

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

\_\_\_\_\_ APPELLATE DISTRICT, DIVISION \_\_\_\_\_

_____,  Petitioner,  On Habeas Corpus.
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No. \_\_\_\_\_  
Related Appeal, No. \_\_\_\_\_  
(\_\_\_\_\_ County  
Super. Court No. \_\_\_\_\_)

PETITION FOR WRIT OF HABEAS CORPUS

TO: THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF  
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, \_\_\_\_\_ APPELLATE  
DISTRICT, DIVISION \_\_\_\_\_:

Petitioner \_\_\_\_\_ respectfully petitions this Court for a writ of habeas corpus on the ground that the statute of limitations applicable to the charged sex offenses expired prior to the 1994 enactment of Penal Code section 803(g)<sup>1</sup> and the application of section 803(g) to revive prosecution of these time-barred offenses violated the ex post facto clause under the U.S. Supreme Court's opinion in *Stogner v. California* (June 26, 2003) \_\_\_ U.S. \_\_\_, 2003 WL 21467073. By this verified petition, petitioner sets forth the following facts and causes for the issuance of the writ:

1. Petitioner is unlawfully held in custody at \_\_\_\_\_ State Prison by the Warden, and by the Director of the Department of Corrections.
2. Petitioner is confined pursuant to a judgment of imprisonment of \_\_\_ years rendered on \_\_\_\_\_ in \_\_\_\_\_ County Superior Court, No. \_\_\_\_\_, Hon. \_\_\_\_\_, Judge.
3. In that proceeding, petitioner was charged with \_\_\_\_\_, in an information filed \_\_\_\_\_ . On \_\_\_\_\_, petitioner entered a plea to Counts \_\_\_, alleged offenses

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

under section \_\_\_\_\_. (CT \_\_\_\_). On \_\_\_\_\_, the trial court sentenced petitioner to a term of \_\_\_ years. (CT \_\_\_\_)

4. Petitioner noticed a timely appeal from the judgment, and that appeal is currently pending before this Court, A\_\_\_\_\_. However, no certificate of probable cause has issued authorizing direct review of “constitutional, jurisdictional, or other grounds going to the legality of the proceedings,” (§ 1237.5), and the time for applying for such a certificate has expired.
5. **Petitioner is entitled to issuance of a writ of habeas corpus vacating his convictions because those convictions were obtained in violation of the ex post facto clause of the U.S. Constitution.** As indicated on the face of the information (CT \*; copy attached as Ex. A), the offenses allegedly occurred on \_\_\_\_\_. At the time of the alleged offenses, the applicable statute of limitations was \_\_\_ years. Consequently, **the statute of limitations had expired prior to January 1, 1994, the effective date of section 803(g)**, which purported to revive the state’s authority to prosecute otherwise time-barred sexual offenses. Because petitioner was not subject to prosecution for the alleged 19\_\_ offenses, due to expiration of the statute of limitations, as of the time of enactment of section 803(g), the application of that statute to authorize prosecution and conviction of petitioner for those alleged offenses violated the federal ex post facto clause under the U.S. Supreme Court’s just-issued opinion in *Stogner v. California* (June 26, 2003) \_\_\_ U.S. \_\_\_, 2003 WL 21467073.
6. Petitioner is entitled to habeas corpus relief for the ex post facto violation because he does not have a speedy and adequate remedy at law. Despite the pendency of his direct appeal, A\_\_\_\_\_, that appeal does not provide a speedy and adequate remedy for this fundamental constitutional violation because the limitations bar to the conviction offenses of \_\_\_\_\_ is not reviewable in a post-plea appeal due to the absence of a certificate of probable cause.

7. The violation is properly reviewable on habeas corpus because, under well-established California law, a violation of the applicable statute of limitations is a jurisdictional defect, and the error is not waived by a plea or by failure to perfect an appeal on that ground. Because jurisdictional errors such as this are not subject to the usual limitations barring habeas review of claims which could have been raised on appeal, the violation is properly cognizable via this petition for writ of habeas corpus.
8. Habeas corpus relief is also appropriate on the additional and independent grounds that the claim relies on a change in the law and that the ex post facto violation represents fundamental constitutional error for the reasons stated in *Stogner v. California*.
9. Because the \_\_\_-year statute of limitations applicable at the time of the \_\_\_ offenses had expired prior to the enactment of section 803(g), petitioner's case comes squarely within the ex post facto holding of *Stogner v. California*. Accordingly, petitioner respectfully requests this Court to vacate those convictions, to order dismissal of the information with prejudice, and to order petitioner's immediate release from custody.
10. Petitioner's continuing imprisonment on charges which had become time-barred prior to the enactment of section 803(g) represents an ongoing violation of the ex post facto clause. Because the U.S. Supreme Court's opinion in *Stogner* conclusively resolves the legal issues and because there are no factual questions (since the limitations bar appears on the face of the information), petitioner respectfully prays this Court to consider and decide this habeas petition on an expedited basis. Consequently, petitioner requests this Court to bypass any round of "informal" briefing on the habeas petition and to proceed immediately to issuance of the writ of habeas corpus or an order to show cause (OSC). Additionally, petitioner requests this Court to set an expedited schedule for the return to the OSC or writ and for prompt disposition of the petition. (See § 1475.) Pending final disposition of the petition, petitioner

respectfully request that the Court order him released on bail or on his own recognizance, as authorized by section 1476.

11. Petitioner hereby incorporates by reference the attached Memorandum of Points and Authorities in support of this petition and the attached exhibits.
12. As stated above, petitioner has no speedy and adequate remedy at law for the constitutional and jurisdictional violations alleged here.
13. No prior petition for writ of habeas corpus has been filed by petitioner or on petitioner's behalf.

WHEREFORE, petitioner respectfully requests that this Court:

- a. Take judicial notice of the record in petitioner's pending direct appeal, No. A \_\_\_\_\_;
- b. Order respondent to show cause why petitioner is not entitled to the relief requested;
- c. Order an expedited schedule for filing of respondent's return and consideration and disposition of the petition;
- d. Order petitioner released on bail or on his own recognizance pending final disposition of the petition;
- e. After full consideration of the petition and return and any other pleadings, vacate the judgment and sentence imposed on petitioner in \_\_\_\_\_ County Superior Court No. \_\_\_\_\_ and order petitioner immediately discharged from any custody or other restraints imposed pursuant to that judgment;
- f. Order the information in Superior Court No. \_\_\_\_\_ dismissed with prejudice; and
- g. Grant such further relief as is appropriate in the interests of justice, including any other orders necessary to ensure petitioner's prompt release from custody.

For all the foregoing reasons, \_\_\_\_\_ respectfully request this Court to grant the petition for writ of habeas corpus and to order petitioner's release.

Dated: \_\_\_\_\_, 2003

Respectfully submitted,

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Attorney for Petitioner

**VERIFICATION**

I, \_\_\_\_\_, declare:

I am a member of the Bar of the State of California. I am the attorney for petitioner \_\_\_\_\_, who is confined and restrained of his liberty at \_\_\_\_\_ State Prison, in \_\_\_\_\_, California.

I am authorized to file this petition for writ of habeas corpus on his behalf. I make this verification because petitioner is incarcerated in a county different from that of my law office and because these matters are more within my knowledge than his.

I have read the foregoing petition for writ of habeas corpus. I declare that all the matters alleged here are true of my own personal knowledge or are supported by the record in petitioner's direct appeal, No. \_\_\_\_\_, or by the attached exhibits.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_, 2003, at \_\_\_\_\_, California.

\_\_\_\_\_  
Attorney for Petitioner

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. HABEAS CORPUS IS THE APPROPRIATE REMEDY FOR THE EX POST FACTO VIOLATION, BECAUSE PETITIONER HAS NO SPEEDY AND ADEQUATE REMEDY AT LAW AND PETITIONER'S CONVICTIONS FOR TIME-BARRED OFFENSES ARE VOID FOR LACK OF JURISDICTION.**

“While ordinarily habeas corpus is not a substitute for appeal [citation], this court has discretion to issue the writ if it believes an appeal is not adequate or if a prompt disposition is required in the interests of justice [citations]. This is such a case” (*In re Duran* (1974) 38 Cal.App.3d 632, 635.) “This is particularly so when the case involves a constitutional issue. [Citation.]” (*In re Quackenbush* (1996) 41 Cal.App.4th 1301, 1305.)

Although petitioner's direct appeal from the judgment is currently pending before this Court, A\_\_\_\_\_, that appeal does not provide a speedy and adequate remedy at law for the statute-of-limitations/ex post facto claim raised here. Because no certificate of probable cause has issued, these “constitutional, [and] jurisdictional ... grounds going to the legality of the proceedings,” are not cognizable in that post-plea appeal. (§ 1237.5.) The time for petitioner to apply for such a certificate or for the trial court to issue a certificate has expired. Under the California Supreme Court's recent opinion in *In re Chavez* (2003) 30 Cal.4th 643, neither this Court nor the trial court has authority to allow an untimely application for a certificate of probable clause. Nor may this Court excuse section 1237.5's requirement of such a certificate for review of these issues on direct appeal. (*Ibid.*) Consequently, petitioner has no available remedy at law.

Despite section 1237.5's apparent preclusion of direct review of this constitutional and jurisdictional error in the pending direct appeal, the underlying statute-of-limitations issue is not subject to forfeiture or implicit waiver, even by entry of a guilty plea.. The California Supreme Court recently reiterated its longstanding rule recognizing the jurisdictional nature of the statute-of-limitations and the inapplicability of waiver/forfeiture bars:

In criminal cases "in California the statute of limitations constitutes a substantive rather than a procedural right which is not waived [fn.] by failure

to assert it at the pleading stage.... [I]t is now well settled that a conviction, *even if based on a plea of guilty, is subject to collateral [or direct] attack* if the charge was originally barred by the applicable limitation period," ... [Citation.] The rule is a reflection of the fundamental principle of our law that "the power of the courts to proceed"-i.e., their jurisdiction over the subject matter-cannot be conferred by the mere act of a litigant, whether it amount to consent, waiver, or estoppel [citations], and hence that the lack of such jurisdiction may be raised for the first time on appeal.' [Citations]" (*People v. Williams* (1999) 21 Cal.4th 335, 339 -340, emphasis added.)

Thus, under the express terms of *William* and previous cases, a conviction in violation of the applicable statute-of-limitations is "subject to collateral ... attack" – i.e., to a habeas corpus petition – even after a guilty plea. (*Williams, supra*, at p. 340.) Additionally, because a limitations error represents a "lack of ... jurisdiction" (as also reiterated in *Williams (ibid.)*), the error comes squarely within the California Supreme Court's exceptions to the usual rules barring habeas consideration of claims that were or could have been raised on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 836-841 ["lack of fundamental jurisdiction" and "in excess of jurisdiction" exceptions to habeas restrictions].)

*Williams'* express endorsement of "collateral attack" on limitations-barred convictions and *Harris'* authorization of habeas review of jurisdictional errors are dispositive of petitioner's entitlement to habeas relief. Moreover, independently of those grounds, petitioner notes that the *Stogner*/limitations error also comes within *Harris'* other exceptions allowing habeas review in lieu of a direct appeal. First, *Stogner v. California* represents a "change in the law" (*Harris, supra*, 5 Cal.4th at pp. 841) because it overruled the California Supreme Court's opinion in *People v. Frazer* (1999) 21 Cal.4th 737, which had upheld the constitutionality of section 803(g). (See *Stogner v. California, supra*, 2003 WL 21467073 at pp. \*\*6-8, 13 [criticizing *Frazer*].)

Finally, the error also comes within *Harris'* exception for "fundamental constitutional error." (*Harris, supra*, 5 Cal.4th at pp. 829-836.) As the *Stogner* majority explained in striking down section 803(g):

California's law subjects an individual such as Stogner to prosecution long after the State has, in effect, granted an amnesty, telling him that he is "at liberty to return to his country ... and that from henceforth he may cease to preserve the proofs of his innocence," [Citations]. It retroactively withdraws a complete defense to prosecution after it has already attached, and it does so in a manner that allows the State to withdraw this defense at will and with respect to individuals already identified. [Citation.] "Unfair" seems to us a fair characterization. (*Stogner v. California, supra*, 2003 WL 21467073 at p. \*17.)

That description of the fundamental unfairness of "reviv[ing] a long- forbidden prosecution" (*Stogner, supra*, at p. \*16) brings this violation squarely within the category of "constitutional error [which] is both clear and fundamental and strikes at the heart of the trial process." (*Harris, supra*, 5 Cal.4th at p. 834.)

On all these grounds, petitioner's claim of jurisdictional and constitutional error is properly cognizable on habeas corpus.

**II. BECAUSE THE APPLICABLE STATUTE OF LIMITATIONS EXPIRED PRIOR TO THE ENACTMENT OF SECTION 803(g), THE EX POST FACTO CLAUSE BARRED PETITIONER’S PROSECUTION, AND PETITIONER IS ENTITLED TO IMMEDIATE RELIEF UNDER *STOGNER v. CALIFORNIA*.**

An information filed on \_\_\_\_\_ charged petitioner with violations of section \_\_\_\_\_, ***all occurring between \_\_\_\_\_ and \_\_\_\_\_*** (CT \_\_\_, copy attached as Exhibit A.) At the time of the charged offenses, the applicable statute of limitations was \_\_\_ years. (§ \_\_\_\_\_) The \_\_\_\_\_ explicitly acknowledged that the limitations period under section § \_\_\_\_\_ had expired. The information further alleged that the prosecution was undertaken pursuant to Penal Code section 803(g). As discussed below, section 803(g) purported to authorize prosecution for time-barred sexual offenses such as these, provided the charges were filed within one year of the alleged victim’s report of the accusation to a law enforcement agency.<sup>2</sup> The information here pleaded factual allegations assertedly bringing the case within the terms of section 803(g). (CT \_\_\_\_\_)

On \_\_\_\_\_, the jury convicted petitioner of \_\_\_\_\_ counts of \_\_\_\_\_. On \_\_\_\_\_, the trial court sentenced petitioner to a term of \_\_\_\_\_ years.

As the chronology above reflects, the state charged petitioner with these sexual offenses over \_\_\_ years after their alleged commission, even though the statute of limitations for such crimes in \_\_\_\_\_ was \_\_\_ years. Most importantly for present purposes, that \_\_\_-year statute of limitations expired long before January 1, 1994, the operative date of the legislation supposedly reviving the state’s authority to prosecute and punish these offenses.

In *Stogner v. California*, *supra*, 2003 WL 21467073, the United States Supreme Court held that application of California’s Penal Code section 803, subdivision (g) (enacted in 1994 and amended in 1996), to Stogner’s case and to those like Stogner’s, violated the federal constitution’s *Ex Post Facto Clause*. Section 803, subdivision (g), “authorizes prosecution for criminal acts committed many years beforehand –and where the original limitations period has expired – as long as prosecution begins within a year of a victim’s first

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<sup>2</sup> Section 803(g) also included additional factual conditions, not directly relevant to the ex post facto issue here, concerning the nature of the charged conduct and corroborating evidence.

complaint to the police.” (*Id.*) Like *Stogner*, petitioner was charged with crimes alleged to have been committed decades earlier and, like *Stogner*, “California could not have prosecuted” petitioner, inasmuch as the then-applicable \_\_\_-year statute of limitations governing the crimes of which petitioner was accused (and convicted) had expired \_\_\_ years or more “before the present prosecution was brought.” (*Id.*)

The United States Supreme Court ruled that section 803(g) “threatens the kind of harm that, in this Court’s view, the *Ex Post Facto Clause* seeks to avoid. Long ago the Court pointed out that the *Clause* protects liberty by preventing governments from enacting statutes with ‘manifestly unjust and oppressive’ retroactive effects. . . . [E]xtending a limitations period after the State has assured ‘a man that he has become safe from its pursuit .. seems to most of us unfair and dishonest.’ [citation omit.] In such a case, the government has refused ‘to play by its own rules,’ [cit. omit.]. It has deprived the defendant of the ‘fair warning,’ [cit. omit.] that might have led him to preserve exculpatory evidence. [cit. omit.]. And a Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both ‘arbitrary and potentially vindictive legislation,’ and erosion of the separations of powers. [cit. omit.]” (*Id.*, at p. 5576)

The *Stogner* Court found its interpretation of the *Clause* as applying to the resurrection of expired statutes of limitations “literally within the categorical descriptions of *ex post facto* laws set forth by Justice Chase more than 200 years ago in *Calder v. Bull*” [(1798) 3 Dall. 386, 1 L.Ed. 648]” and in the virtually unanimous opinions of “numerous legislators, [state] courts and commentators” dating back to the Civil War. (*Id.*, at pp. 5576-5577) It found the California Supreme Court’s *Frazer* opinion to be the anomaly, pointedly observing that “[t]he dissent refers to no case, outside of California, that has held, or even suggested,” that laws resurrecting time-barred prosecutions are **not** *ex post facto*. (*Id.*, at p. 5580)

Petitioner’s case comes squarely within *Stogner*’s *ex post facto* holding because, as summarized above, the applicable statute of limitations expired before the enactment of section 803(g). Nor are there any factual questions or ambiguities requiring resolution. The limitations bar appears on the face of the accusatory pleading. Indeed, the information

acknowledged the expiration of the statute of limitations and expressly relied upon section 803(g), the very statute voided in *Stogner*, as the basis for this prosecution. After *Stogner*, there can be question that petitioner is entitled to immediate relief, and release from his unlawful imprisonment.

**III. BECAUSE PETITIONER'S ENTITLEMENT TO RELIEF IS CLEAR UNDER *STOGNER*, THIS COURT SHOULD ORDER EXPEDITED FILING OF A RETURN AND SHOULD ORDER PETITIONER RELEASED ON BAIL OR HIS OWN RECOGNIZANCE PENDING FINAL DISPOSITION OF THE PETITION.**

As outlined in the preceding section, because petitioner's conviction was only made possible by section 803(g)'s unconstitutional revival of the statute of limitations, petitioner's entitlement to relief under *Stogner v. California* is clear-cut. Now that the U.S. Supreme Court has struck down that statute, every additional day that petitioner spends in prison is "manifestly unjust and oppressive" and represents an affront to fundamental concepts of justice. (See (*Stogner, supra*, 2003 WL 21467073 at p. \*3.) With the constitutional issue now definitively resolved, there is no longer any room for debate about his entitlement to relief and hence no cause for any delay. Consequently, this petition presents this Court with the task of ensuring final disposition of petitioner's case on the most expedited basis possible.

Habeas corpus has historically been the preferred vehicle in situations such as this where there is an urgent need to secure a defendant's immediate release from custody. As the California Supreme Court has explained, though habeas court requires a number of formal procedures,

This does not mean that obtaining relief through habeas corpus proceedings must be slow or cumbersome. *If the claim asserted in the petition has apparent merit and there is some urgency* because the petition, for example, alleges entitlement to release on bail or challenges the validity of a contempt order, *the court may require the custodian or real party in interest to submit the return to the writ or order to show cause as little as 24 hours* after being served with the petition. (Pen. Code, § 1475, pars. 3-4.) *Pending the outcome of the habeas corpus proceeding, the court may order that the petitioner be temporarily released from custody.* (See *id.*, § 1476 [court may "admit [the petitioner] to bail, if the offense is bailable"] [Citations]. (*People v. Romero* (1994) 8 Cal.4th 728, 744, emphasis added.)

Petitioner requests this Court to take each of the steps outlined in *Romero* to expedite disposition of the matter. First, because the information on its face reveals that the charged offenses were time-barred prior to 1994, there can be no question but that petitioner has established a "prima facie case" for relief under *Stogner v. California*. Consequently, this

Court should dispense with soliciting any “informal” response to the habeas petition and should proceed immediately with issuance of an order to show cause (OSC) or a writ of habeas corpus to bring petitioner before the court. Pursuant to section 1475, this Court should order respondent to file its return within one court day of the filing and service of this petition and should set the matter for hearing at the earliest available date. Finally, pending that hearing and final disposition of the petition, this Court should order petitioner released on his own recognizance or on bail, as authorized by section 1476. (See *Romero*, *supra*, 8 Cal.4th at p. 744.)

### CONCLUSION

Because petitioner’s conviction was obtained pursuant to section 803(g)’s unconstitutional revival of the statute of limitations, *Stogner v. California* requires this Court to take all steps necessary to ensure petitioner’s prompt release. Accordingly, as outlined in the preceding sections, petitioner respectfully asks this Court: 1) to grant petitioner released on his own recognizance or on bail pending final disposition of this petition; 2) to order respondent to show cause on an expedited basis (within one court day) why petitioner is not entitled to relief under *Stogner v. California*; 3) to set the matter for hearing at the earliest possible date; and 4) to vacate petitioner’s conviction and judgment and to order the underlying information dismissed with prejudice.

Dated: \_\_\_\_\_, 2003

Respectfully submitted,

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Attorney for Petitioner