No.

In the Supreme Court of the United States

STATE OF MONTANA,
Petitioner,

v.

RONALD DWIGHT TIPTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Stogner v. California*, 539 U.S. 607 (2003), this Court held that a California statute that revived time-barred prosecutions for sex-related child abuse crimes, and that was itself enacted after the limitations period for the alleged offense had expired, violated the *Ex Post Facto* Clause. *Stogner* involved a sexual abuse report 25 years after the alleged abuse and was based on recovered memory. This case, by contrast, involves the 1987 rape of an 8-year-old who immediately reported the crime; the suspected rapist's identity was discovered only after the crime lab entered Ronald Tipton's DNA profile into CODIS in 2014 as part of a separate criminal case and found that it matched the unsolved rape. The Montana Supreme Court nevertheless held that *Stogner* barred prosecution of Tipton because the statute of limitations for the 1987 rape had expired before Montana enacted a law allowing prosecutions within one year of a suspect's DNA identification, even if the limitations period had expired.

The questions presented are:

1. Whether this Court should revisit *Stogner* and clarify that the *Ex Post Facto* Clause does not bar the revival of a limitations period in cases where DNA evidence identifies the suspect after the statute of limitations has expired.

2. Whether this Court should overrule *Stogner* because it departed from the exclusive definition of *ex post facto* laws set forth in *Calder v. Bull*, 3 U.S. 386 (1798).

PARTIES TO THE PROCEEDING

Petitioner State of Montana was the respondent below. Because the Montana Supreme Court reviewed the district court's decision on a state procedure known as a writ of supervisory control, which allows for interlocutory review of district court orders (Pet. App. 6-7), the Thirteenth Judicial District Court and district court judge Mary Jane Knisely were also respondents, but nominally so. Respondent Ronald Dwight Tipton was the petitioner below.

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PETITION FOR A WRIT OF CERTIORARI

The State of Montana respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court in this case.

OPINIONS BELOW

The opinion of the Montana Supreme Court (Pet. App. 1) is published at 421 P.3d 780. The relevant order of the trial court is not reported, but is available at Pet. App. 21.

JURISDICTION

The judgment of the Montana Supreme Court was entered on July 5, 2018. Pet. App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10, Clause 1 of the United States Constitution provides: "No State shall . . . pass any . . . ex post facto Law . . . ." The relevant statutory provision, Montana Code Annotated § 45-1-205(9), is set forth at Pet. App. 51.

INTRODUCTION

This Court had been in existence barely eight years when it developed a four-part framework for analyzing e*x post facto* cases in *Calder v. Bull*, 3 U.S. 386 (1798). That framework endured for more than two centuries as "an exclusive definition of *ex post facto* laws," and its essence can be summarized in familiar yet simple terms: "Legislatures may not retroactively alter the definition of crimes or increase the punishment for

criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 42-43 (1990).

The Court's 5-4 decision in *Stogner v. California*, 539 U.S. 607 (2003), changed course. For the first time, the Court relied on what it described as an "alternate" formulation to hold that a California law that revived a statute of limitations that had expired was impermissibly *ex post facto*. Although *Stogner* involved unusual facts—sexual abuse first reported 25 years after the crime and 22 years after the limitations period expired—the rule the Court announced broadly prohibits any legislative act that revives a statute of limitations if the limitations period already expired. 539 U.S. at 632-33.

That rule has led to disastrous results in cases where perpetrators evaded identification past the limitations period and were later identified by DNA. This case is a good example. When Linda Tokarski Glantz was eight years old, a man broke into her family's home in the middle of the night and raped her.[1] Her rapist's DNA was preserved, but it took nearly 30 years before law enforcement was able to match that DNA profile to Ronald Tipton. Like many states, Montana has a statute allowing prosecution within one year of a suspect's DNA identification, even if the limitations period has already expired. The

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[1] Linda was identified by her initials in the courts below, but she has since publicly discussed what happened to her and has expressed a desire to be identified by her full name. *See* Jayme Fraser, *Out of the Shadow: A Child Rape Survivor's Story*, Billings Gazette, July 4, 2017, https://billingsgazette.com/feature/a-child-rape-survivor-s-story/article_21494ad1-6928-56b3-b780-6ff9d7dd7af1.html.

Montana Supreme Court, however, believed it was bound by *Stogner* and ordered that the charges against Tipton be dismissed.

Reviving a limitations period based on DNA identification does not violate the *Ex Post Facto* Clause because it does not retroactively alter the definition of a crime or increase its punishment. Nor are the concerns the Court identified in *Stogner* implicated when a rape victim immediately reports the crime and the suspect is identified years later by DNA testing. This Court should grant certiorari and either limit *Stogner*'s application or overrule it.

STATEMENT

A. Linda Tokarski Glantz's Rape, DNA's Exoneration of a Wrongly-Convicted Man, and Ronald Tipton's Identification as the Suspect Decades after the Crime.

On Friday, March 20, 1987, in a quiet neighborhood in Billings, Montana, the Tokarski family ended their day like any other and went to sleep. At around 4:30 in the morning, while the five children and their parents slept, a man slipped through a bathroom window that was cracked open. Careful not to wake anyone, he found his way to the upstairs bedroom of 8-year-old Linda. Pet. App. 24.

He startled Linda awake by stuffing a cloth belt in her mouth. He told her that he would kill her if she did not keep quiet. He then removed the cloth belt, took Linda's clothes off, and began raping her. He raped her orally, vaginally, and anally. When he was finished, he put a pillow over Linda's head and left. *Id.* 24-25.

In shock, and sure that he would kill her entire family, Linda somehow summoned the courage to run to her parents' room and wake her father. She told him what happened and the family frantically called the police. *Id.* at 25.

The police began their investigation immediately. *Ibid*. Within hours of the crime they completed a composite sketch of the suspect, whom Linda described as skinny with a moustache and red spots on his face. They also collected physical evidence, including Linda's underwear, on which the Montana Crime Lab found several samples of semen. The samples were preserved, even though DNA forensic science was still too undeveloped to be helpful in the case.[2] *Id*. at 3, 26.

In the following weeks, the police investigation focused on Jimmy Ray Bromgard after circumstantial evidence connected him to the crime. Pet. App. 25. At the same time, Respondent Ronald Tipton, who had not surfaced as a suspect, decided to leave the State. Testimony from Tipton's then-wife indicates that the decision to leave Billings was made hastily, and they were gone within two weeks of the crime. *Id*. at 29. Over the next year and a half, Tipton repeatedly changed locations, moving between Washington, Utah, and Arizona. Mot. To Dismiss Hr'g Tr. ("Tr."), 31-35, July 28, 2017.

Law enforcement eventually charged Bromgard with three counts of rape, and he was convicted and

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[2] The Montana Supreme Court first approved the use of DNA in a criminal trial in 1994. *See Montana v. Moore*, 885 P.2d 457, 464 (Mont. 1994).

sentenced in December of 1987. Pet. App. 3, 10. Approximately nine months after Bromgard's sentencing, Tipton returned to Montana after spending consecutive stints in jail in all three states he had visited. Tr. 31-35.

By 2002, DNA science had progressed substantially, and Bromgard requested that the biological material from Linda's underwear undergo DNA testing. Pet. App. 3-4. That test conclusively proved that Bromgard was not the source of the semen, and therefore innocent. He was released from prison and the police reopened the investigation into Linda's rape. *Ibid*.

Investigators then entered the semen sample from Linda's underwear into the Combined DNA Index System—known as CODIS. *Id.* at 4. CODIS is a set of databases run in conjunction with the FBI that allows law enforcement across the nation to compare DNA samples in unsolved cases. CODIS was designed for cases like Linda's, where crime scene evidence yielded a full DNA profile, but the suspect remains unknown.[3] Pet. App. 25-26.

For more than a decade, DNA profiles from known offenders were compared against the DNA profile from Linda's unknown attacker, but without success. The investigation remained open, but cold—until 2014. In 2014, Ronald Tipton pleaded guilty to felony drug possession and, as part of his plea, provided a DNA sample. Pet. App. 28. When the Montana Crime Lab

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[3] *See* Fed. Bureau of Investigation, Frequently Asked Questions on CODIS and NDIS, FBI CODIS and NDIS Fact Sheet, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Sept. 30, 2018).

processed Tipton's DNA, they received a CODIS "hit" that matched Tipton's DNA to the unknown profile from Linda's long-cold 1987 rape case. *Id*. at 26-27. Following protocol, the Crime Lab ran the profile again, and received the same result. *Id.* at 27. Based on that analysis, the probability of an unrelated individual from a random population having matching DNA is 1 in 2,603,000,000,000,000 Caucasians. *Ibid*. Law enforcement then obtained a warrant for a DNA sample from Tipton, which confirmed that Tipton's DNA profile matched the profile obtained from Linda's underwear. *Id*. at 28-29. The State charged Tipton with three counts of sexual intercourse without consent.

B. Montana's Statutes of Limitations for Sex Crimes and the Underlying Proceedings.

Over the past three decades, the Montana Legislature has repeatedly extended the statutes of limitations that apply to sex crimes against children. In 1987, when Tipton allegedly raped Linda, a rape prosecution had to be commenced within five years of the rape if the victim was younger than sixteen. *See* Mont. Code Ann. § 45-1-201(1)(b) (1985). In 1989, the Legislature linked the limitations period to the victim's age and expanded the time to prosecute to five years from the victim's eighteenth birthday, if the victim was a minor at the time of the rape. Mont. Code Ann. § 45-1-201(b) (1989). Additionally, under Montana law, criminal statutes of limitations are tolled when the offender is absent from the state. *See* Mont. Code Ann. § 45-1-206.

Linda turned 18 on May 8, 1996, meaning that, barring any tolling, the State had until May 8, 2001, to commence a prosecution for her rape. Of course, at this

time, police were not investigating the rape because Bromgard had been convicted. Additionally, shortly after Linda's rape, Tipton fled Montana at the beginning of April 1987, and he did not return until September 1988. Pet. App. 29. Based on the record presented below, the State conservatively estimates that Tipton was absent from Montana for at least 526 days in the year and a half following the rape. Under Montana's tolling statute, Tipton's absence would have tolled the limitations period.

On May 1, 2001, Montana's Governor signed a bill expanding the time to charge a child rape until ten years after the victim turned eighteen. Mont. Code Ann. § 45-1-205(9)(b) (2001). That law did not include an effective date within the legislation and so, by default, it became effective on October 1, 2001. *See* Mont. Code Ann. § 1-2-201 (without express effective date, new laws automatically take effect on October 1). Absent statutory tolling, the statute of limitations in Linda's case would have expired 146 days before that amendment took effect. The 2001 statute of limitations expanded the time to commence a prosecution until May 8, 2006, Linda's 28th birthday. In 2001, however, Bromgard was still in prison for the crime of raping Linda, and DNA testing would not exonerate him until the next year. Pet. App. 25.

The 2007 Legislature took note that DNA forensic science had become an invaluable tool for solving crimes, sex crimes in particular. That session, the Legislature enacted an exception to the statute of limitations. Under the new provision, if DNA testing "conclusively identified" a suspect after the limitations period had expired for certain sex crimes, including

rape, then the State could nonetheless commence a prosecution within one year of the suspect's identification. Mont. Code Ann. § 45-1-205(9) (2007).[4] The new section exemplified "the law catching up with science" and was designed to prosecute "cold cases" where the time to prosecute had expired. Pet. App. 35-36. The law became effective on October 1, 2007, 511 days after Linda's 28th birthday. Applying the remaining 380-day time period that Tipton was outside Montana, the statute became effective 131 days after the limitations period in Linda's case would have run.

In 2014, when law enforcement matched Tipton's DNA to Linda's unsolved 1987 rape, the State commenced its prosecution under the DNA revival statute, Mont. Code Ann. § 45-1-205(9). During the trial court proceedings, Tipton moved to dismiss, arguing that the statute of limitations had expired and that applying the DNA exception to his circumstance would amount to an *ex post facto* violation. In rejecting the challenge, the district court relied heavily on legislative hearings, which had emphasized the unique ability of DNA to conclusively identify suspects in sex crimes. According to the court, the intent of the DNA exception was clear: "holding offenders accountable for their crimes and protecting the victims of violent sexual attacks." Pet. App. 35, n.4. The hearings highlighted three things: "(1) the importance and power of DNA evidence; (2) the acceptance of DNA evidence

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[4] The provision reads in full: "If a suspect is conclusively identified by DNA testing after a time period prescribed in subsection (1)(b) or (1)(c) has expired, a prosecution may be commenced within 1 year after the suspect is conclusively identified by DNA testing." Mont. Code Ann. § 45-1-205(9).

as valid and reliable; and (3) the need for legal evolution so that the law can keep pace with changes in science and technology, while ensuring Constitutional protections." *Id*. at 37.

The trial court distinguished Tipton's case from this Court's *Stogner* decision. First, Montana's statute is significantly narrower than the California statute at issue in *Stogner*. Unlike the California law, which permitted otherwise time-barred prosecution based on delayed reporting, the Montana law permits revival only if DNA conclusively identifies a suspect. Pet. App. 41-45. The court noted that this statute "ensures access to justice for victims, while preventing prosecutions against individuals without a conclusive DNA match. The 2007 amendment is only triggered by conclusive DNA analysis and requires immediate prosecution." *Id*. at 45. The court determined that the limited ability to revive a sex crime prosecution based only on DNA identification was a "key difference" between the Montana law and the one reviewed in *Stogner*, and the court noted that "*Stogner* never mentioned DNA evidence in relation to the statute of limitation nor did it address any amendment to a statute of limitation dealing directly with DNA evidence" like Montana's law. *Id*. at 42-43.

The trial court also determined that *Stogner* was distinguishable based on the *ex post facto* factors set out in *Calder v. Bull*, 3 U.S. 386 (1798). First, the 2007 DNA exception did not punish an act that had been lawful when committed; as now, rape was illegal in 1987. *Id.* at 45. Second, the law did not make the punishment more burdensome. *Id.* at 46. The court noted that the definition of the crime had not changed

and that Tipton's potential sentence was based on the law in effect in 1987 rather than the current sentencing structure, with its mandatory minimums, sex offender registration, and treatment provisions. Pet. App. 46, n.5. Additionally, unlike the law at issue in *Stogner*, which revived "any and all previous causes of action that would have been time barred," the "only way [Tipton] could have been positively identified was by having his DNA, in the Montana database as required by statute, compared to the DNA left on [Linda's] underwear in the unsolved rape." *Id*. at 46. Unlike California's law, "Montana's law is highly specific and requires a conclusive DNA match before prosecution can occur." *Id*. at 47. According to the court, the concerns in *Stogner*—"lack of evidence and concerns about problems with the memories of witnesses"—were contrary to the evidence presented in the form of "DNA and its scientific validation and uses." *Ibid*.

Finally, the court noted that this case was factually distinct from *Stogner* in that the victim immediately reported the rape and that the suspect's identity was unknown. The court stated that "two particular facts distinguish this case from *Stogner* and highlight the manifest injustice" that would occur if the DNA exception did not apply. *Id*. at 47-48. First, this case did not involve familial rapes, delayed reporting, or alleged false accusations. Rather, Linda reported the rape immediately and a person was convicted for the crime. It was only due to DNA testing that the person who was incarcerated was exonerated. *Id*. at 48.

Second, the only reason Tipton was identified through his DNA was due to a new criminal conviction; but for his new offense, his identity would have

remained unknown and Linda's rape would still be a cold case. *Ibid*. Based on these distinctions, the court opined "It is hard to believe these facts are the type contemplated by the *Stogner* Court as it addressed the California law allowing resurrection of *any and all* previous rapes having been time barred. These facts are wholly different from the *Stogner* facts." Pet. App. 49 (emphasis in original). The district court thus held that the DNA exception did not violate the *Ex Post Facto* Clause.

The Montana Supreme Court reversed, ruling that *Stogner*'s expansive holding covered Tipton's case and rendered the prosecution an *ex post facto* violation. The Court framed the issue as follows: "Does a law that purports to revive an expired statute of limitations when a suspect is conclusively identified by DNA evidence violate the *Ex Post Facto* Clause when the statute of limitations for the charged crime expired before the statute came into effect?" *Id*. at 12. The Court viewed this as similar to the question resolved in *Stogner*. *Ibid*.

In applying *Stogner*, the Montana Supreme Court observed that *Stogner* had relied on Justice Chase's "alternative description" of what constitutes an *ex post facto* violation to determine that a statute that revives an expired statute of limitations fell within the second *Calder* category: "Every law that aggravates a crime, or makes it greater than it was, when committed." *Id.* at 13 (quoting *Calder*, 3 U.S. at 389). The Court recognized *Stogner*'s binding holding that reviving an expired limitations period "aggravated the crime because 'it inflicted punishment for past criminal conduct that (when the new law was enacted) did not

trigger any such liability.'" *Ibid*. (quoting *Stogner*, 539 U.S. at 613) (internal quotation marks omitted).

The Montana Supreme Court acknowledged that the facts at issue in Tipton's case "differ[ed] in important respects from the facts in *Stogner*." Pet. App. 17-18. The court noted that, unlike in *Stogner*, the rape victim did not delay reporting the offense; the crime was promptly investigated and prosecuted; the State and victim believed the perpetrator had been convicted; and Tipton was identified only because he committed another crime and because of advances in DNA technology. *Id*. at 17. But while the cases were factually distinct, the Court could find no constitutional distinction from *Stogner*, which left "no room to balance the State's and the victim's interests against the defendant's constitutional right to be free from *ex post facto* laws." *Id*. at 17. "Strong as societal interests are, *Stogner* offers no latitude to distinguish this case based upon any of the grounds the State raises." *Id*. at 17-18.

In sum, the Montana Supreme Court determined that it was bound by *Stogner* and that, although Tipton's case differed in many respects, *Stogner* required a reversal:

> The crime against L.T. more than thirty years ago was, and remains, a horrific, morally repugnant act that the people of Montana expect will be punished for the protection of the victim and society. The State's case against the alleged perpetrator is strong, and the scientific evidence is compelling. But the Supremacy Clause of the United States Constitution, *see* U.S. Const. art. VI, cl. 2, compels the judges of this State to apply the federal constitution as interpreted by

> the United States Supreme Court. Applying the rule of law from *Stogner*, as we must, the State's arguments fail. *Stogner* compels us to hold that the charges against Tipton must be dismissed.

Id. at 18.

REASONS FOR GRANTING THE PETITION

I. This Court Should Revisit *Stogner v. California*, and Clarify that the *Ex Post Facto* Clause Does Not Bar Revival of Statutes of Limitations for Sex Crimes When DNA Identifies A Suspect.

In *Stogner v. California* the Court held that reviving a statute of limitations after it had expired violated the *Ex Post Facto* Clause. 539 U.S. at 609. There, the victim reported the sex abuse allegations for the first time 25 years after they allegedly occurred, based on recovered memory. *Id.* at 610, 631. The Court held that to prosecute a defendant under those circumstances was impermissibly *ex post facto* because it failed to provide fair warning and was an example of arbitrary and potentially vindictive legislation. *Id.* at 611, 630-31.

The Court's broad ruling has had unforeseeable and likely unintended consequences for cold cases in which a suspect, who has successfully evaded identification and capture beyond the statute of limitations, is identified for the first time through DNA that was collected during the initial investigation. Advances in DNA technology combined with cooperative efforts among the states and federal government to enter and track DNA profiles have led to a number of breaks in sexual assault cold cases. Unfortunately, however,

suspects are often identified only after the statute of limitations has expired.

Reviving a statute of limitations based on a suspect's identification from DNA evidence collected in the initial investigation does not implicate the concerns identified in *Stogner*—fair warning to the defendant and avoiding vindictive and arbitrary legislation. This Court should clarify that *Stogner* does not reach these cases.

A. *Stogner* Allows Rapists Conclusively Identified by DNA Who Have Evaded Identification and Capture Beyond the Limitation Period to Go Free.

Rape is a unique crime because the perpetrator often leaves irrefutable evidence of his identity. Semen from an assault produces a DNA profile that makes it possible to "match[] a suspect with near certainty." *Maryland v. King*, 569 U.S. 435, 443 (2013); *id.* at 461 (recognizing "the unmatched potential of DNA identification"). DNA technology is "one of the most significant scientific advancements of our era," and has the "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *Id.* at 442 (quoting *District Attorney's Office v. Osborne*, 557 U.S. 52, 55 (2009)). Indeed, in this case it did both: DNA exonerated Bromgard and identified Tipton as the suspect.

But to gather that crucial DNA, the victim first must endure a sexual assault forensic examination. The process for collecting the evidence, known as a rape kit, lasts between two and six hours and must be completed within 72 hours of the rape. Between the

rape and the exam, the victim cannot bathe or shower. She cannot change her clothes or comb her hair. She's discouraged from even using the restroom. During the exam, the victim stands alone on a white sheet while undressing and every piece of evidence—hair, fibers, tissue, blood, semen—is methodically collected and preserved. She is photographed from every angle. Swabs and samples are taken from private places that just hours earlier were violently attacked.[5]

Thousands of women suffer this process every year for one purpose: to bring the perpetrator to justice. But, sadly, justice is often deferred. "It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity." *King*, 569 U.S. at 450 (quotation omitted). As a result, many of these cases quickly go cold unless additional leads point to a suspect. The perpetrator's DNA, however, does not fade like a memory. It sits preserved in a database on the chance that the perpetrator will slip up.

And they usually do slip up, though sometimes not until many years later. It is not uncommon that "people detained for minor offenses can turn out to be the most devious and dangerous criminals." *Id.* at 450 (quoting *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 334 (2012)). In this case, for example, Tipton's DNA was collected after he was caught growing marijuana plants in his trailer home.

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[5] *See, generally* RAINN, *What Is A Rape Kit?*, RAINN.org, www.rainn.org/articles/rape-kit (last visited September 7, 2018).

But too often, as in this case, suspects effectively conceal their identities and evade capture until after the statute of limitations has expired. Recognizing this problem and the unique reliability of DNA, Montana, the federal government, and at least 14 other states have enacted legislation that allows prosecutions for a limited time (usually between 1-3 years) after DNA identifies a suspect, notwithstanding an expired statute of limitations.[6]

This Court's *Stogner* decision, however, blocks prosecution if the statute authorizing revival was enacted after the limitations period expired. The Court limited its ruling to statutes of limitations that had already expired, exempting cases in which the legislature extended the statute of limitation after the crime was committed, but before the limitations period expired. *Id.* at 613, 618.

Stogner's holding prevents any prosecutions if a limitations period has expired, even if the victim reported the crime immediately and a suspect is later identified through DNA evidence collected during the initial investigation. As the Kansas Supreme Court

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[6] *See* 18 U.S.C. § 3297; Cal. Penal Code § 803; Conn. Gen. Stat. § 54-193(b); Del. Code Ann. 11, § 205(i); Fla. Stat. § 775.15(15)(a); Ga. Code Ann. § 17-3-1(d); Haw. Rev. Stat. § 701-108(3)(c); Ind. Code § 35-41-4-2(b)(1); La. C. Cr. P. Art 572(B); Minn. Stat. § 628.26(f); N.D. Cent. Code § 29-04-03.1(2); Or. Rev. Stat. § 131.125(10); Okla. Stat. tit. 22 § 152(2); 42 Pa. Code § 552(c)(1); Utah Code § 76-1-302(2)(a), (3). A sixteenth state, Kansas, previously had a DNA revival statute for sexual assaults. Kan. Stat. Ann. 2001 Supp. 21-3106(4), (3)(a). But that law was repealed after the Kansas Supreme Court ruled it unconstitutional under *Stogner*. *See Garcia*, 169 P.3d at 1075.

recognized, "'[s]ince *Stogner* did not carve out an exception for DNA evidence, it appears that even near-perfect reliability in linking a defendant to a crime will be insufficient to justify reviving a time-barred prosecution.'" *Kansas v. Garcia*, 169 P.3d 1069, 1075 (Kan. 2007) (overturning rape conviction and ruling DNA exception unconstitutional) (quoting Note, *Does Time Eclipse Crime*, Stogner v. California *and the Court's Determination of the Ex Post Facto Limitations on Retroactive Justice*, 38 U. Rich. L. Rev. 1011, 1043 (2004)); *see also* Pet. App. 17.[7] Thus, unless the perpetrator also committed murder, for which no state has a statute of limitations, he will likely never be prosecuted if he evades identification and capture past the limitations period. Indeed, in these situations most prosecutors will not even charge a suspect identified by DNA because of *Stogner*'s broad ruling.

Stogner is having a particularly harsh impact on law enforcement's ability to prosecute cold cases in recent years because suspects in sex crime cases are being identified at an unprecedented rate. Two reasons explain the uptick. First, the federal government appropriated nearly a billion dollars between 2015-2019 to help states "enhance the analysis of DNA samples," especially backlogged samples. Congressional Budget Office Cost Estimate, *H.R. 4323 Debbie Smith*

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[7] *See also State ex rel. Nicholson v. Louisiana*, 169 So. 3d 344 (La. 2015) (same); *Oklahoma v. Harris*, No. CF-2014-122, *Order of Defendant's Demurrer to the Information and Motion to Dismiss* (Okla. Dist. Ct. May 5, 2015) (same).

Reauthorization Act of 2014, April 4, 2014.[8] Thanks to that joint effort, thousands of cold case DNA profiles have been added into CODIS, which in turn has offered victims of unsolved crimes hope. *See e.g.,* Linda Fairstein, *Unsolved Rapes: How Testing the Rape Kit Backlog Could Solve Thousands*, The Daily Beast, February, 25, 2011; Meris Lutz, *Rape Kit Backlog Yields New Leads in Metro Atlanta Cold Cases*, Atlanta Journal-Constitution, June 1, 2018. Of course many of these cases are sexual offenses in which the statute of limitations has expired. Because of *Stogner*, prosecutors will not charge them.

The second factor that has increased the number of identifications in cold cases is the recent development of a new investigative technique using DNA evidence. The technique started with the capture of Joseph DeAngelo in California in April, 2018. DeAngelo is accused of raping more than 50 women and killing twelve people in California between 1974 and 1986. Despite a massive multi-jurisdictional manhunt, DeAngelo evaded identification and capture for nearly 44 years. Throughout that time, several potential suspects were identified, but they were cleared by DNA evidence collected from the crimes. Finally, in April 2018 an investigator entered the perpetrator's unidentified DNA profile into an open source genealogy website. *See* Cal Arango, Tim; Goldman, Adam; Fuller, Thomas*, To Catch a Killer: A Fake Profile on a DNA Site and a Pristine Sample*, N.Y. Times, April 27, 2018. That narrowed the field of potential suspects to a very small familial group. Investigators quickly focused on

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[8] https://www.cbo.gov/publication/45236 (last visited September 21, 2018).

DeAngelo, who was living in a suburban Sacramento neighborhood with his daughter and granddaughter. After obtaining DeAngelo's DNA, law enforcement matched him to the preserved DNA from the serial rapes. Police arrested him, and charged him with twelve homicides. But like Tipton, DeAngelo will not be prosecuted for the dozens of rapes he allegedly committed. *Ibid*.

Investigators are using that same technique to break cold cases nationwide. Heather Murphy, *Genealogists Turn to Cousins' DNA and Family Trees to Crack Five More Cold Cases*, N.Y. Times, June 27, 2018. But unless the perpetrators committed murder, they likely will not be charged for any crime because of *Stogner*. Police will not even arrest suspected rapists if the limitations period had expired because they know that they cannot be prosecuted in light of *Stogner*'s broad holding.

B. The Rule from *Stogner* Should Not Apply Where There Is No Delay in Reporting the Rape and DNA Evidence Identifies a Suspect after the Statute of Limitations Expired.

The *Stogner* majority's holding that "a law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution" was unnecessarily broad. *Stogner*, 539 U.S. at 623-33. The Court should clarify that, although the California law at issue in *Stogner* may have violated the *Ex Post Facto* Clause, not every law that revives a limitations period does so. Specifically, the Court should hold that reviving a statute of limitations based on identification

of a suspect from DNA collected as part of the initial investigation does not violate the *Ex Post Facto* Clause.

A primary reason the *Stogner* majority gave for its holding was that the California law implicated the harms that the *Ex Post Facto* Clause sought to avoid. *Stogner*, 539 U.S. at 611. The Court has repeatedly recognized two overarching purposes of the *Ex Post Facto* Clause, which guide its application: (1) protecting defendants from "arbitrary and vindictive legislation"; and (2) providing "fair warning." *Stogner*, 539 U.S. at 611; *see also Calder*, 3 U.S. at 389; *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Miller v. Florida*, 482 U.S. 423, 429-30 (1987). Those purposes do not apply to cold cases involving sex crimes where the victim did not delay reporting the crime and DNA evidence was collected during the initial investigation.

The *Ex Post Facto* Clause's first purpose is not implicated because there is no danger that a legislature is acting arbitrarily or vindictively when it enacts a DNA revival statute. No evidence is more detached and dispassionate than DNA. Unlike other types of evidence, "it is not subject to the judgment of officers" who may have personal bias or emotional responses to suspects, and it leaves no discretion with those testing the DNA. *King*, 569 U.S. at 448 (citation omitted); *accord United States v. Sylla*, 790 F.3d 772, 774 (7th Cir. 2015) (recognizing that CODIS operates in a manner that safeguards against "arbitrary and discriminatory enforcement"). In other words, there is no possible danger that these laws are "violent acts which might grow out of the feelings of the moment." *Stogner*, 539 U.S. at 611 (quoting *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810)); *see also Calder*, 3 U.S. at 389

("With very few exceptions, the advocates of such [*ex post facto*] laws were stimulated by ambition, or personal resentment, and vindictive malice.").

Moreover, there is nothing arbitrary about DNA testing. The Court in *King* described the meticulously standardized process of DNA analysis through the FBI's CODIS database, which "connects DNA laboratories at the local, state, and national level." *King*, 569 U.S. at 444. "To participate in CODIS, a local laboratory must sign a memorandum of understanding agreeing to adhere to quality standards and submit to audits to evaluate compliance with the federal standards for scientifically rigorous DNA testing." *Id.* at 445 (citing J. Butler, *Fundamentals of Forensic DNA Typing* 270 (2010)). Montana's crime lab, like every other states', complies with those quality standards, which is confirmed by regular audits of the lab. Tr. 88-89.

Additionally, DNA testing does not lend itself to vindictive investigation. Every DNA profile is anonymous to the analyst. Profiles are assigned an identifying number and stripped of any personally identifying information when entered into CODIS. Tr. 60. ("All offender profiles are assigned a specific DNA number that is separated from the individual's name and identifying information, so CODIS does not contain . . . any identifying information as far as name, date of birth, Social Security number, that kind of thing."). A separate database that is maintained on a separate network contains the personally identifying information that can be accessed once CODIS signals a positive match. Tr. 61.

The result is a system that is safeguarded from human bias, vindictive purpose, or even a margin of error in identifying suspects. Tr. 92 ("We don't have margin of error or tolerance in DNA. I mean the profile is the profile . . . margin of error comes into play and tolerance more in like toxicology type testing where they're measuring quantities of things, and DNA is not that way."); *see also* Pet. App. 27. In this case for example, law enforcement did not have suspects who they were trying to build a case against. The case was cold. The crime lab analyst simply entered Tipton's de-identified profile into CODIS and it rendered a hit. Pet. App. 26-27.

The *Ex Post Facto* Clause's second purpose—fair warning to the defendant—is also not implicated in cases involving a DNA exception to a statute of limitations. In *Stogner*, the alleged crime was not reported for at least 25 years after the offense, and thus, "the accused lacked notice that he might be prosecuted" so many years later. *Stogner*, 539 U.S. at 621, 631. That problem was compounded because the allegations were based on repressed memory. *Id*. at 631. ("Such problems can plague child abuse cases, where recollection after so many years may be uncertain, and 'recovered' memories faulty, but may nonetheless lead to prosecutions that destroy families.") (citing Lynn Holdsworth, *Is It Repressed Memory with Delayed Recall or Is It False Memory Syndrome? The Controversy and Its Potential Legal Implications*, 22 Law & Psychol. Rev. 103, 103-104 (1998)).

The Court's concerns with repressed memory are simply not at play in DNA identification because the

effectiveness of a DNA profile does not diminish over time. As the Seventh Circuit noted, "[s]tatutes of limitations exist, in part, to protect people from having to defend against charges where the basic facts may have become obscured by the passage of time. . . . But properly stored DNA evidence, unlike most other kinds of evidence, can maintain its reliability for decades." *United States v. Hagler*, 700 F.3d 1091, 1098 (7th Cir. 2012) (internal citations omitted). This case illustrates the point. The crime was reported immediately, and the DNA evidence was collected as part of that initial investigation. Pet. App. 25-26. The perpetrator certainly had fair warning that he would be prosecuted, as soon as he was identified and captured. Thus, a case like this one in which the perpetrator's identity remains unknown, despite active investigation, is not an example of the "state having neglected to prosecute within the time prescribed for its own action. . . ." *Stogner*, 539 U.S. at 629 (quoting *Texas v. Sneed*, 25 Tex. 66 (1860)). That is particularly true here, where the State prosecuted and convicted a suspect who thankfully was exonerated by DNA. And "[t]here can be no contention that they were not adequately forewarned both that their conduct was prohibited and of its consequences." *Harisiades v. Shaughnessy*, 342 U.S. 580, 593 (1952); *accord Dobbert v. Florida*, 432 U.S. 282, 297 (1977) (upholding law against *ex post facto* challenge that "provided fair warning as to the degree of culpability").

Moreover, the law at issue in *Stogner* was both broad and unusual, which should serve to limit *Stogner*'s application. The Court described the law as "a kind of extreme variant that . . . has not likely been often enacted in our Nation's history." *Stogner*, 539

U.S. at 630. Montana's law, on the other hand, is quite narrow—applying only to certain sexual crimes and only where DNA conclusively identifies a suspect. At least 14 other states and the United States have enacted DNA exception laws. This is especially significant, given that these laws were enacted even in the face of *Stogner*'s broad rule banning their application to cases in which the statute of limitation has already expired.

When a crime is reported and investigated, a perpetrator is on notice that he will be prosecuted once he is identified. Perpetrators who commit these crimes but evade identification and capture should have no legitimate claim to repose nor any reliance interest in an expired statute of limitations. They are not surprised when they are finally apprehended. Take for example John Miller, who is accused of raping and killing an eight-year-old girl in 1988. Following DeAngelo's arrest in California, Indiana investigators used the same technique and connected Miller's DNA to the rape. Kyle Swenson, *After 30 Years, Police Say They've Captured A Child Killer Who Left A Sickening Trail of Taunts*, Washington Post, July 16, 2018. When investigators showed up at Miller's house to question him, they asked if he knew why they were there. He simply replied, "April Tinsley." *Ibid.*

Stogner bars Indiana from charging Miller for April Tinsley's rape, just like it bars Montana, California, and every other state that is identifying suspects in unsolved rapes. States may have good reason to retain statutes of limitations, but they should not be put to an all-or-nothing proposition, particularly given the advances in DNA identification. States should be

allowed to revive statutes of limitation when DNA collected as part of the initial investigation identifies a suspect, and this Court should take the opportunity to hold that the *Ex Post Facto* Clause does not stand in their way.

II. Alternatively, This Court Should Overrule *Stogner*, Which Stands Doctrinally Discordant from the Court's *Ex Post Facto* Precedent.

The Court's 5-4 decision in *Stogner* is an outlier in its *Ex Post Facto* jurisprudence because it is the only non-overruled case to go beyond Justice Chase's definitive and exclusive description of the Clause's boundaries, set forth in *Calder*, 3 U.S. at 390. Justice Chase recognized that "[t]he prohibition, 'that no state shall pass any ex post facto law,' necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." *Ibid*. He then offered his summation of the Clause's reach:

> I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 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 offense, in order to convict the offender."

Id. at 390-91.

The Court has repeatedly affirmed this formulation "as an exclusive definition of ex post facto laws." *Collins*, 497 U.S. at 39 (citing *Fletcher v. Peck*, 10 U.S. 87, 138 (1810)); *See Carmell v. Texas*, 529 U.S. 513, 539 (2000) ("Accordingly, *Collins* held that it was a mistake to stray *beyond Calder*'s four categories"); *Gut v. Minnesota*, 76 U.S. (9 Wall.) 35, 38 (1869); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867). In *Collins*, the Court summarized the crux of Justice Chase's formulation, noting simply that the original understanding of the *Ex Post Facto* Clause is uncomplicated: "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." 497 U.S. at 43.

Rather than following Justice Chase's "exclusive definition," the *Stogner* majority looked to what it described as an "alternate" description. *Stogner*, 539 U.S. at 612. Specifically, the Court viewed Justice Chase's observation that "at other times they inflicted punishments, where the party was not, by law, liable to any punishment" *Calder*, 3 U.S. at 389, as an expansion of Justice Chase's second category prohibiting aggravation of a crime. "The second category—including any 'law that aggravates a crime, or makes it greater than it was, when committed' *id.* at 390—describes California's statute as long as those words are understood as Justice Chase understood them—*i.e.*, as referring to a statute that 'inflict[s] punishments, where the party was not, by law, liable to any punishment,' *id.* at 389." *Stogner*, 539 U.S. at 613

(citation altered from original). The majority viewed the second category as applicable in *Stogner* because "[a]fter (but not before) the original statute of limitations had expired, a party such as Stogner was not 'liable to any punishment.' California's new statute therefore 'aggravated' Stogner's alleged crime, or made it 'greater than it was, when committed,' in the sense that, and to the extent that, it 'inflicted punishment' for past criminal conduct that (when the new law was enacted) did not trigger any such liability." *Stogner*, 539 U.S. at 613.

Justice Kennedy correctly pointed out that *Stogner* was the first and only time the Court had strayed from Justice Chase's four categories to find "alternate" categories as authoritative. *Id*. at 635-36 (Kennedy, J., dissenting). Justice Chase himself warned against expansion of the Clause's application, noting that its history and purposes dictated a narrow application: "But I will go no farther than I feel myself bound to do; and if I ever exercise the jurisdiction I will not decide any law to be void, *but in a very clear case*." *Calder*, 3 U.S. at 395 (emphasis added). Justice Patterson's concurrence also emphasized the Clause's narrow application: "From the above passages it appears, that *ex post facto* laws have an appropriate signification; they extend to penal statutes, and no further; they are restricted in legal estimation to the creation, and, perhaps, enhancement of crimes, pains and penalties." *Id.* at 397 (Patterson, J., concurring).

The *Stogner* majority drew from what it described as a "complicated history" (*id.* at 623) to support its holding, as well as cases that had eschewed Justice Chase's four part framework and instead adopted an

expanded view of the *Ex Post Facto* Clause. *See Stogner*, 539 U.S. at 636 (citing *Moore v. New Jersey*, 43 N.J.L. 203, at 216, 220 (1881)). As Justice Kennedy noted, the authority that the *Stogner* majority relied on had rejected that the *Ex Post Facto* Clause was limited to the *Calder* formulation. *Id.* at 637-38 (Kennedy, J., dissenting).

The Court has not shied from correcting "departure from *Calder*'s explanation of the original understanding of the *Ex Post Facto* Clause." *Collins*, 497 U.S. at 49. In *Collins* the Court overruled two decisions that incorrectly expanded *Calder*'s categories, *Kring v. Missouri*, 107 U.S. 221 (1883) and *Thompson v. Utah*, 170 U.S. 343 (1898). *Kring* had held that an *ex post facto* law is one that, "in relation to the offense or its consequences, alters the situation of a party to his disadvantage." 107 U.S. at 228-29 (quotation omitted). *Thompson* had held that an *ex post facto* law was one that deprived a defendant of "a substantial right involved in his liberty." 170 U.S. at 352. The Court rejected both of these broad formulations because they were inconsistent with the framer's understanding of what constituted an *ex post facto* law. The Court noted that other formulations that may have been misinterpreted too broadly were "simply shorthand for legal changes altering the definition of an offense or increasing a punishment." *Collins*, 497 U.S. at 49. The Court overruled these decisions because they expanded the Clause's application beyond *Calder's* categories, and thus "depart[ed] from the meaning of the Clause as it was understood at the time of the adoption of the Constitution." *Id*. at 50. It should do so again here.

Stogner's distinction between extending expired and unexpired statutes of limitations, 539 U.S. at 613, 618, highlights its departure from longstanding precedent in still another way. The distinction makes sense only if perpetrators gain a vested reliance interest once the statute of limitations expires. *Id.* at 631. *Stogner* marked the first time the Court recognized an accused's "reliance interests" as an independent purpose underlying the *Ex Post Facto* Clause. But the right to a reliance interest makes little sense in the criminal context because there was never a question that the perpetrator's conduct was unlawful. As one commentator noted, "Values of reliance and repose fit comfortably the paradigm of conduct that the society wishes (or once wished) to encourage, but such values are distinctly less well suited to the paradigm of action that all admit should never have taken place." Laurence H. Tribe, *American Constitutional Law* 629-30 (2d ed. 1988).[9] Simply because the perpetrator has evaded discovery is no reason he should have a reliance interest in a statute of limitations. As Justice Kennedy noted, "We should consider whether it is warranted to presume that criminals keep calendars so they can mark the day to discard their records or to place a gloating phone call to the victim." *Stogner*, 539 U.S. at 650 (Kennedy, J., dissenting). In any event, recognizing a perpetrator's reliance interest makes no sense when

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[9] Even if the interest was relevant in *Stogner* because of the long delay in reporting (*Stogner*, 539 U.S. at 631), that interest has little weight in cases involving DNA revival statutes, where there is no delay in reporting the crime and the suspect is identified through preserved DNA evidence, *see* Section I, *supra*. Moreover, any reliance interest rising from lengthy delay would still be entitled to protection under the Due Process Clause.

a crime has been reported and investigated, and the only reason the perpetrator has not been charged is that he has not yet been identified or because someone else has been wrongly convicted.

This Court should grant certiorari to re-align its *Ex Post Facto* Clause jurisprudence and once again affirm that Justice Chase's four categories form the Clause's exclusive parameters.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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