thereof, and
4 go forward in the future under such a premise. In this --

5 QUESTION: What -- what if a State says we
6 reserve the right to dispense with any of the elements of
7 -- of crime that are on our books? I mean, it announces
8 that. We reserve the right in the future to dispense with
9 -- retroactively with any of the elements of the crimes
10 that we have defined in our -- in our code. You wouldn't
11 say that's okay, would you?

12 MR. NAJERA: No, I would not, Your Honor.

13 QUESTION: Why is this any different? I -- I
14 don't know. If it violates the Ex Post Facto Clause, I
15 can't see how the State can get around it by announcing in
16 advance that it's going to -- to violate the Ex Post Facto
17 Clause. How does that make it okay?

18 MR. NAJERA: Because the Ex Post Facto Clause
19 violation only occurs when the offense is deemed no more,
20 and that only occurs when it runs. So if the case hasn't
21 run yet -- or the statute has not run yet, we are in a
22 completely different posture. No -- in California --

23 QUESTION: But it has run. The State announces
24 it in advance. Then the statute runs, and the State says,
25 hey, we told you. We told you beforehand that even after

1 the statutes run, we're going to be able to get you. And
2 I thought you said that's okay.

3 MR. NAJERA: It's okay in the statute of
4 limitations context because there they have reserved that
5 situation that allows them to say the public offense still
6 continues in this particular situation. What we have here
7 is an absolute rule that says once run, not only can no
8 punishment be had, not only can no conviction be had, but
9 not even a prosecution can be maintained. There is no
10 offense once the statute has run.

11 QUESTION: But you're saying a State could have
12 no statutes of limitations.

13 MR. NAJERA: Yes, and -- and the States have
14 clearly done that in certain instances such as in the case
15 of murder. There is no statute of limitations in -- in
16 such a particular case.

17 QUESTION: And you have no trouble with
18 prospective application of either saying we're not going
19 to have any statute of limitations for this crime or
20 prospectively the time is going to be longer. You're only
21 talking about the retrospective.

22 MR. NAJERA: That is correct, Your Honor. It is
23 in its retrospective aspect that we run into problems
24 because the State has clearly said there is no offense
25 anymore. It is gone. It is dead. It has been

1 terminated.

2 QUESTION: And for the -- the -- you were being
3 asked before about the difference between extending a
4 limitation that has not yet expired and reviving a dead
5 case, and for that there's -- there was a very nice
6 statement of the difference between the two by Judge
7 Learned Hand. I thought in response to Justice Kennedy's
8 question, you would come back with that.

9 MR. NAJERA: That is correct, Your Honor. It is
10 clear as -- as His Honor Judge Learned Hand, that we're
11 not offended in the same manner before the crime has
12 expired when we extend the matter --

13 QUESTION: That -- that was the footnote in the
14 Falter case?

15 MR. NAJERA: That is correct, Your Honor.

16 QUESTION: Footnote 26 or something?

17 Now, that has never been approved by this Court.
18 Have -- have various circuit courts approved of that?

19 MR. NAJERA: Various circuit courts have -- as I
20 recall, have spoken of it. Some have objected to such
21 language recently such as the -- the Brechtel case. But
22 every State court that has looked at the matter, not just
23 in California, has said you cannot maintain such an action
24 once it has expired. That's clearly been the law
25 throughout.

1 And it -- it is important to note that this type
2 of precedent, this history has been throughout the -- the
3 history of the United States. We have cases extending
4 early on, State v. Sneed, a case that was cited, I might
5 note, in the Kring opinion that was overruled by this
6 Court. But nevertheless, it was cited there for the
7 proposition that -- that a statute of limitations, once
8 run, did in fact cause ex post facto violations.

9 QUESTION: Well, whatever the Federal stopper, I
10 -- I gather that this Court must have assumed there's such
11 a distinction when it was dealing with Fifth Amendment
12 claims and it said, once the statute of limitations has
13 expired, you can't plead the Fifth.

14 MR. NAJERA: That's absolutely correct, Your
15 Honor. And State opinions are, of course, in accord. And
16 it is striking to note that as late as 1993 in a case in
17 California called Blackburn, an accused in a civil matter
18 attempted to rely on the Fifth Amendment in order to avoid
19 questions concerning child molestation. And the court
20 there said, well, you haven't made a sufficient showing,
21 and the reason being? Because the statute of limitations
22 essentially replaces the Fifth Amendment.

23 And I would note in that regard, in California
24 in particular, that the statute of limitations has been
25 viewed as such a powerful matter that it's been likened

1 not only to the Fifth Amendment, but it has been likened
2 to the Fourth Amendment in that it prevents unlawful
3 seizures of a person. It has been likened to the Double
4 Jeopardy Clause in that one cannot prosecute a person
5 again once the statute of limitations has run.

6 And so this statute of limitations is not a
7 matter of minimal import.

8 QUESTION: Well, the California Supreme Court,
9 in announcing under State law, didn't give it that
10 fundamental sweep at all.

11 MR. NAJERA: It -- it had --

12 QUESTION: We're bound by what -- how California
13 characterizes its own statute I assume.

14 MR. NAJERA: To some extent, yes, and to some
15 extent, no, because in ex post facto analysis, it is this
16 Court that looks at State law and it's this Court that
17 makes a determination whether or not it violates ex post
18 facto regardless of what label a State may give it in
19 particular. That principle was announced in -- in
20 Lindsey, and it certainly was reaffirmed in -- in Carmell.

21 QUESTION: But we -- we have to -- we have to
22 take the State law as we -- as we find it. I mean, if the
23 Supreme Court of California says a law meant one thing, we
24 don't come in and say it meant another. We can say you've
25 changed the law and therefore it's ex post facto, but we

1 don't decide for ourselves over the -- overruling a State
2 court what that particular law said at a particular time.

3 MR. NAJERA: Well, the Court looks at -- at the
4 substance of the matter I believe. The Court looks at
5 whether or not the law violates the Ex Post Facto Clause,
6 and it would seem to me that simply changing labels would
7 be an easy way for a State to get around the Ex Post Facto
8 Clause. As the Court said, as early as Cummings, it's a
9 matter of substance, not a matter of form

10 And California, throughout its history, up until
11 Frazer granted, had always considered statute of
12 limitations to be matters of substance. They were not
13 simply remedial matters or not simply procedural matters.
14 They were matters of substance and they were matters of
15 rights for the defendant or the person accused.

16 QUESTION: Your -- your claim doesn't fit very
17 comfortably under any of the four Calder v. Bull factors,
18 or categories I should say, of ex post facto violations.
19 You're trying to shoehorn it under the rule of evidence
20 category, number four?

21 MR. NAJERA: Whether -- Your Honor, whether
22 comfortable or not, I believe it fits, and I believe that
23 it fits within each of the four categories, not only
24 because of the nature of the Ex Post Facto Clause, but
25 because of the multifaceted nature of the statute of

1 limitations at issue here.

2 For example, if we look at Calder category
3 three, which deals with punishments and the laws that are
4 annexed to the punishment, in the case of Lynce, which I
5 believe was authored by Your Honor, in that case what was
6 at stake was not what the State had defined as the
7 punishment per se, the number of years. What was at stake
8 there was that the State itself had granted credits,
9 overcrowding credits. They did not even intend to -- to
10 give a benefit to the defendant there. And yet it fell
11 within Calder three because the punishment had been
12 reduced by laws that were annexed to the crime, the laws
13 dealing with the overcrowding.

14 And in that way, one can say if the Court
15 rejects the principle that this is a material ingredient
16 of the offense itself, as California has defined it,
17 certainly as a matter of punishment, it is a law that's
18 annexed to that punishment and says, after a certain
19 period of time, no punishment shall be had.

20 And that's quite clear under California law
21 because it is not a waivable right. In other words, a
22 person can go ahead and proceed to trial or go ahead and
23 plead guilty and be languishing in prison and suffering
24 the punishment and years later discover that he has a
25 statute of limitation right and assert it then and

1 punishment shall be had no more. He must be released.

2 And so in that way I do believe it fits within Calder

3 category --

4 QUESTION: That -- that's the law in California,
5 what you just said, that even though you never raise it as
6 a -- as an issue in your trial, and you're in -- you're in
7 prison, many years later you could then come in and under
8 California law if it -- if the statute had run, you would
9 be released?

10 MR. NAJERA: That is correct, Your Honor. That
11 -- that has been held over and over in California since
12 its early days and reaffirmed in particular in the McGee
13 case which was seminal in California and which defined it
14 not just merely as a matter of defense, not just merely as
15 a -- as a right of the defendant, but also as a matter of
16 jurisdiction for the court. And in that case, they made
17 it very clear that since no offense could be stated, no
18 jurisdiction could be had by the court.

19 QUESTION: Then -- then what was the effect of
20 the Frazer case?

21 MR. NAJERA: Well, the Frazer case certainly
22 tried to redefine the history, I believe, of -- of the
23 California law. And I might note, of course, that it
24 dealt with a subsequent statute of limitations enacted
25 well after the statute of limitations applicable to

1 petitioner in this case and reinforced by 805.5 in 1985.

2 QUESTION: So did the Frazer case overrule some
3 of this California doctrine on statute of limitations that
4 you've just told us about?

5 MR. NAJERA: It certainly overruled cases such
6 as Sobiech which had held that, in fact, this was a
7 violation of the Ex Post Facto Clause. While calling it a
8 matter of legislative grace, they did not touch cases such
9 as Zamora which occurred in 1976, the same year that the
10 statute of limitations would have expired here, that
11 reaffirmed that this was in fact a substantive right.

12 And I might note that even while using the
13 language legislative grace, this Court in Weaver said even
14 if good-time credits are given as a matter of legislative
15 grace, it does not bar application of ex post facto, and
16 so such credits cannot be taken away, even though they had
17 not, in that particular case, been earned.

18 QUESTION: Mr. Najera, could -- could you
19 explain to me -- I -- I understand your argument that this
20 falls within the fourth category of Calder because you
21 have to produce more evidence under the -- or I'm sorry --
22 less evidence. It alters the amount of evidence necessary
23 for conviction. Before the statute, you -- you had to
24 show that the crime was committed by an earlier date and
25 after this, you don't have to show it was committed by

1 that earlier date.

2 But if that's the case, what I don't understand
3 is why it makes any difference whether this increase -- or
4 decrease in the amount of evidence necessary to convict
5 occurs before or after the old statute of limitations has
6 run. In either event, it -- it amounts to a decrease in
7 the amount of evidence necessary to convict.

8 MR. NAJERA: Well, there's certainly an argument
9 that can be made, and -- and I know that amicus has -- has
10 in a footnote addressed that.

11 My -- my belief is that what must be shown is
12 not a particular number of years per se, because that can
13 be altered I believe. What must be shown by the evidence
14 before the -- before a court is that because the number of
15 years requisite of the statute of limitation has in fact
16 passed, therefore the case is no more. So, yes, one does
17 consider the number of years, but the number of years only
18 matter as to whether or not the statute has, in fact, run
19 in that particular case.

20 QUESTION: Well, I hear you but I -- I don't --
21 I don't really --

22 QUESTION: I suppose you could also say that
23 even though literally it would apply to both situations,
24 there's a longstanding tradition of not applying it in the
25 case where the statute has not run, and so you would

1 construe that exception rather narrowly.

2 MR. NAJERA: That is correct. The State of
3 California throughout has told all of its citizens you no
4 longer need to keep your guard up because the statute has
5 run. If you have evidence, you don't have to preserve it.
6 If you have letters that might be of some support in your
7 case, you don't have to maintain them. If you have
8 witnesses, you no longer need to know where they are or --
9 or how to get a hold of them. And that only --

10 QUESTION: Am I correct -- just so I get your
11 view on it -- am I correct that with respect to an
12 unexpired statute of limitations where there's an attempt
13 by the legislature to extend it, the law is really very
14 well settled that that's permissible?

15 MR. NAJERA: Yes, and in particular in
16 California because in the same year that the Sobiek case
17 was decided, in which the court said it is a violation of
18 ex post facto to revive an expired cause of action, in
19 that same year they decided People v. Snipe, which was an
20 extension case. The statute had not yet run, and the
21 court there had no problem saying there is no ex post
22 facto problem there.

23 If -- if I might continue, and I would like to
24 attempt to address all -- all the relevant categories.

25 Turning to category number two, for example,

1 there we deal with a situation in which a crime is
2 aggravated or enlarged and the opposition says, well, this
3 only deals with punishment. Well, in one respect all
4 Calder categories deal with -- ultimately with punishment.
5 Nevertheless, it is a situation that is simply not
6 redundant to the other categories. It is a category unto
7 itself. And -- and even though there does not appear to
8 be a great deal of case law on the point, one must still
9 ask the question, when is a -- when is a case aggravated
10 in a fashion that doesn't merely mirror one of the other
11 Calder categories, and I believe it's when the
12 jurisdiction is increased, when persons who fall outside
13 of the statute become ensnared in it.

14 And if I might, unless there is an additional
15 question, at this point I would like to reserve the
16 remaining time.

17 QUESTION: Very well, Mr. Najera.

18 Ms. Gaard, we'll hear from you.

19 ORAL ARGUMENT OF JANET GAARD

20 ON BEHALF OF THE RESPONDENT

21 MS. GAARD: Mr. Chief Justice, and may it please
22 the Court:

23 Based on new evidence that children who have
24 been sexually abused often delay reporting the crimes for
25 substantial periods of time, the California legislature

1 extended the statute of limitations for the most serious
2 of these offenses and it expressly made the law
3 retroactive. This law does not violate the Ex Post Facto
4 Clause or the Due Process Clause.

5 Turning first to ex post facto, this law does
6 not criminalize conduct that was innocent when it was
7 done.

8 QUESTION: Before you go through the four
9 categories, might I just ask this general question? What
10 if the defendant had been pardoned, would it be an -- an
11 ex post facto violation to -- for the legislature to say
12 we're going to now make it subject to prosecution?

13 MS. GAARD: No, Your Honor, it would not violate
14 the Ex Post Facto Clause.

15 QUESTION: And why not?

16 MS. GAARD: Because what we're looking at with
17 those four categories is what the law was in effect at the
18 time the crime was committed, whether or not it was an
19 innocent act that was later criminalized. A pardon has no
20 effect on the -- whether or not the act was innocent at
21 the time it was committed. So I would say that is like an
22 ex -- a statute of limitations, that there would not be a
23 change in the ex post facto.

24 QUESTION: I'm sorry. I really didn't
25 understand. You say that the pardon would be treated

1 differently than the statute of limitations.

2 MS. GAARD: No. It would be treated the same
3 for ex post facto purposes.

4 QUESTION: Oh, it would be treated the same.

5 MS. GAARD: Yes.

6 QUESTION: And what about a general amnesty for,
7 say, illegal aliens coming into the country and then
8 Congress passes a statute saying we will forgive the crime
9 and you cannot be prosecuted? The same analysis there
10 too?

11 MS. GAARD: With an amnesty, I don't -- I
12 believe it would be the same with the ex post facto.
13 There may be some separation of powers issues. There may
14 be double jeopardy issues, and there may be due process
15 issues. I suppose it would depend on the circumstances.

16 QUESTION: Well, why would those issues be
17 different in that situation than in this situation?

18 MS. GAARD: I believe that they actually would
19 be very similar, but it would depend. I think sometimes
20 amnesties are conditional or some --

21 QUESTION: No. Unconditional in my hypothesis.

22 MS. GAARD: An unconditional?

23 QUESTION: Just like a pardon but a legislative
24 decision.

25 MS. GAARD: Then what you would look to would be

1 due process there, which you also can look to with an ex
2 post facto change.

3 QUESTION: Then why can't we look to due process
4 in this case?

5 MS. GAARD: I don't think that you look to
6 substantive due process. I believe that what was
7 expressed earlier is when we have an explicit textual
8 source of protection, which we have here, you don't look
9 to substantive due process. The protection comes by way
10 of procedural due process.

11 QUESTION: But that would be the same for the
12 pardon and the amnesty.

13 MS. GAARD: Yes, I believe it would be, Your
14 Honor.

15 QUESTION: And another preliminary question.
16 You started out by saying these are very troublesome kinds
17 of cases. But the argument that you're making, I take it,
18 is across the board.

19 MS. GAARD: Yes.

20 QUESTION: Doesn't -- it could be -- it could be
21 pickpocketing and -- and the argument would be the same.

22 MS. GAARD: Without violating the Ex Post Facto
23 Clause --

24 QUESTION: Yes.

25 MS. GAARD: -- yes.

1 And the Ex Post Facto Clause has been
2 interpreted in terms of the four Calder categories. What
3 I'd like to do is -- is focus primarily on categories one
4 and four which this Court has said are mirror images of
5 each other.

6 The first category prevents the State from
7 making an act that was innocent when it was committed
8 criminal at a later time. It provides fair warning so
9 that citizens are able to assess whether or not to engage
10 in certain conduct. And it's related to guilt or
11 innocence. The statute of limitations has no relation to
12 guilt or innocence. It's a defense that's raised that
13 says whether or not the defendant committed the crime, the
14 State is not going to be able to prosecute.

15 And when you look at whether or not the crime
16 existed, what you look at is the definition of the crime
17 as set forth by the elements. And I would refer the Court
18 to the Frazer opinion, footnote 22, where the California
19 Supreme Court has said, whatever its nature for various
20 State law purposes, the statute of limitations is not an
21 element of the offense insofar as the definition of
22 criminal conduct occur.

23 The California Supreme Court has said that the
24 crime that's at issue in this case is set forth in Penal
25 Code section 288, and the statute of limitations has no

1 relation to that.

2 Interplaying with the category one is category
3 four.

4 QUESTION: May I ask you before you get to four?
5 May I ask you just to spend a -- a moment on something
6 that -- that hasn't been the focus of much? And that is
7 category two that -- that refers to ex post facto as
8 something that makes greater or more serious a -- a crime
9 that was previously defined.

10 It seems to me that there are two sort of
11 indexes of seriousness in a crime. One is the -- the
12 penalty in the strict sense that is -- is provided for it,
13 but another index seems to me, the period of time after
14 its commission that a person who committed it is liable to
15 be prosecuted. That is a judgment about seriousness. And
16 that judgment is being changed here. Why doesn't it
17 offend the second category?

18 MS. GAARD: I believe when you're talking about
19 increasing the punishment, what -- what the -- the cases
20 have looked at is the punishment that exists at the time
21 of the crime. And it really is the actual punishment
22 whether or not the term of a punishment is 1 year or it's
23 20 years, and I don't think that there's authority --

24 QUESTION: But -- but that isn't exactly the
25 term that at least that -- that Calder used. I mean, it

1 -- it -- Calder states -- I'm -- I'm looking at the
2 quotation on page -- page 6 of the -- 8, rather, of the --
3 the Government's brief. It -- it refers to every law that
4 aggravates a crime or makes it greater than it was when
5 committed. And it seems to me that the -- that the
6 aggravation greater concept isn't necessarily limited to
7 the index of punishment, and it -- it could refer to the
8 -- to the index of seriousness that -- that exists in the
9 period of liability to prosecution.

10 MS. GAARD: The second Calder category, if we
11 look back at the historical basis for that, comes from the
12 creation of a new punishment that wasn't in effect at the
13 time.

14 QUESTION: Well, that just replicates the third.

15 QUESTION: Yes.

16 QUESTION: That makes it totally redundant.

17 MS. GAARD: Well, I -- I don't think so because
18 the second one was, for example, where the new punishment
19 that was imposed was banishment which didn't exist at the
20 time as a penalty for the prescribed crime. The third one
21 is the increase in the punishment. But creating a new
22 punishment, I don't think that holding a defendant liable
23 for a longer period of time is the type of punishment that
24 this Court has looked at when it has applied those cases.

25 What we're looking at is the purposes of the Ex

1 Post Facto Clause, which is to provide fair warning so
2 that he knows whether or not he should commit the crime.

3 QUESTION: Well, the same -- that's here. Isn't
4 that here?

5 MS. GAARD: Excuse me?

6 QUESTION: I mean, isn't that present here, at
7 least in respect to the evidence? I mean, a person as --
8 as -- for example, this particular defendant you would
9 like to prosecute, among other things, for crimes that
10 were committed in your view 43 years before the present --
11 before the time of indictment and 22 years anyway since
12 the statute of limitations expired. It's quite possible
13 that during that time people would have thought that they
14 didn't have to keep records, that they didn't have to keep
15 all the evidence, that they might not have to defend
16 themselves. And of course, there's something to be said
17 on the other side, but also memories can be revived
18 through hypnosis. Is this such a case?

19 MS. GAARD: This is not such a case, and in
20 fact, the California --

21 QUESTION: Yes, all right. So -- so then I --
22 but -- but there -- they could be, and sometimes those are
23 inaccurate. So people feel that they are free not to keep
24 the evidence after 22 years.

25 Now --

1 MS. GAARD: If you're --

2 QUESTION: -- what I'm -- I'm trying to trigger
3 your reaction as to some of these fairly obvious points as
4 to --

5 MS. GAARD: I guess you have -- you have touched
6 on a couple of things. First is repose and second is
7 potential for prejudice. And the potential for prejudice
8 exists because of the passage of time, not necessarily
9 because of the retroactive change. So the fact that the
10 evidence may be somewhat stale is a function of the mere
11 passage of time, and as the Court is aware, there -- the
12 State could impose no statute of limitations so we could
13 have a case that was 40 years out and that would be the
14 same issue. But in terms of --

15 QUESTION: But the point -- the point, of
16 course, is that -- that in *Calder v. Bull*, the Justice
17 says, all these and similar laws are manifestly unjust and
18 oppressive. And some of the purposes here, particularly
19 the ones on evidence and so forth, seem to be about the
20 kinds of things you're talking about.

21 MS. GAARD: The Court has said, and similar, but
22 this Court has repeatedly held, most recently in *Carmell*
23 in 2000, that the four *Calder* categories are the outside
24 parameters, and that a law, to be *ex post facto*, needs to
25 fall within one-fourth of -- one of those four.

1 And in terms of the prejudice, there is
2 protection --

3 QUESTION: But the Calder category in -- in
4 Carmell, the opinion of the Court said that category
5 covers instances where the Government refuses after the
6 fact to play by its own rules, altering them in a way that
7 is advantageous only to the State to facilitate an easier
8 conviction. If that was the Court's most recent
9 description of the fourth category, this case would seem
10 to fit in it.

11 MS. GAARD: But I believe what the Court said
12 there was that what was impermissible or unfair was
13 undermining a presumption of -- of innocence, and that's
14 not relative when you have a statute of limitations.
15 Innocence is of no import.

16 So what the Court said was in Calder category
17 one, you cannot change the elements of the crime
18 retroactively, and in Calder category four, it said you
19 can't change what the prosecution has to prove with
20 respect to those four -- or those elements. So you can't
21 change the presumption of innocence, which the Court spoke
22 to in the Cummings case, and you can't lower the
23 sufficiency of the evidence required to prove the elements
24 of the crime, which is what the Court was saying in
25 Calder.

1 And in fact, if you find that changing this
2 would -- would implicate the fourth Calder category, then
3 you may want to look at Gut v. Minnesota where the Court
4 held that a change in a venue did not implicate any of the
5 four Calder categories. And if you were to change venue,
6 that would also change the fourth Calder category which
7 this would.

8 And also --

9 QUESTION: May -- may I ask you this -- this
10 question? Obviously, the -- you know, the -- we're
11 engaged in kind of a definition of what the categories
12 mean, as well as an analysis of what you have. Would you
13 agree that if we do not fit this case within one of the
14 Calder categories, that -- and -- and we accept your
15 position, that we will have to overrule Hale and -- and
16 Henkel, the -- the case holding that -- that in fact, the
17 -- the Fifth Amendment cannot be pleaded once the -- once
18 the statute has expired?

19 MS. GAARD: No. I think what that would be is
20 so long as the statute of limitations has expired and not
21 been revived, that there is no present threat of
22 prosecution --

23 QUESTION: Oh, in other words, the -- one could
24 be required to present evidence against himself and then
25 the next morning the State could say, hey, we've had a

1 great idea. We're going to extend the statute of
2 eliminations -- the statute of limitations and prosecute
3 you for what you just admitted to under the authority of
4 Hale and Henkel. Is -- is that your position?

5 MS. GAARD: Yes, but I think that you would have
6 to suppress that statement because it would be unfair.
7 That would be an act of misleading by the State to say you
8 would have to -- to testify and then we're going to use it
9 against you. So as we said, we don't believe this fits
10 within the -- one of the four Calder categories, but the
11 protections come by way of -- or the procedural component
12 of the Due Process Clause, that if in fact there has been
13 actual prejudice, the -- the defendant may raise that as
14 he may in any instance where there is a pretrial delay,
15 and then the court will weigh that versus the reasons for
16 the delay, which is the test that this Court --

17 QUESTION: Would -- would that -- and I -- and I
18 think this is your position. That would equally be true
19 if the statute is extended before it has expired.

20 MS. GAARD: Yes, it would be. Whenever there's
21 pretrial delay, you use the test that the Court enunciated
22 in Marion and reiterated in Lovasco, and that's where we
23 believe the protections come here. This case is before
24 the Court on a demurrer. There has been no allegation by
25 the defendant that he's been prejudiced in any way in his

1 ability to present a defense.

2 QUESTION: But your strongest argument against
3 Justice Souter's initial point, which I thought was --
4 that the word aggravated -- every law that aggravates a
5 crime, treating that as a kind of catchall where, in fact,
6 it isn't literally within the other three, but from the
7 point of view of purposes, it's the same. The argument
8 against treating that aggravating a crime as a kind of
9 catchall is?

10 MS. GAARD: I don't think that that was the
11 intent at the time that this was --

12 QUESTION: And the evidence that it wasn't the
13 intent?

14 MS. GAARD: If we look at the historical basis
15 for this, it was the creation of a --

16 QUESTION: It -- it was the banishment matter.

17 MS. GAARD: It was the creation --

18 QUESTION: But you could treat the banishment
19 that they were referring -- that one thing or that they
20 were treating it as a catchall.

21 MS. GAARD: Yes. It was the creation of a new
22 punishment. I don't think they had -- that it was meant
23 to be a catchall, and this Court has never interpreted it
24 to be a catchall.

25 QUESTION: One way or the other, or has it said

1 it isn't?

2 MS. GAARD: It has not said it is not, as far as
3 I'm aware.

4 QUESTION: Thank you.

5 MS. GAARD: And I think that Justice Kennedy
6 mentioned about the extensions, and one of the things that
7 you need to look at is when you're -- you're deciding
8 whether or not an extension of the statute of limitations
9 that isn't applied retroactively violates the Ex Post
10 Facto Clause, we look to a defense that existed at the
11 time the act was committed. And if he had a 3-year
12 statute of limitations at the time the act was committed,
13 you would be changing the evidence, if you followed his
14 theory, from 3 years to an extended period, whether or not
15 it was an extension or a revival.

16 So we don't think that that would work, and this
17 Court would actually have to overrule a long line of cases
18 saying that extensions are also permissible. And the --
19 the Federal district -- or courts of appeals, several of
20 them have spoken about the fact that the statute of
21 limitations is not the type of element that we're looking
22 for to determine whether or not there has been a change in
23 the --

24 QUESTION: My other case -- I don't know --
25 quite know how the statute of limitations works in the

1 criminal area. In the civil area, you can very easily
2 waive the statute of limitations if you don't plead it at
3 the right time or if you make a counterclaim based on the
4 same facts, et cetera. In -- in the criminal system, are
5 statute of limitations routinely held waived?

6 MS. GAARD: In this --

7 QUESTION: Or -- or on the other hand, after the
8 fact and a prisoner could say I forgot there's a statute
9 of limitations here and -- and bring collateral attack?

10 MS. GAARD: May I answer?

11 QUESTION: Yes, briefly.

12 MS. GAARD: In California, the defendant has the
13 right to a pretrial hearing on the statute of limitations,
14 and if the court finds that the statute of limitations'
15 exceptions have not been met, the defendant gets a
16 dismissal. If it goes to trial, the court makes a
17 determination -- or the jury makes a determination. They
18 first find guilt or not guilt, and then they make findings
19 by a preponderance of the evidence --

20 QUESTION: Thank you, Ms. Gaard.

21 We'll hear now from Mr. Gornstein.

22 ORAL ARGUMENT OF IRVING L. GORNSTEIN
23 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
24 SUPPORTING THE RESPONDENT

25 MR. GORNSTEIN: Mr. Chief Justice, and may it

1 please the Court:

2 California's statute of limitations does not
3 violate the Ex Post Facto Clause because it does not
4 violate any of the four Calder categories.

5 QUESTION: Mr. Gornstein, may I interrupt you to
6 ask the same question I did of your co-counsel? Do you
7 agree that the rule in this case will apply to pardons and
8 general amnesties as well?

9 MR. GORNSTEIN: Insofar as we're talking about
10 the Ex Post Facto Clause, correct, yes.

11 QUESTION: What other clause might apply other
12 than --

13 MR. GORNSTEIN: Well, the -- the legislature
14 could not undo a -- an executive pardon --

15 QUESTION: Why not?

16 MR. GORNSTEIN: -- under this Court's decisions.
17 Under the Pardon Clause, it has finality that the
18 legislature can't undo it. I think the case is Ex parte
19 Garland.

20 QUESTION: What -- what provision of the
21 Constitution prevents the legislature from authorizing the
22 -- the prosecution of someone who has been pardoned?

23 MR. GORNSTEIN: The provision of the
24 Constitution that grants the President the power to
25 pardon.

1 QUESTION: The legislative amnesty.

2 QUESTION: And -- and what's the difference with
3 an amnesty too? Legislative amnesty.

4 MR. GORNSTEIN: Can I -- let me -- let me do the
5 pardon first.

6 QUESTION: Sure.

7 MR. GORNSTEIN: And then I'll move to the
8 amnesty.

9 With respect to a presidential pardon, it is
10 final with respect to the legislature by virtue of the
11 Pardon Clause. The Pardon Clause gives the President the
12 power to issue a final pardon that the -- the legislature
13 can't undo.

14 QUESTION: Does the word final appear in the
15 Pardon Clause? Does the word final --

16 MR. GORNSTEIN: It is not, but that's how the
17 Court interpreted the Pardon Clause in, I think it's Ex
18 parte Garland, but I'm not sure of the decision.

19 QUESTION: And what's the -- what's the answer
20 with respect to a State pardon?

21 MR. GORNSTEIN: There would be a State
22 constitutional provision usually analogous to that.

23 QUESTION: Well, but I mean, I --

24 MR. GORNSTEIN: There would not be a Federal --

25 QUESTION: Let's -- let's assume the State says

1 no. Then -- then there's no problem here.

2 MR. GORNSTEIN: If the State -- if the State
3 says no, then the only question that would arise in a
4 pardon is if you start to analogize it to a agreement
5 situation like Santobello because in some pardon
6 situations, it's like an offer and it has to be accepted.
7 You can't just force a pardon on somebody. And if there's
8 an offer and an acceptance, you could potentially
9 analogize it under the due process principle of Santobello
10 where the government can't withdraw from an agreement
11 without implicating the Due Process Clause.

12 With respect to an amnesty, there would not be,
13 again, an Ex Post Facto Clause violation, and there would
14 not be a -- any other sort of due process violation,
15 again, once again, unless it fell into the Santobello kind
16 of situation or the Raley kind of situation where the
17 Government offers something, it's accepted, and then it --

18 QUESTION: You -- you assert there would be no
19 ex post facto violation, but why is it different from the
20 -- from a statute of limitations running?

21 MR. GORNSTEIN: There's no -- there's no Ex Post
22 Facto Clause violation with a statute of limitations
23 running either. That's our position because it does not
24 violate --

25 QUESTION: You say you could -- you could indict

1 someone after granting them amnesty. I misunderstood you.

2 MR. GORNSTEIN: Yes, yes.

3 Now, with --

4 QUESTION: What is your position on -- on Hale
5 against Henkel and Brown against Walker? The Fifth
6 Amendment. Can -- can the State say the statute of
7 limitations has expired, therefore you have to speak, and
8 then revive the time in which the prosecution can be
9 brought?

10 MR. GORNSTEIN: The premise of that decision is
11 that you cannot assert the Fifth Amendment when there's no
12 present threat of prosecution, and there is no present
13 threat of prosecution when there's an expired limitations
14 period. But if the person speaks under compulsion in that
15 situation, and a statute of limitations is subsequently
16 retroactively amended, the Government could not use the
17 testimony that was secured through compulsion.

18 QUESTION: So what is your -- I mean, starting
19 your basic argument -- I look back. I see Learned Hand
20 says that after the period is run, it is unfair and
21 dishonest to prosecute a person. It violates the Ex Post
22 Facto Clause. After the Civil War, Roscoe Conkling, a
23 Hawk I think, said when they wanted to revive treason
24 against Jefferson Davis, he said that the offense is dead
25 if the statute has run. It would be ex post facto.

1 Hornbook law like American Jurisprudence until recently
2 said absolutely contrary to the Constitution.

3 So what's changed? Or are -- in -- in the
4 Government's view, were all those people -- they weren't
5 supreme courts, I agree. But it seemed to be accepted.
6 So has something changed or were they all wrong or what's
7 the view?

8 MR. GORNSTEIN: The -- in this Court's decision
9 in Collins, it recognized there had been some disagreement
10 about the scope of the Ex Post Facto Clause in prior
11 cases, and with some courts saying that it goes beyond the
12 four categories to capture laws that operate to the
13 disadvantage of the defendant in some important way and
14 with other courts saying it's limited to the Calder
15 categories. In Collins, the Court resolved that debate
16 and said that the Ex Post Facto Clause is limited to the
17 four Calder categories. There is not a fifth category of
18 things that operate unfairly to the disadvantage of the
19 defendant.

20 Now, that was the analysis that Judge Hand used
21 in the opinion that you refer to. He did not say that
22 this violates any of the four categories. He essentially
23 said this operates to the disadvantage of the defendant in
24 an unfair way, a line of analysis that this Court ruled
25 out in Collins and reaffirmed ruling it out in Carmell.

1 The same thing is true of the State court
2 decision that Judge Hand referred to in the first in the
3 line of those decisions, Hart v. Moore. It frankly
4 acknowledged that this law, changing an expired
5 limitations period, does not violate any of the four
6 Calder categories. It said, though, we are going to go
7 with the spirit that underlies the Ex Post Facto Clause.
8 Well, again, this Court's decision in Collins absolutely
9 rules out that line of analysis. In order to find an Ex
10 Post Facto Clause violation, you must find that it
11 violates one of the specific Calder categories.

12 QUESTION: I didn't think that Hand or American
13 Jurisprudence or the cases or Roscoe Conkling or the civil
14 or any of these things said one thing one way or the other
15 about whether it fell within the categories. I'm not sure
16 I'm right on that, which is why I'm raising it. And --
17 and if I -- if I -- but if I am right, can you use the
18 second category, anything that aggravates a crime? It
19 seems to aggravate a crime to say that this crime would
20 have been prosecuted for 3 years and then we change it
21 retroactively and say it could be prosecuted for 50 years.
22 I mean, that seems to aggravate the -- so what is your
23 response to those --

24 MR. GORNSTEIN: On the --

25 QUESTION: Am I right in thinking they were

1 silent?

2 MR. GORNSTEIN: No.

3 QUESTION: And two -- no.

4 MR. GORNSTEIN: In Hart v. Moore, which is the
5 key precedent that Judge Hand referred to, it's just an
6 1880 case, the -- the Court said that it doesn't violate
7 the four Calder categories. And so it -- it relied on the
8 spirit underlying the clause.

9 In the case of Judge Hand, he didn't undertake
10 an analysis under the four categories, but he undertook
11 the kind of a catchall fifth category analysis that some
12 of this Court's cases suggested was possible at the time,
13 but that the Collins case said is not.

14 Now, with respect to the question of category
15 two, category two, this Court explained in the Carmell
16 decision, is traced to Wooddeson's discussion. Wooddeson
17 said that there are two kinds of laws that affect
18 punishment. One of them creates new punishments, another
19 one increases the severity of the punishment. And what
20 the Court said in Carmell is that Justice Chase precisely
21 adapted those concepts into his category. Category two is
22 changing -- creating a punishment. Category three is
23 increasing the severity of the punishment. And that is
24 the limit of what those two categories involve, and
25 neither of those are implicated in this case because the

1 punishment is exactly the same in form and amount as that
2 which was prescribed at the time of the offense.

3 QUESTION: It is odd, Mr. Gornstein, isn't it,
4 that we take as gospel something that was said en passant
5 in -- what year was Calder against Bull? Very early on.
6 And the case in fact decided it wasn't an ex post facto
7 law. So this was dictum en passant, and it didn't dispose
8 of the case one way or another.

9 MR. GORNSTEIN: But -- but the situation is not
10 that the -- it is stare decisis from that case. It is
11 stare decisis from subsequent cases like Collins and
12 others which have concluded that Justice Chase accurately
13 determined the limits of the Ex Post Facto Clause based on
14 the historical evidence of what the Framers thought,
15 including Wooddeson and Blackstone and -- and State
16 constitutions, and the Framers and other sources that he
17 relied on. He was right. He got it right, and subsequent
18 decisions of the Court have held that, including Collins.

19 QUESTION: What --

20 QUESTION: Which Collins also said something --
21 the recitation in Collins included, nor deprive one
22 charged of -- with crime of any defense. It used the word
23 any defense available according to the law at the time the
24 act was committed.

25 MR. GORNSTEIN: No. In -- in Collins, what the

1 Court said is that -- that prior cases had used that
2 formulation of any defense and in particular Beazell. And
3 what Collins did was to clarify that the only defenses
4 that are available are those that go to excuse or
5 justification at the time the offense is committed. And
6 it merges it then with the first category which deals with
7 changing laws and criminalizing conduct that was innocent
8 when done. The defenses that -- that are prohibited that
9 you can't change under the Ex Post Facto Clause are those
10 that have the effect of criminalizing conduct that would
11 have been innocent when it was done.

12 I want to move to the fourth category where some
13 of the questions have been, and it's critical to
14 understand the fourth category is closely connected to the
15 first category. It -- it changes what evidence is
16 sufficient to show that the defendant's conduct was a
17 crime at the time he acted, and a statute of limitations
18 does not operate in that way. It changes what evidence is
19 sufficient to show that there has been a timely
20 prosecution, but it has no effect whatsoever on what
21 evidence is sufficient to show that the defendant's
22 conduct was a crime at the time he acted.

23 QUESTION: So suppose on that particular point,
24 the State had a law that said that oral evidence can no
25 longer be used for conviction after 10 years passes. And

1 then it later changed the law to say it can be. Would
2 that fall under the fourth category?

3 MR. GORNSTEIN: It -- it would, Justice Breyer,
4 if you said no evidence is sufficient to sustain a
5 conviction unless it meets certain specifications because
6 that's going to the crime. You can't prove up the crime
7 that way.

8 QUESTION: So you just -- what you'd say is
9 you'd say no oral evidence of child abuse can be admitted
10 after 10 years, though you can use other forms of
11 evidence.

12 MR. GORNSTEIN: No. Admissibility is a
13 different question, Justice Breyer.

14 QUESTION: So -- so it wouldn't apply at all
15 here.

16 MR. GORNSTEIN: It wouldn't apply to
17 admissibility. Under -- Carmell draw -- drew a
18 distinction between admissibility and sufficiency of the
19 evidence rules. Changes in admissibility rules are
20 permissible. Changes in sufficiency of the evidence rules
21 are not.

22 Now, explaining further why the fourth category
23 needs to be read in this way, there are several reasons.
24 The first is that's the way the Court has applied the
25 fourth category. In situations where there's been a

1 change in what evidence is sufficient to prove the first
2 -- to prove the defendant committed a crime, it found a
3 violation, as in Carmell and as in Cummings. But where
4 the change was -- there was a change in what was
5 sufficient to establish some other precondition that
6 doesn't go back to whether the defendant acted criminally
7 at the beginning, the Court hasn't found a violation.

8 And -- and the example is Gut v. Minnesota where
9 there was a change in the venue rule. What was changed
10 there -- change was -- was sufficient to prove venue,
11 which was a precondition to guilt, but it didn't change
12 what was sufficient to prove that the defendant acted in a
13 criminal manner when he acted. And the Court said that
14 there was no fourth category violation.

15 Also, the statutes of limitations for over 100
16 years -- all the courts have concluded that if you
17 retroactively amend an expired limit -- I'm sorry -- an
18 unexpired limitations period, there's no Ex Post Facto
19 Clause violation, and in terms of the Calder category
20 four, there's absolutely no difference between those
21 statutes and this one. In both cases, it changes what's
22 sufficient to show that there is a timely prosecution. In
23 neither case does it change what's sufficient to show that
24 the defendant committed -- when he acted, he committed a
25 crime. And that is what category four is about.

1 Finally, in Carmell, this Court noted that
2 category four is a mirror image of category one, and it
3 said they both work together to prevent subversions of the
4 presumption of innocence. And that description of
5 category four supports the conclusion of the linkage
6 between four and one that the -- what you're talking about
7 are rules that change what evidence is sufficient to show
8 that the defendant's conduct was a crime when he acted.

9 And that's not -- and the statute of limitations
10 here doesn't do that. It changes what's sufficient to
11 show that there's been a timely prosecution. It doesn't
12 change in any way what's sufficient to show that the
13 defendant committed a crime when he acted.

14 If the Court has no further questions --

15 QUESTION: I have one question. Other than the
16 reference to the language in the four categories, is there
17 any precedent of this Court supporting the Government's
18 position?

19 MR. GORNSTEIN: The -- the only precedent -- and
20 it's mild precedent -- is the Stewart v. Kahn decision
21 where the Court was examining a retroactive tolling period
22 during the Civil War, and the Court -- the issue actually
23 before the Court was the civil component of that. But in
24 the course of discussing that, Justice Stevens, the Court
25 mentioned that the criminal component of it was also

1 retroactive and -- and it applied to expired limitations
2 period. And in a paragraph that applied to both civil and
3 criminal, the Court said there's no constitutional problem
4 with that.

5 QUESTION: Thank you, Mr. Gornstein.

6 Mr. Najera, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF ROBERTO NAJERA

8 ON BEHALF OF THE PETITIONER

9 MR. NAJERA: Thank you, Your Honor.

10 I'd like to, first of all, answer one question.

11 It's clear by California law that post-conviction, a
12 person can raise, either by habeas or other appellate
13 relief, the statute of limitations claim. That's been
14 clear since *Ex parte Vice* and was reaffirmed in the *McGee*
15 case.

16 Turning to the *Collins* question, the real import
17 in *Collins* was not to get caught up in distinctions or
18 labels such as substantive versus procedure, and it would
19 seem that if we began to draw such distinctions here, we
20 run ultimately into the same problems. And it would seem
21 to me that if *Collins* stands for the proposition that
22 affirmative defenses, defenses which the defendant has the
23 burden of establishing, are protected, why are not
24 defenses that the district attorney must disprove such as
25 the statute of limitations? For this has always been, in

1 California, the burden upon the prosecution to show that
2 the statute has in fact not run.

3 Also, it seems that the State wishes to shift
4 the burden and foist it upon the petitioner and says,
5 well, we can address this in procedural due process, while
6 in fact that, as I said, foists the burden onto the
7 petitioner when the burden in fact lies with the
8 prosecution.

9 And in the Marion case, Supreme Court case, the
10 Court reaffirmed that an irrebuttable presumption of harm
11 occurs by such delay, and that's by way of the legislative
12 act.

13 Finally, I'd like to note that not only would
14 finality be upset in these particular cases, but really
15 what we're talking about is respect for the laws. Every
16 day in this country citizens make bargains with -- with
17 the State, and the State makes bargains with its citizens.
18 It did so by creating a statute of limitations. And every
19 day, particularly in the criminal field, most, the vast
20 majority of the accused enter into bargains. They plea
21 bargain. They give away their rights and accept a
22 bargain. And we hold them to that. We hold them
23 accountable for what they bargain.

24 Are we here -- if we accept the State's
25 position, are we here to hold the State to a lesser

1 standard than we hold to what many consider the meanest
2 and lowest amongst us? I would think not. I think we
3 would expect the State and the Federal Government to stand
4 for something more, to be the leader and not the follower,
5 to have a standard higher or at least equal to that of
6 which we expect of each of our accused, each person who
7 pleads in this particular case.

8 I would ask, as I said in the beginning, that
9 this Court hold the State to the bargain that it chose to
10 make, to the terms that it chose to define by creating the
11 statute of limitations.

12 And if there are no further questions, I will
13 submit the matter.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Najera.

15 The case is submitted.

16 (Whereupon, at 12:16 p.m., the case in the
17 above-entitled matter was submitted.)

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