No. 18-9794

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL VALLEJO,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Third Court of Appeals at Austin, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a petitioner be granted a writ of certiorari to consider a claim that his prosecution is barred by the Ex Post Facto Clause, where the state legislature eliminated the statutory limitations period before the previously-applicable limitations period expired?

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INTRODUCTION

Statutes of limitations, when they exist, require the government to commence prosecution for an offense within a designated period, or else the case is subject to dismissal for untimely prosecution. It is well settled that legislative bodies may amend statutes of limitations and apply them retroactively, so long as doing so does not resurrect a prosecution that has already been time-barred by the previously enacted statute of limitations.

Petitioner complains that he should benefit from the limitations period that was in effect at the time he is alleged to have committed the offenses at issue. He makes this complaint even though the Texas Legislature amended the law before Petitioner could have asserted a limitations defense. Numerous state and federal courts have considered similar scenarios—including instances where the statutory amendment resulted in no, or an indefinite, limitations period—but no violations of the Ex Post Facto Clause have been found.

Petitioner invites this Court to deviate from long-standing principles that govern the scope of the Ex Post Facto Clause and to unjustifiably restrict legislatures' authority to define the appropriate limitations period.

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Texas,[1] respectfully files this brief in opposition to Paul Vallejo's petition for writ of certiorari.

STATEMENT OF JURISDICTION

The judgment of the Third District Court of Appeals at Austin, Texas, affirming the trial court's order denying Petitioner's pre-trial application for writ of habeas corpus, was entered on November 14, 2018. Petitioner filed a timely motion for rehearing in the intermediate appellate court, but it was denied. Petitioner then filed a timely petition for discretionary review with the Texas Court of Criminal Appeals, but it was refused. Petitioner filed this petition for writ of certiorari on June 21, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a), which provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Petitioner was charged in a three-count indictment with the aggravated

[1] Respondent, the State of Texas, will be referred to herein as "the State."

sexual assault of one child, under Texas Penal Code § 22.01. Those offenses were alleged to have been committed on or about May 1, 1999 (Count I); on or about July 1, 1999 (Count II); and on or about July 1, 1999 (Count III). CR 3–4.[2] The indictment was filed on January 30, 2017. CR 3. The indicted charges are still pending.

"Petitioner filed a [pre-trial] writ of habeas corpus alleging violation of ex post facto and statute of limitations." Pet. App. 4. The Petitioner's habeas corpus application contends that the Texas Legislature's 2009 elimination of the statutory limitation period for the offenses of aggravated sexual assault of a child resulted in an ex post facto violation. CR 33–38; *See* TEX. PEN. CODE § 22.01; TEX. CODE CRIM. PROC. art. 12.01 § 5(B) (2007) (amended 2009) (current version at TEX. CODE CRIM. PROC. art. 12.01 (2019)). Petitioner's claim is premised on the undisputed fact that the child alleged to be the victim of all three offenses was born on October 19, 1985. CR 33.

Under the preexisting statute of limitations, in effect at the time of the commission of the alleged offenses, the State would have been required to begin prosecution by October 19, 2013, which marked the ten-year anniversary of the

[2] "CR" refers to the clerk's record in the original trial proceeding, which was prepared by the District Clerk of Travis County, for Petitioner's direct appeal to the Third Court of Appeals. Each such reference will be followed by the applicable page number(s) of the clerk's record.

victim's eighteenth birthday. *See* TEX. PEN. CODE § 22.01; TEX. CODE CRIM. PROC. art. 12.01 § 5(B) (2007) (amended 2009) (current version at TEX. CODE CRIM. PROC. art. 12.01 (2019)).

In 2009, the Texas Legislature amended the applicable statute of limitations to provide: "no limitation [period applies to] aggravated sexual assault under Section 22.021(a)(1)(B), Penal Code . . . ."[3] TEX. CODE CRIM. PROC. art. 12.01(1)(B). The parties agree that the amendment occurred before Petitioner could perfect a limitations defense, and that the enactment was explicitly intended by the Legislature to apply to offenses predating the amendment where the statute of limitations had not yet run. *See* Pet. App. 8; TEX. CODE CRIM. PROC. art. 12.01.

The trial court denied Petitioner's pre-trial application on February 20, 2018. CR 32. Petitioner appealed this ruling to the Third Court of Appeals at Austin, Texas, which affirmed the trial court's ruling in a memorandum opinion, which was not designated for publication. *See Ex parte Vallejo*, No. 03-18-00297-CR, 2018 Tex. App. LEXIS 9253 (Tex. App.—Austin 2018). Petitioner sought discretionary review from the Texas Court of Criminal Appeals, which refused his request without further written order. *Ex parte*

[3] TEX. PEN. CODE § 22.01(a)(1)(B) defines the offense of aggravated sexual assault of a child.

Vallejo, No. PD-0061-19, 2019 Tex. Crim. App. LEXIS 291 (Tex. Crim. App. Mar. 27, 2019) (not designated for publication).

REASONS FOR DENYING THE WRIT

The relevant issue for this Court is whether the elimination of a statutory limitations period, when applied to a defendant whose prosecution was not yet time-barred, offends the Ex Post Facto Clause.

While courts in numerous jurisdictions have upheld a legislature's authority to eliminate a statute of limitations, no appellate court has *ever* determined that there is a meaningful distinction between the extension and the elimination of a statutory limitations period in the ex post facto context. The intermediate appellate court's decision is consistent with the Court's opinion in *Collins v. Youngblood*, 497 U.S. 37 (1990), and its progeny, which discourage broadly construing the Ex Post Facto Clause to prohibit timely modifications to a statute of limitations. Limitations have consistently been found to be defenses of a uniquely procedural nature. Thus, no compelling reason exists for this Court to exercise its discretion to review this case.

I. Multiple federal courts have already considered this federal constitutional question and have harmoniously concluded no ex post facto violation results from the elimination of an unexpired limitations period.

Texas is hardly unique in its decision to eliminate a limitations period

for the prosecution of certain sexual offenses against children.[4] In fact, prior to the 2009 amendment of the Texas law at issue in this case, the United States Congress had already modified federal law in the same manner by enacting the Adam Walsh Child Protection Act. *See* the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 248-109, 120 Stat. 587 (codified as enacted in 18 U.S.C. § 4247). The Second Circuit and the Sixth Circuit have upheld that elimination of a statutory limitations period and found that, when prosecution was not previously time-barred, the indefinite period for prosecution does not violate ex post facto. *United States v. Vickers*, No. 13-CR-128A(Sr), 2014 U.S. Dist. LEXIS 64150 (W.D.N.Y. 2014) (not designated for publication); *United States v. Shepard*, No. 4:10 CR 415, 2011 U.S. Dist. LEXIS 92519 (N.D. Ohio 2011) (not designated for publication). In the instant case, the lower Texas court's application of the Fifth Amendment Ex Post Facto Clause aligns precisely with these federal court holdings. Therefore, this Court need not settle any issue involving the federal question raised. *See* Sup. Ct. Rule 10.

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[4] The following is a non-exhaustive list of jurisdictions where there is no limitations period for prosecution of sexual crimes against children: Arkansas (ARK. CODE ANN. § 5-1-109; Colorado (COLO. REV. STAT. § 16-5-401); Connecticut (CONN. GEN. STAT. § 54-193a); Florida (FLA. STAT. ANN. § 775.15(13)(b)); Idaho (IDAHO CODE § 19-401); Kentucky (KY. REV. STAT. § 500.050(1); Missouri (MO. REV. STAT. § 556.036); Montana (MONT. CODE ANN. § 45-1-205(1)(c)); New Jersey (N.J. STAT. ANN. § 2C:1-6(a)(1)); Rhode Island (12 R.I. GEN. LAWS § 12-12-17(a); South Dakota (S.D. CODIFIED LAWS § 22-22-1); Tennessee (TENN. CODE ANN. § 40-2-101); Utah (UTAH CODE ANN. § 76-1-301); Vermont (VT. STAT. ANN. tit. 13, § 4501); Washington, D.C. (D.C. CODE § 23-113).

II. There is no conflict among state courts that have applied the Ex Post Facto Clause in cases where a statute of limitations period was eliminated.

Numerous state courts have been presented with ex post facto challenges where a limitations period has been repealed, yielding consistent results. The Texas Court of Criminal Appeals opined that "statutes of limitations . . . may be changed or repealed without violating constitutional prohibitions against ex post facto laws in any case where a right to acquittal has not been absolutely acquired by the completions of the period of limitations." *Phillips v. State*, 362 S.W.3d 606, 612 (Tex. Crim. App. 2011) (internal citation omitted). This sentiment was consistent with earlier holdings in other jurisdictions, including *Commonwealth v. Duffy*, 96 Pa. 506 (1881); *Hawkins v. State*, 549 So. 2d 552 (Ala. Crim. App. 1989); *State v. Noble*, No. CR-92-575, 1993 Me. Super. LEXIS 432 (1993); *State v. Burns*, 524 N.W.2d 516 (Minn. Ct. App. 1994); *State v. Morales*, 236 P.3d 24 (N.M. 2010); and *Hoennicke v. State*, 13 A.3d 744 (Del. 2010). The same holding was reached more recently by state courts in *People v. Hicks*, 262 P.3d 916 (Colo. App. 2011); *Huffman v. State*, 116 A.3d 1243 (Del. 2015); *Commonwealth v. White*, 61 N.Ed.3d 423, 430 (Mass. 2016).

The State is unaware of any court that has reached a contrary conclusion, or any case that would provide any support for Petitioner's claim that this is an important federal question that needs to be settled. The

resounding accord among lower courts illustrates why this Court should decline to grant certiorari. *See* Sup. Ct. Rule 10.

III. The Court should not recognize and make a distinction, for the first time ever, between a legislature's authority to extend a limitations period and its authority to eliminate one.

Petitioner attempts to draw some demarcation between the legislature's power to expand, versus eliminate, a limitations period. *See* Pet. App. 8. This is a distinction without a difference.

No court has ever recognized such a distinction when considering an ex post facto claim. In the cases addressed *supra* at II., courts relied on previous cases involving both extended and repealed statutes of limitations without noting any difference in precedential value. Even this Court has referred to a legislature's power to repeal or extend a limitation period, with retroactive application, so long as the benefit of an expired limitations period has not already accrued. *See Stogner v. California*, 539 U.S. 607, 618–19 (2003) (citing *Duffy*, 96 Pa. at 514). "In any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to *enlargement or repeal* without being obnoxious to the constitutional prohibition against ex post facto laws." *Id.* (quoting *Duffy*, 96 Pa. at 514) (emphasis added).

Petitioner claims that a lawmaking body has absolute power to extend

an unexpired limitations period in finite increments. *See* Pet. App. at 8. Petitioner then contends that lawmakers cannot also do away with a limitations period entirely. *Id.* This invites an absurd result. Such divergent outcomes, with no underlying rationale, would permit legislatures to enact perpetual extensions or extensions of such a length that they would serve the same practical function as the elimination of a limitations period. This Court should decline to entertain Petitioner's unsupported position that the elimination of a statutory limitations period presents an important constitutional question, where he has conceded that the extension of a limitations period does not.

IV. Petitioner's claim that modifications to unexpired statutes of limitations alter the legal rules of evidence or change the quantum of evidence required to convict the accused has been rejected in several jurisdictions.

Petitioner asserts that the statutory amendment, which eliminated the limitations period for prosecution, altered "the legal rules of evidence and requires less or different testimony than the law required at the time of the commission of the offense to convict the accused." *See* Pet. App. 7–8 (citing *Calder v. Bull*, 3 U.S. 386, 390–91 (1798)). To support his claim, Petitioner relies on *Carmell v. Texas*, to illustrate a substantive change that violates ex post facto laws if applied retroactively. *See* Pet. App. 7–8; *Carmell v. Texas*,

529 U.S. 513, 522 (2000). That opinion is inapposite because *Carmell* involved an amendment to an evidentiary statute that impacted whether the State need corroborate a child victim's testimony about a sexual offense for a conviction to be legally sufficient. 529 U.S. at 516.

Additionally, arguments like Petitioner's have been raised and rejected by lower courts in other jurisdictions. In *Duffy*, the Supreme Court of Pennsylvania contemplated this argument and denied it, holding, "the period of limitation is not a subject of proof at all." 96 Pa. at 514. More recently, in *State v. Creekpaum*, the Supreme Court of Alaska found that the retroactive application of a statute of limitations did not impact the "quantity or the degree of proof necessary to establish" the guilt of the accused. 753 P.2d 1139, 1142 (Alaska 1988) (citing *Miller v. Florida*, 482 U.S. 423, 435 (1987) (quoting *Dobbert v. Florida*, 432 U.S. 282, 294 (1977))). The Court should deny Petitioner's claim.

V. Certiorari should be denied because the decision below is fully consistent with this Court's precedent.

This Court has previously recognized that the categories of ex post facto laws are "so well known that their citation may be dispensed with . . . . [A]ny statute which punished as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a

crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925). Petitioner claims that the 2009 amendment lifting the limitations period deprives him of a defense available at the time the act was committed. *See* Pet. App. 8 (citing *Calder*, 3 U.S. at 390).

This Court previously considered the meaning of "defenses" for purposes of ex post facto analysis when it stated in *Collins v. Youngblood* that "a law that abolishes an affirmative defense of justification or excuse contravenes [the Ex Post Facto Clause] because it expands the scope of a criminal prohibition after the act is done." 497 U.S. 37, 49 (1990). In that decision, the Court warned against broadly construing the Ex Post Facto Clause to prohibit amendment of procedural rules in a way that would merely "alter the situation of a party to his disadvantage." *Id.* at 50 (overruling *Kring v. Missouri*, 107 U.S. 221 (1883)). Since *Collins* was decided, one court has noted that the pre-*Collins* approach confused "procedural defenses with defenses to elements of the crime." *United States v. Knipp*, 963 F.2d 839, 843 (6th Cir. 1992). Petitioner's assertion that his unperfected statute-of-limitations defense is indistinguishable from defenses relating to the elements of the offense relies upon the very rationale that the Court rejected when it overruled *Kring*.

Lower federal courts have consistently relied on *Collins* as authority to find that a motion to dismiss based on an expired limitations period is not a defense within the meaning of ex post facto. *See, e.g.*, *Knipp*, 963 F.2d at 843; *United States v. Brechtel*, 997 F.2d 1108, 1113 (5th Cir. 1993). Pleading an expired limitations period may be a "defensive measure," but that does not make it a "'pure' defense, which defeats one or more of the elements of a crime." *Knipp*, 963 F.2d at 843. As the *Brechtel* court articulated, "only statutes withdrawing defenses related to the definition of the crime, or to the matters which a defendant might plead as justification or excuse" are within the meaning of the Ex Post Facto Clause. 997 F.2d at 1113.

The State is unaware of any published or unpublished opinion in which *any* state or federal appellate court has *ever* declared that the elimination of a statutory limitations period, where one previously existed, removes a defense from a criminal defendant. This point bears repeating: Petitioner fails to cite a single case (and the State is aware of no such case) involving the Ex Post Facto Clause in which *any* appellate court has issued an opinion in conflict with the decision below. There being no deprivation of a defense for ex post facto purposes, the Court should deny the petition.

Further, there is no basis for Petitioner to claim that fundamental fairness is offended when the statute of limitations was amended prior to the

expiration of the pre-amendment limitations period. A procedural change that works to the detriment of the accused is not, *per se*, ex post facto. *People v. Russo*, 487 N.W.2d 698, 701 (Mich. 1992) (citing *Dobbert v. Florida*, 432 U.S. 282, 292–93 (1977)). The expansion of a limitations period was contemplated by Judge Learned Hand, speaking for the court in *Falter v. United States*:

> Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it.

23 F.2d 420, 426–27 (2d Cir. 1928), *cert. denied*, 277 U.S. 590 (1928), *superseded by statute as recognized in United States v. Roselli*, No. 93-CR-220, 1993 U.S. Dist. LEXIS 18749 (N.D.N.Y. 1993).

Statutes of limitations are legislative constructs that serve multiple policy purposes. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). "The common law recognized no right of criminals to repose." *Doggett v. United States*, 505 U.S. 647, 668 (1992) (O'Connor, J., dissenting). "[M]any serious offenses, such as murder, typically carry no limitations period at all." *Id.* (citing Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 652–53 (1954) (comparing state

statutes of limitations for various crimes); Gerald F. Uelmen, *Making Sense out of the California Criminal Statute of Limitations*, 15 PAC. L. J. 35, 76–79 (1983)). In Texas, limitations have been described as procedural rules that operate "as an act of grace for the benefit of potential defendants, a voluntary surrendering by the people of their right to prosecute." *Proctor v. State*, 967 S.W.2d 840, 843 (Tex. Crim. App. 1998) (citing *Vasquez v. State*, 557 S.W.2d 779, 781 (Tex. Crim. App. 1977)).

While these policy concerns apply generally to all criminal prosecutions, child sexual abuse raises unique considerations for a legislature to consider. This point was observed by Justice Kennedy in his dissent in *Stogner v. California*:

> The California Legislature noted that "young victims often delay reporting sexual abuse because they are easily manipulated by offenders in positions of authority and trust, and because children have difficulty remembering the crime or facing the trauma it can cause." *People v. Frazer*, 982 P.2d 180, 183–84 (Cal. 1999). The concern is amply supported by empirical studies.

539 U.S. 607, 649 (2003) (internal citations omitted).

The psychological effects of childhood sexual abuse, are often due in part to the violation of trust between the offender and the victim, including "deep and lasting hurt." *Stogner*, 539 U.S. at 649. The Texas Legislature's removal of a procedural impediment for victims who often delay reporting due

to the very nature of the crime committed against them not only reflects these important policy considerations, but advances the cause of justice.

Because Petitioner cannot demonstrate that the modification of an unexpired limitations period deprives him of a defense or violates fundamental fairness, this Court should decline further consideration of his petition.

CONCLUSION

On the basis of the foregoing arguments and authorities, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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