IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE JACK WAYNE FRIEND, On Habeas Corpus.	No. S256914 Related to: First Appellate District, Division Three, No. A155955 Alameda County Super. Ct., No. 81254 (Hon. Don Clay) DEATH-PENALTY CASE

OPENING BRIEF ON THE MERITS

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7 Witkin, Summary of Cal. Law (11th ed. 2019)
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The American Heritage Dictionary of the English Language (5th ed. 2015) 90
Voter Information Guide, Gen. Elec. (Nov. 8, 2016) .. *passim*

QUESTIONS PRESENTED

Petitioner-Appellant Jack Wayne Friend quotes the questions presented by the Court:

> (1) Is the *dismissal* of a condemned inmate's habeas corpus petition pursuant to Penal Code section 1509, subdivision (d) an appealable order and subject to the requirement of obtaining a certificate of appealability under Penal Code section 1509.1, subdivision (c), which applies to the "decision of the superior court *denying relief* on a successive petition" (italics added)?; (2) What is the meaning of the term "successive petition" in Penal Code section 1509, subdivision (d), and is the habeas corpus petition at issue a successive petition?; (3) If the habeas corpus petition at issue is a successive petition within the meaning of the statute, can the statutory provisions governing such petitions be applied to this petition when petitioner's first habeas corpus petition was filed before the statutes took effect (see, e.g., *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 269-270)?

STATEMENT OF THE CASE

In January 1989 Friend was found guilty of robbery and first-degree murder (6 CT 1448) and, after a 1992 retrial on special circumstances, sentenced to death (13 CT 3245, 3313-17).[1] In 2007 Friend filed a habeas corpus petition in No. S150208, while his direct appeal was pending in No. S012943. In 2009 this

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[1] Documents from the Clerk's Transcript in Friend's direct appeal are designated by volume number, "CT," followed by the relevant bates numbers. Documents from the Clerk's Transcript in the 2018 habeas proceedings are denominated "CT2." The Reporter's transcripts from the trial proceedings follow the same format, using "RT" for citations to the 1988 trial and "RT2" for citations to the 1992 special-circumstance and penalty-phase retrials.

Court affirmed the judgment on appeal, and in 2015 it denied his habeas petition.

In 2016 Friend filed a habeas petition in federal district court, which he amended. (2 CT2 426.) The district court granted Friend's motion to stay proceedings to allow him to exhaust claims in state court. (4 CT2 811-18.) In particular, the district court observed that the ineffective assistance of state habeas counsel established good cause to return to state court under *Rhines v. Weber* (2005) 544 U.S. 269, 278. (4 CT2 814-17.)

In the November 2016 general election, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act. "The initiative measure extensively revamps the procedures governing habeas corpus petitions in capital cases." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 822.) Proposition 66 enacted Penal Code sections 1509 and 1509.1, among other statutes.[2] Section 1509, subdivision (d) (hereafter "section 1509(d)") directs that "successive petitions" for habeas relief filed by capital prisoners be "dismissed" unless the superior court finds "by the preponderance of all available evidence . . . that the defendant is actually innocent of the crime . . . or is ineligible for the sentence." Section 1509.1 creates a new scheme for appellate review in capital habeas cases. Subdivision (a) of section 1509.1 (hereafter "section 1509.1(a)") directs petitioners to "appeal the decision of a superior court on an initial petition under Section 1509 to the court of appeal." Subdivision (c) of section 1509.1

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[2] Statutory references are to the Penal Code unless otherwise specified.

(hereafter section "1509.1(c)") permits petitioners to "appeal the decision of the superior court denying relief on a successive petition only if the superior court or the court of appeal grants a certificate of appealability," which requires that the petitioner show a "substantial claim for relief" and a "substantial claim that the requirements of subdivision (d) of Section 1509 have been met."

In June 2018, after Proposition 66 became effective, Friend filed the instant six-claim habeas petition in the Alameda County Superior Court (1 CT2 1-81), which the court denied in October 2018 (Order Den. Pet. for Writ of Habeas Corpus (Oct. 24, 2018, No. 81254A) [hereafter "Super. Ct. Order"]).[3] The court first determined that the petition was "successive" within the meaning of section 1509(d) "as Petitioner has already been denied relief on habeas corpus by the California Supreme Court." (Super. Ct. Order at p. 4.) It then purported to "adopt[] the meaning of the term [successive petition] as provided in *Briggs*" (Super. Ct. Order at p. 4, citing *Briggs*, 3 Cal.5th at p. 836 fn. 14 ["We have used "successive petition" to refer to one raising claims that could have been presented in a previous petition."]), which in turn cited *In re Robbins* (1998) 18 Cal.4th 770, 788, fn. 9, and *In re Clark* (1993) 5 Cal.4th 750, 769-70. The court "dismisse[d]" Claims 1, 2, 4, 5, and 6 as "contain[ing] no allegations that, if true, would

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[3] The 2018 Clerk's Transcript omitted the even pages of the superior court's order. (4 CT2 910-13.) Friend attaches the 7-page order to his accompanying request for judicial notice and cites to the page numbers appearing therein.

demonstrate that Petitioner is actually innocent of the crime or is ineligible for the death sentence." (Super. Ct. Order at p. 5.) It also "dismisse[d]" Claim 3 "pursuant to" section 1509(d). (Super. Ct. Order at p. 5.) The court then denied a certificate of appealability ("COA"). (Super. Ct. Order at pp. 6-7.)

Friend noticed an appeal (4 CT2 914-15) and requested a stay pending implementation of post–Proposition 66 rules of procedure, which the court of appeal granted (Order (Jan. 9, 2019, No. A155955)). After the rules became effective, Friend continued to dispute that his petition was successive but requested a COA to be cautious. (Req. for COA at p. 14 fn. 3 (June 26, 2019, No. A155955).) After the State answered (July 1, 2019, No. A155955), the court of appeal denied the COA request thus:

> Petitioner fails to make the requisite showing under Penal Code section 1509.1, subdivision (c), that he has both a substantial claim for relief and a substantial claim that the requirements of subdivision (d) of Penal Code section 1509 have been met. With regard to the requirements of subdivision (d) of Penal Code section 1509, petitioner fails to show he has a substantial claim of his actual innocence of the crime of which he was convicted or his ineligibility for the sentence of death.

(Order (July 5, 2019, No. A155955).)

Friend filed a petition for review, which this Court granted on September 11, 2019. (No. S256914.)

SUMMARY OF ARGUMENT

The Court asked how the term "successive petition" in section 1509(d) should be interpreted; whether Proposition 66's

provisions governing "successive petition[s]" can apply to a prisoner who filed his first petition before they were enacted; and whether the superior court's order is appealable and subject to section 1509.1(c)'s COA requirement. To preserve the voters' intent and satisfy state and federal constitutional requirements, the Court should hold as follows.

First, the term "successive petition" in section 1509(d) refers to a petition presenting claims that could have been raised in a prior collateral challenge, without an adequate explanation for why they were not raised earlier. This is the meaning the Court has long given the term, which the drafters are presumed to have adopted. Further, this definition coheres with other Penal Code statutes, promotes the voters' intent, and preserves the statute's constitutionality, in particular by avoiding a suspension of the writ of habeas corpus and violations of due process and equal protection. The instant petition is not successive. The ineffective assistance of prior counsel adequately explains the omission of Friend's claims from the previous petition.

Second, if the Court finds that Proposition 66 does change the definition of "successive petition," the provisions governing such petitions cannot be applied here. Applying them, particularly section 1509(d), would change the legal effect of preenactment conduct by attaching new consequences to the filing of Friend's 2007 petition, including triggering procedural barriers to the instant petition that would preclude merits review and extinguishing his state-law right to effective habeas counsel. Applying the successive petition provisions would also unsettle

the reasonable expectations of prisoners and their counsel who, like Friend, filed first-in-time habeas petitions before Proposition 66 was enacted. Therefore, these provisions would operative retroactively, and Proposition 66 does not evince the clear intent necessary for that result.

Third, the order dismissing Friend's claims and denying his petition is appealable. The threshold determination that section 1509(d) applies to a petition should be reviewed under section 1509.1(a), and therefore section 1509.1(c) and its COA requirement are inapplicable. Alternatively, if Friend's appeal instead is governed by section 1509.1(c), then the COA requirement either does not extend to the threshold question of whether section 1509(d) applies to a petition, or, if it does, it requires a COA to issue when a prisoner raises a substantial argument that section 1509(d) does not apply and presents a substantial claim for relief.

ARGUMENT

This Court has long recognized the writ of habeas corpus as "the safeguard and the palladium of our liberties." (*In re Begerow* (1901) 133 Cal. 349, 353.) "As befits its elevated position in the universe of American law, the availability of the writ of habeas corpus to inquire into an allegedly improper detention is granted express protection in both the United States and California Constitutions." (*People v. Villa* (2009) 45 Cal.4th 1063, 1068.) Although the Court has upheld procedural rules "designed to ensure legitimate claims are pressed early in the legal process," it has emphasized the need to leave open a "'safety valve' for those

rare or unusual claims that could not reasonably have been raised at an earlier time." (*In re Reno* (2012) 55 Cal.4th 428, 452.)

This case is about preserving the Great Writ. Proposition 66 was "intended to facilitate the enforcement of judgments and achieve cost savings in capital cases." (*Briggs*, *supra*, 3 Cal.5th at p. 822.) But it was not intended to close the "safety valve" for diligent and faultless prisoners like Friend. Nor would the state and federal constitutions permit such a result. Yet that would be the consequence of construing Proposition 66 to silently change the meaning of the term "successive petition," of permitting its provisions governing successive petitions to apply retroactively, and of reading its appellate mechanism to foreclose review of the threshold determination that a petition is in fact successive.

In the following three sections, Friend provides answers to the Court's questions that further the voters' aims in enacting Proposition 66, while avoiding unintended consequences of the new law that would offend constitutional demands for habeas corpus review, due process, equal protection, and appellate oversight. Although Proposition 66 imposes restrictions on condemned prisoners' pursuit of postconviction relief, the Court can and must interpret those restrictions consistently with constitutional commitments to fair, equal, and fulsome habeas review.

I. The term "successive petition" retains its pre–Proposition 66 meaning, pursuant to which Friend's petition is not successive

Proposition 66 imposes new restrictions on "successive petitions," but it does not define or purport to change the import

of that term, which this Court has long given a particularized meaning. The plain intent of the electorate therefore was to make it more difficult for condemned prisoners to obtain review of petitions that have traditionally been deemed successive, but not to impose those difficulties on petitions that have never been considered to be successive. In view of that intent, and based on established rules of statutory construction, a "successive petition" as used in section 1509(d) is one presenting claims, without an adequate explanation, that could have been raised in a prior collateral attack. Because Friend adequately explains why he did not present the claims in the instant petition when he filed his 2007 challenge, it is not successive.

A. A successive petition is one presenting claims that could have been raised in a prior petition without an adequate explanation

The term "successive petition" is not defined in section 1509(d) or elsewhere in Proposition 66 or the Penal Code. The Attorney General asserted in the court of appeal that this omission did not "require a new and different definition, particularly where a clearly established definition already exists." (Answer to Req. for Cert. of Appealability at pp. 2-3 (July 1, 2019, No. A155955), citing *Clark*, *supra*, 5 Cal.4th at pp. 769-71.) In this respect, the parties agree. The term "successive petition" continues to have the definition the Court established in its decisional law.

1. Statutory text must be interpreted in light of prior judicial construction

"It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the Legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts." (*City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191; *see also In re Harris* (1989) 49 Cal.3d 131, 136 ["Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source."]; *People v. Weidert* (1985) 39 Cal.3d 836, 845-46.)

Proposition 66 was enacted against a backdrop of decisional law already using the term "successive" in reference to certain habeas petitions. In *Clark*, the Court used the term to refer to petitions presenting claims that were previously rejected or "known to the petitioner at the time of a prior collateral attack on the judgment." (*Clark, supra*, 5 Cal.4th at p. 768.) In *Robbins*, the Court elaborated that "[c]laims presented in a 'subsequent' petition that *should have been* presented in an earlier filed petition will be barred as "successive" unless the petitioner 'adequately explains' his or her failure to present *all* claims in the earlier filed petition." (*Robbins, supra*, 18 Cal.4th at p. 787, fn. 9, citing *In re Horowitz* (1949) 33 Cal.2d 534, 545-46, and *Clark*, 5 Cal.4th at pp. 768, 782.) The ineffective assistance of counsel may

provide one such adequate explanation. (*Clark*, 5 Cal.4th at p. 780.)

Thus, prior to Proposition 66 the Court had used the term "successive" in reference to petitions presenting claims that could have been raised in a prior petition. (*Briggs*, *supra*, 3 Cal.5th at p. 836 fn. 14.) If the claims could not reasonably have been raised in a prior petition, or if the petitioner adequately explains the need to present previously omitted claims, including because his prior counsel ineffectively omitted them, then the "subsequent" petition is not considered "successive." (*Robbins*, *supra*, 18 Cal.4th at p. 788, fn. 9; *see also Clark*, *supra*, 5 Cal.4th at pp. 767-70, 774, 780.)

Because "successive petition" has a specific, technical meaning, the "presumption is almost irresistible" that the drafters of Proposition 66 and the electorate intended for the same term in section 1509(d) to have the same meaning. (*Weidert*, *supra*, 39 Cal.3d at pp. 845-46; *see also Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050.) This presumption is particularly forceful here because the drafters used "successive" rather than the broader terms this Court has used when it referred to any habeas petition filed after the first one. (*E.g.*, *Robbins*, *supra*, 18 Cal.4th at p. 788, fn. 9 [contrasting "subsequent petition[s]" with "successive" ones]; *Reno*, *supra*, 55 Cal.4th at p. 521 [imposing page limits on "second and subsequent petitions"].)

Indeed, in the court of appeal the Attorney General noted the lack of evidence "showing the Electorate intended to apply a

separate definition of the term" apart from the meaning the Court had supplied in its prior cases. (Answer to Req. for Cert. of Appealability at p. 3 (July 1, 2019, No. A155955).) Similarly, the Fourth District Court of Appeal has preliminarily concluded that pre–Proposition 66 caselaw continues to give meaning to the term "successive petition" used in section 1509(d). (*See* Order at p. 2, *In re Lucero* (Cal. Ct. App. Dec. 30, 2019, No. E074350) ["[T]his court has made a *preliminary* determination that Lucero's current petition is not successive because he could not have raised his claim about flawed or false evidence in his 2002 petition."], *citing In re Richards* (2016) 63 Cal.4th 291, 294 fn. 2.)[4]

2. Statutes must be interpreted to avoid unconstitutional and absurd results

It is also an established cannon of interpretation that statutes must be construed to avoid constitutional questions. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1216.) Moreover, even where an interpretation would not result in a constitutional violation, the courts must avoid it if it would lead "to mischief or absurdity." (*In re Greg F.* (2012) 55 Cal.4th 393, 410, quoting *In re Samano* (1995) 26 Cal.App. 4th 700, 989; *People v. Ledesma* (1997) 16 Cal.4th 90, 95.)

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[4] The court noted that its determination was "preliminary" because the "the question of how to define a successive petition" for purposes of section 1509(d) is pending in Friend's case. (Order at p. 2, *In re Lucero* (Cal. Ct. App. Dec. 30, 2019, No. E074350.)

Retaining the *Clark/Robbins* definition of "successive petition" preserves the constitutionality of Proposition 66. By contrast, interpreting the term to refer to any second or subsequent petition, as the Alameda County District Attorney advocated in the superior court (4 CT2 830), would jeopardize the initiative's constitutionality and lead to results that are unjust to the point of absurdity. Several applications of the new statutes, including Friend's case, illustrate the point.

First, if "successive petition" refers to any second or subsequent petition, then section 1509(d) would foreclose relief where the petitioner did not discover the basis of a constitutional violation despite acting diligently, including because the State suppressed it. For example, in *In re Bacigalupo* (2012) 55 Cal.4th 312, 316, the Court granted sentencing relief on a subsequent petition based on evidence that "the prosecution before trial failed to disclose evidence that at the penalty phase would have supported petitioner's claim of having killed under duress." The petition was based, in part, on suppressed evidence discovered after the petitioner first filed for habeas relief (*id.* at p. 323) but which presumably would not have established "innocence" or "ineligibility" as those terms are used in section 1509(d).[5] If the operative pleading were a "successive petition" simply because it was second in time, section 1509(d) would require that it be

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[5] The Court's order granting review did not include any question about the meaning of these terms, which the Court need not reach because Friend's petition is not successive. (*See infra* Section I.B.)

dismissed. This would be particularly inequitable because the State had "affirmatively dissuaded the defense from pursuing a line of inquiry that would have uncovered such evidence." (*Id.* at p. 340 (conc. opn. of Liu, J.); *see also Banks v. Dretke* (2004) 540 U.S. 668, 696 [abhorring criminal justice system in which "prosecutor may hide, defendant must seek"].)

Similarly, in *In re Miranda* (2008) 43 Cal.4th 541, 582, the Court vacated a death sentence challenged in consolidated fourth- and fifth-in-time petitions based on failure to disclose material evidence. As in *Bacigalupo*, the suppressed evidence in *Miranda* did not prove the petitioner's innocence. To the contrary, the Court concluded that the suppressed evidence was consistent with the petitioner's guilt, but that it reasonably likely would have made a difference to the question of penalty. (*Id.* at pp. 580-81.) And because the jury also found true a special circumstance that was unaffected by the *Brady* violation (*id.* at p. 544), the suppressed evidence presumably would not have proved ineligibility either (*see* § 1509(d) ["Claims of ineligibility include a claim that none of the special circumstances in subdivision (a) of Section 190.2 is true[.]"]). Again, if the Court were constrained to treat the fourth and fifth habeas petitions as successive simply because they were not first in time, section 1509(d) would require dismissal.

The problem would not be unique to *Brady* claims. Rather, it would arise in any case where a diligent petitioner discovered a constitutional error that did not establish innocence or ineligibility after his first petition: for example, evidence of juror

misconduct. (*Cf. Tharpe v. Sellers* (2018) 138 S.Ct. 545 (per curiam) [evidence that juror harbored racial animus discovered seven years after trial]; *Williams v. Taylor* (2000) 529 U.S. 420, 442 [evidence that juror concealed disqualifying information during voir dire discovered during federal habeas proceedings].) Or evidence that the trial judge had taken bribes. (*Cf. Bracy v. Gramley* (1997) 520 U.S. 899 [evidence that trial judge was involved in racketeering discovered several years after first state habeas petition].) Or that the prosecutor made materially false statements at the penalty phase. (*Cf. Commonwealth v. Williams* (2017) 641 Pa. 283, 168 A.3d 97 [evidence of misconduct discovered 20 years after trial].) Or evidence that that the State violated *Batson v. Kentucky* (1986) 476 U.S. 79. (*Cf. Foster v. Chatman* (2016) 136 S.Ct. 1737, 1755.) If these constitutional violations were presented in a subsequent petition and none of the evidence supporting them established innocence or ineligibility, section 1509(d) would require dismissal.

Second, treating all second and subsequent petitions as "successive" would require dismissing claims that did not ripen until after the first petition and do not prove innocence or ineligibility. For one example, section 1509 requires habeas counsel to be appointed by the superior court "[a]fter the entry of a judgment of death in the trial court" and to file "the initial petition within one year" of the appointment. (§ 1509, subds. (b) & (c).) A literal reading of the statute suggests that claims of ineffective assistance of appellate counsel likely will not ripen until after the statute of limitations in section 1509, subdivision

(c) has already expired, denying petitioners the opportunity to vindicate their constitutional right to effective appellate counsel. (*See Evitts v. Lucey* (1985) 469 U.S. 387, 397.) For another example, this Court has denied claims challenging a method of execution as premature, suggesting that they be raised in a subsequent petition at the appropriate time. (*See, e.g., People v. DePriest* (2007) 42 Cal.4th 1, 61 ["Alleged imperfections and illegalities in the execution process that may or may not exist when his death sentence is implemented are premature."].) Reading "successive petition" in section 1509(d) to refer to all subsequent petitions would appear to foreclose these or other claims that ripen after a first petition but do not prove innocence or ineligibility.

Third, applying section 1509(d)'s limitations to all subsequent petitions would require dismissing many second-in-time petitions based on legal developments. Under *Clark/Robbins*, a second-in-time petition based on new law would not be considered successive. (*Richards, supra,* 63 Cal.4th at p. 294 fn. 2 ["Because of the change in the applicable law . . . , the petition is not subject to the procedural bar of successiveness."], citing *Clark, supra,* 5 Cal.4th at p. 767.) But section 1509(d) does not include any exceptions for second-in-time petitions based on new law. Thus, interpreting "successive petition" to sweep in all subsequent petitions would foreclose condemned prisoners who cannot prove innocence or ineligibility from benefitting from new legal developments, including from changes in statutory rights (*cf. Richards*, 63 Cal.4th at pp. 309-11 [discussing revisions to

section 1473]) and even from federal constitutional rules that have been made retroactive like *Gideon v. Wainwright* (1963) 372 U.S. 335.[6]

Fourth, applying section 1509(d) to all subsequent petitions would preclude a prisoner from raising new scientific developments. (*See* § 1473(b); *see also Richards, supra*, 63 Cal.4th at pp. 305-07 [demonstrating the decade-long development of exculpatory scientific evidence]; *Gimenez v. Ochoa* (9th Cir. 2016) 821 F.3d 1136, 1144 ["[I]t's particularly important to permit claims of constitutional error grounded in faulty science in a second or successive petition. After all, flawed analytical methods may not be debunked until well after the expiration of a petitioner's one-year deadline to file a habeas petition under AEDPA."].) Section 1509(d) would require dismissing claims based on new scientific evidence or technological improvements that, for example, reveal a prisoner to have been an accomplice rather than a principal in a capital murder. (*Cf. Taylor v. Crowther* (D. Utah Jan. 17, 2017, No. 2:07-CV-194-TC) 2017 WL 168871 [granting evidentiary hearing on second-in-time petition where new forensic evidence suggested that condemned prisoner was present for double homicide but did not fire the fatal shots].)

Fifth, applying section 1509(d) to all subsequent petitions would require dismissing a second-in-time petition that included meritorious claims that the petitioner's counsel ineffectively

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[6] The loosely analogous federal law permits a second-in-time petition that "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

failed to include in his first petition but that did not show innocence or ineligibility. (*See Clark*, *supra*, 5 Cal.4th at p. 780; *see also In re Sanders* (1999) 21 Cal.4th 697, 726 [finding good cause for delayed presentation of claims where first habeas counsel failed to investigate them].) Indeed, as set forth in more detail in Section I.B., that would likely be the result in the instant case if the Court abandons the *Clark/Robbins* definition of successive petition.

Given the foregoing examples, the *Clark/Robbins* definition of "successive petition" must be retained to preserve Proposition 66's constitutionality. If "successive petition" instead referred to any second or subsequent petition, then the restrictions section 1509(d) imposes would raise several serious constitutional questions.

Initially, section 1509(d) would prevent courts from remedying errors that were unknown to diligent and faultless petitioners before a first petition and did not establish innocence or ineligibility, such as the *Batson* error that was ineffectively omitted from the prior habeas petition in this case or the *Brady* violations that occurred in *Bacigalupo*, *supra*, 55 Cal.4th 312, and *Miranda*, *supra*, 43 Cal.4th 541.[7] This would raise serious questions about the process afforded to condemned prisoners like Friend under the California Constitution. (*See* Cal. Const. art. I, § 15 [guaranteeing criminal defendants due process of law]; *see also* Civ. Code § 3523 ["For every wrong there is a remedy."].) The

[7] This interpretation would burden the exercise of statutory rights as well as constitutional ones, as described *infra* regarding sections 1473 and 1054.9.

electorate, like "the Legislature[,] cannot, by a purported change in procedure, cut off all remedy. Unless it leaves a reasonably efficient remedy to enforce the right, the right itself is affected, and the statute will be held invalid as an impairment of a substantive right." (7 Witkin, Summary of Cal. Law (11th ed. 2019) Const. Law, § 699, citing *Lane v. Wilson* (1939) 307 U.S. 268.) If Proposition 66 cuts off all remedies for meritorious claims that could not have been presented in a first petition, absent proof of innocence or ineligibility, the Court likely would have to conclude that the initiative violates due process. (*Cf. Allen v. Butterworth* (Fla. 2000) 756 So.2d 52, 54 ["The successive motion standard of [Florida's Death Penalty Reform Act of 2000] prohibits otherwise meritorious claims from being raised in violation of due process."].)[8]

A definition of successive petition that precludes claims ineffectively omitted from prior habeas petitions also raises equal protection concerns under the Fourteenth Amendment to the U.S. Constitution and article I, section 7 of the California

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[8] This result would also raise questions, as a matter of federal due process, about the adequacy of California's postconviction procedures to vindicate the substantial rights of its petitioners. (*See DA's Office for Third Judicial Dist. v. Osborne* (2009) 557 U.S. 52, 69-70; *see also Evitts v. Lucey* (1985) 469 U.S. 387, 401 ["[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."]; *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 293 (conc. opn. of Stevens, J.) ["[I]f a State establishes postconviction proceedings, [then] these proceedings must comport with due process."].)

Constitution. As detailed in Section II.A.2., before Proposition 66 capital prisoners could bring a subsequent petition to raise claims ineffectively omitted from a prior petition, and after Proposition 66 petitioners can similarly raise such claims on appeal from an adverse habeas ruling. Friend cannot now appeal the adverse decision on his 2007 petition, however, and if section 1509(d) applies to all subsequent petitions, he also cannot bring a second-in-time petition that does not prove innocence or ineligibility. Thus, neither the pre– nor post–Proposition 66 mechanism for pursuing meritorious claims ineffectively omitted by prior counsel would be available to Friend. These mechanisms are available for condemned prisoners who are otherwise similarly situated, however, and so making all second and subsequent petitions successive would treat Friend disparately. (*See People v. Guzman* (2005) 35 Cal.4th 577, 584, 592.) Because there could be no rational basis for distinguishing among similarly situated condemned prisoners for purposes of the new statutes, an interpretation of successive petition that precludes Friend from raising claims previously omitted by ineffective counsel while permitting others to raise such claims would violate equal protection. (*People v. Romo* (1975) 14 Cal.3d 189, 196.)

In *Briggs*, the Court rejected the argument that section 1509(d)'s restrictions violated equal protection because they are not similarly imposed on noncapital petitioners. (*Briggs*, *supra*, 3 Cal.5th at pp. 841-45.) But the crux of the Court's holding was that capital and noncapital prisoners are different. (*Ibid.*) Here, by contrast, abandoning the *Clark/Robbins* definition would bar

subsequent petitions raising claims previously omitted by ineffective habeas counsel for some condemned prisoners, like Friend, but not other condemned prisoners. The equal protection holding in *Briggs* regarding section 1509(d) therefore is inapposite.

Moreover, abandoning the *Clark/Robbins* definition would raise serious questions about whether Proposition 66 violates the Suspension Clause in article I, section 11 of the California Constitution. In California, the Great Writ affords prisoners a way to prove that their confinement is unjust, irrespective of innocence or ineligibility. (*Reno*, *supra*, 55 Cal.4th at p. 450 ["Despite the substantive and procedural protections afforded those accused of committing crimes, the basic charters governing our society wisely hold open a final possibility for prisoners to prove their convictions were obtained *unjustly*."], quoting *Sanders*, *supra*, 21 Cal.4th at pp. 703-04 (emphasis added); *Clark*, *supra*, 5 Cal.4th at p. 806 (conc. & dis. opn. of Kennard, J.) ["To deny relief on procedural grounds to one who can persuasively demonstrate innocence, *or whose guilt or punishment was determined in a manner that was grossly unfair*, would betray traditional and deeply held convictions of our society." (emphasis added)].) Treating all subsequent petitions as successive would subject them to dismissal under section 1509(d), effectively suspending the writ for diligent and faultless petitioners who cannot establish innocence or ineligibility and cannot bring claims until after their first petitions, including because the State suppressed their factual bases, the petitioner

did not learn of the claims until his ineffective counsel was replaced, or the law changed after the first petition.

Like California, Montana has enshrined the right of habeas corpus in its Constitution. In *Lott v. State* (2006) 334 Mont. 270, 271-72, the Montana Supreme Court considered a prisoner's collateral challenge to a noncapital sentence based on two state cases decided after his right to seek postconviction relief had expired. The State asserted, and the Court acknowledged, that the petitioner was therefore procedurally barred from seeking relief. (*Id.* at pp. 272, 278.) But the Montana Supreme Court also recognized that habeas corpus was designed to correct occasional flaws in the courts' pursuit of justice. (*Id.* at p. 279.) Because the procedural bar operated to prevent the petitioner from seeking habeas relief and precluded correction of a "troubling" error, the court held that the statute imposing the bar unconstitutionally suspended the writ. (*Id.* at pp. 278-79.)[9]

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[9] Notably, the Montana Supreme Court guarded the scope of the writ against encroachment by the legislative branch more jealously than has the U.S. Supreme Court. (*Lott*, *supra*, 334 Mont. at p. 274 ["In contrast to the United States Supreme Court's deference to Congress's judgment about the proper scope of the federal writ, we conclude that Montana's guarantee of the privilege of habeas corpus embodies a fundamental, intrinsic principle: the right to challenge the cause of one's imprisonment. In Montana, therefore, there are inherent limits on the Legislature's ability to define or restrict the scope of the writ because the fundamental principle of the writ cannot be 'suspended' under Article II, Section 19 of the Montana Constitution."].)

If the term "successive petition" in section 1509(d) referred to all second-in-time petitions for collateral relief, this Court likely would have to reach the same conclusion as did the Montana Supreme Court in *Lott*. In view of the California Constitution's guarantee that the right of habeas corpus "may not be suspended unless required by public safety in cases of rebellion or invasions" (Cal. Const. art. I, § 11) and this Court's recognition that in California the purpose of habeas corpus is to prevent unjust confinement, the Court would have to conclude that by restricting habeas review to prisoners who could prove innocence or ineligibility, the lawmakers exceeded the bounds of permissible limits and suspended the writ. (*See Clark*, *supra*, 5 Cal.4th at pp. 797-98 ["The magnitude and gravity of the penalty of death persuades us that the important values which justify limits on untimely . . . petitions are outweighed by the need to leave open this avenue of relief."]; *In re Harris* (1993) 5 Cal.4th 813, 831 ["[W]e would be remiss were we to 'close the door' completely, ignoring the legitimate arguments of habeas corpus litigants who claim that their bedrock constitutional rights have been trampled by the state."]; *Reno*, *supra*, 55 Cal.4th at p. 452 [explaining that judicially created procedural limits on habeas corpus relief, which are "essentially barriers to access deemed necessary for institutional reasons, are of course subject to exceptions designed to ensure fairness and orderly access to the courts"].)

Finally, even if interpreting "successive petition" to mean all subsequent petitions did not violate the state and federal

constitutions, the results described above would be absurd. Even accepting that Proposition 66 was meant to strike a new balance between the State's interest in finality and the need to permit challenges to unjust confinement by imposing section 1509(d)'s requirements on petitions properly deemed successive, the statutory text does not reveal an intent to change the meaning of "successive petition" to subject all subsequent petitions, including those filed by faultless petitioners, to section 1509(d)'s restrictions. (*See Briggs*, *supra*, 3 Cal.5th at p. 844 [explaining that section 1509 "tackles the same problems" of "abusive writ practices" targeted in *Reno*].) Indeed, such an interpretation of Proposition 66 would effect a departure from prior law so radical that the *successful* petitions in cases like *Bacigalupo* and *Miranda*—hardly the abusive petitions section 1509(d) was intended to tackle—would be *unreviewable* if filed today. Thus, beyond the constitutional concerns implicated, the term "successive petition" must retain its longstanding meaning to avoid such absurd results. (*See Ledesma*, *supra*, 16 Cal.4th at pp. 93-94.)

Changing the meaning of the term successive petition in section 1509(d) would create other mischief, too. Proposition 66 applies only to condemned prisoners. (§ 1509, subd. (a).) The *Clark/Robbins* definition of "successive petition" continues to be used in noncapital cases. (*E.g.*, *In re Bolton* (2019) 40 Cal.App.5th 611, 620 [concluding that subsequent petition should not be denied as successive based on intervening change in the law], citing *Clark*, *supra*, 5 Cal.4th at pp. 759, 797.) If the term

continues to have the *Clark/Robbins* meaning in noncapital cases, but Proposition 66 imposes a more restrictive definition in capital cases, then the same term will have different meanings depending on the sentence imposed. Even if the application of section 1509(d) only to noncapital prisoners does not violate equal protection (*see Briggs, supra,* 3 Cal.5th at p. 841), the prospect of employing different definitions of the same term militates against departure from the one supplied in *Clark* and *Robbins*. Again, the more straightforward reading of Proposition 66 is that it limits the instances in which capital prisoners' petitions that are properly deemed successive may be reviewed on the merits—not that it silently changed the definition of "successive petition" so that the term now means different things in capital and noncapital cases.

3. The text must be harmonized with other statutes

Interpreting section 1509(d) to retain the *Clark/Robbins* definition is further supported by looking to other provisions of Proposition 66 and the Penal Code. (*See Nat. Res. Def. Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 965 ["[I]t is well settled that the statutes and codes blend into each other, and are to be regarded as constituting but a single statute. One should seek to consider the statutes not as antagonistic laws but as parts of the whole system which must be harmonized and effect given to every section."]; *see also People v. Squier* (1993) 15 Cal.App.4th 235, 240.)

First, maintaining the *Clark/Robbins* definition of "successive petition" in section 1509(d) coheres with the use of

the same term in section 1509.1(a), which states that "[a] successive petition shall not be used as a means of reviewing a denial of habeas relief." Using the term "successive" to describe a post–Proposition 66 petition in the courts of appeal re-raising claims that have already been rejected, as was the practice prior to Proposition 66, is consistent with the Court's use of that term in *Clark* and *Robbins*. Although the Court generally referred to such petitions as "new" petitions (*Briggs*, 3 Cal.5th at p. 836 fn. 14), after Proposition 66 there is no longer any justification for repeating the same claims in a new petition to obtain review in a higher court because petitioners now seek review through appeal. The term "successive" as used in *Clark* and *Robbins* therefore accurately describes what was previously known as a "new" petition.

Second, section 1473, as amended in September 2016 by Senate Bill 1134—just before Proposition 66 was on the ballot—permits the filing of a habeas petition to raise new, credible evidence that is presented without substantial delay, discovered after trial through the exercise of diligence, and would more likely than not have changed the outcome of trial. (§ 1473, subd. (b)(3).) The provision does not contain an innocence or ineligibility requirement. If the term "successive petition" in section 1509(d) continues to have the *Clark/Robbins* definition, the two statutes are harmonious: a second-in-time petition based on newly discovered evidence that more likely than not would have changed the sentencing outcome would not be barred as successive. If, by contrast, the term means any subsequent

petition, then section 1509(d) would require that such a petition be dismissed. There is no indication that the drafters intended to countermand section 1473. (*See Cook County v. United States ex rel. Chandler* (2003) 538 U.S. 119, 132 [noting "cardinal rule . . . that repeals by implication are not favored"]; *People v. Mayers* (1980) 110 Cal.App.3d 809, 816 [noting the "judicial aversion to a sub silentio repeal"].)

Third, section 1054.9 creates a mechanism for postconviction discovery. (*See In re Steele* (2004) 32 Cal.4th 682.) A prisoner might not obtain section 1054.9 discovery, however, in time to support his first habeas petition. The process is time consuming. (*Cf. Rubio v. Superior Court* (2016) 244 Cal.App.4th 459, 466-67 [demonstrating protracted nature of obtaining postconviction discovery]). And a prisoner might not initially request section 1054.9 discovery because the parties engaged in informal discovery and the State assured him that formal discovery was unnecessary. (*Cf. Banks*, *supra*, 540 U.S. at pp. 674-75 ["Prior to trial, the State advised Banks's attorney there would be no need to litigate discovery issues."]; *Bacigalupo*, *supra*, 55 Cal.4th at p. 340 (conc. opn. of Liu, J.) [noting that the State had "affirmatively dissuaded the defense from pursuing a line of inquiry that would have uncovered [*Brady*] evidence"]; *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, 531 ["[Section 1054.9] imposes no constraint on the timing of the motion [for discovery], other than that it occur after sentencing and in the prosecution of a postconviction writ of habeas corpus."].)

If the prisoner ultimately obtains exculpatory evidence that supports a new claim, but does not establish innocence or ineligibility, and he raises it in a second-in-time petition, then his petition is not successive under *Clark/Robbins*. If "successive" refers to any subsequent petition, however, section 1509(d) requires dismissal, and the right to discovery under section 1054.9 would be impaired. The Court should resist a definition of "successive petition" that would undermine another section of the Penal Code absent any indication that this result was intended. (*Nat. Res. Def. Council, Inc.*, *supra*, 59 Cal.App.3d at p. 965; *Squier*, *supra*, 15 Cal.App.4th at p. 240.)

Finally, section 4 directs that all provisions of the Penal Code "are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." For the foregoing reasons, abandoning the *Clark/Robbins* approach and treating all second and subsequent petitions as successive for purposes of section 1509(d) would violate section 4's mandate.

4. Federal law and practice support retaining the prior construction

First, the phrase "second or successive habeas corpus application" in Title 28 of the United States Code, section 2244(b), which imposes limitations on piecemeal habeas practice in federal court, is not interpreted literally. (*Magwood v. Patterson* (2010) 561 U.S. 320, 332 ["it is well settled that the phrase does not simply 'refe[r] to all § 2254 applications filed second or successively in time'"], quoting *Panetti v. Quarterman* (2007) 551 U.S. 930, 944.) For example, in *Panetti*, 551 U.S. at p.

947, the petitioner brought a second-in-time habeas petition claiming that he was incompetent to be executed under *Ford v. Wainwright* (1986) 477 U.S. 399. The U.S. Supreme Court rejected the State's assertion that the claim must be dismissed pursuant to section 2244(b) of Title 28. Instead, the high court concluded that Congress did not intend its restriction on "second or successive" petitions to govern a *Ford* claim that ripened after resolution of the first habeas petition. (*Panetti*, 551 U.S. at p. 945.) *Stewart v. Martinez–Villareal* (1998) 523 U.S. 637, 643 similarly construed a second-in-time petition as a continuation of the first rather than an impermissible "second or successive" challenge where it presented a claim that had been previously dismissed as premature. And *Slack v. McDaniel* (2010) 529 U.S. 473, 478 declined to bar a second-in-time petition where the first had been dismissed as unexhausted. Like the federal courts, this Court should decline to interpret "successive petition" to refer to all second and subsequent petitions.

Second, in light of the federal exhaustion requirement (28 U.S.C. § 2254, subd. (b)(1)), California prisoners generally attack their judgments in state court before proceeding to federal court. If a petitioner discovers a new claim in federal proceedings (*e.g.*, *Miranda*, *supra*, 43 Cal.4th at pp. 544, 545 fn. 2; *Robbins*, *supra*, 18 Cal.4th at p. 790), he ordinarily must return and present it to the state courts before the federal court will consider it. (*See Rhines*, *supra*, 544 U.S. at 273-78; *see also* 4 CT2 818 ["To the extent that any claim contains allegations or supporting documentation that were not part of the state court

record . . . such materials must be presented to the California Supreme Court before they may be reviewed by this Court[.]"].) If the new evidence does not establish innocence or ineligibility, however, then abandoning the *Clark/Robbins* definition in favor of treating all second and subsequent petitions as successive would require dismissing such an exhaustion petition pursuant to section 1509(d) without providing the state courts the first opportunity to correct errors.

For all the foregoing reasons, Proposition 66 did not change the definition of "successive petition," which continues to refer to a petition presenting claims, without adequate justification, that could have been raised in a previous collateral challenge.

B. The instant petition is not successive because the omission of each of its six claims from the prior petition is adequately explained

"If . . . counsel failed to afford adequate representation in a prior habeas corpus application, that failure may be offered in explanation and justification of the need to file another petition." (*Clark*, *supra*, 5 Cal.4th at p. 780; *see also Sanders*, *supra*, 21 Cal.4th at p. 720 ("[W]e recognized in *Clark* that the actions (or inactions) of appointed counsel are relevant to deciding whether the procedural rule against successive habeas corpus petitions is applicable."). Here, the ineffective assistance of prior habeas counsel adequately explains the omission of the following claims from the previous collateral challenge and the need to include

them in the instant petition. The instant petition therefore is not successive.[10]

1. Claims 1 and 2.B

Trial prosecutor Ted Landswick discriminated on the basis of race, ethnicity, and gender in exercising his peremptory strikes (*Batson, supra*, 476 U.S. at pp. 96-98; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 131; *People v. Wheeler* (1978) 22 Cal.3d 258, 275-76), and Friend's counsel rendered ineffective assistance in failing to object. At the first trial, Landswick used at least seven of 17 strikes to exclude minority jurors (30 RT 5709-23 [striking jurors A.B., B.R., A.J., I.A., J.B., A.S., and R.B.]; 5 RT 1060 [reflecting that A.B. is Filipino]; 4 CT2 950-67 [suggesting that the six others are African American or Latina]), including several who expressed pro-State views (*e.g.*, 17 RT 3438-40 [I.H.]; 27 RT 5253 [A.S.]). At the second trial, Landswick used 12 of his 19 strikes to remove women (16 RT2 2802-19), used at least four on the basis of race (16 RT2 2806, 2812-13 [striking O.C., F.C.,

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[10] Because petitioners must set forth the facts supporting the assertion that ineffective omission of claims justifies their subsequent presentation (*Clark, supra*, 5 Cal.4th at p. 780), and because the Court does not permit incorporation by reference (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 294, fn. 20), Friend explains why omission of each claim from the prior petition was ineffective. Given the need to file a concise brief, however, he has not included all the allegations from his petition. Friend requests a remand if necessary to evaluate whether the instant petition is successive using the correct definition, including by taking evidence to determine whether the ineffective assistance of prior habeas counsel adequately explains the need for filing it. (*See People v. Knoller* (2007) 41 Cal.4th 139, 158.)

T.D., and L.W.]; 18 CT 6293 [reflecting that O.C. is Latino]; 4 CT2 978-94 [suggesting that F.C. is Latino, T.D. is Asian American, and L.W. is African American]), and struck the only two Jewish jurors (16 RT2 2811-12, 2815 [striking B.D. and L.M.]; 18 CT 6368 [reflecting that B.D. identifies as Jewish]; 19 CT 6518 [same regarding L.M.]).

Landswick's practice of discriminating is evident in other cases. He prosecuted four other capital cases in Alameda County between 1984 and 1994 that resulted in death sentences, and, when available, he used peremptory strikes to remove Jewish prospective jurors in each case. (*See Flowers v. Mississippi* (2019) 139 S.Ct. 2228, 2235; *see also* 2 CT2 384-421 [revealing 15-year pattern of Alameda County District Attorney's Office removing Jewish jurors].) Additionally, Landswick had a history of making racist remarks (*see* 2 CT2 371-82), and his jury selection notes from another case reflect that he kept track of African-American jurors (*see* 4 CT2 930, 938, 941, 943, 945, 947).

Nonetheless, Friend's trial counsel deficiently failed to challenge the discrimination. (*See Strickland v. Washington* (1984) 466 U.S. 668, 687.) "Decisions of the California Supreme Court from 1978 to 1984 reversing lower court judgments on *Wheeler* grounds make clear that defense attorneys were making *Wheeler* motions under similar circumstances at that time." (*Mitcham v. Davis* (N.D. Cal. 2015) 103 F.Supp.3d 1091, 1103, quotation marks and citation omitted.) Under the circumstances, there is a reasonable probability that such a challenge would

have been successful. (*See Johnson v. California* (2005) 545 U.S. 162, 168; *Mitcham, supra*, 103 F.Supp.3d at p. 1120.)

Thus, prevailing professional norms required counsel who filed Friend's first habeas petition to raise the strikes, as well as trial counsel's failure to challenge them. (*See Mitcham, supra*, 103 F.Supp.3d at p. 1103.) Landswick's discriminatory comments were well publicized and should have given habeas counsel additional reason to raise these issues. (2 CT2 371, 378, 380-81.) Nonetheless, counsel did not raise either claim, and she acknowledged that "[t]there was no strategic reason not to include" them. (1 CT2 111-12.) Because "the issue is one which would have entitled [Friend] to relief had it been raised and adequately presented in the initial petition" (*Clark, supra*, 5 Cal.4th at p. 780; *see also Strickland, supra*, 466 U.S. at p. 694), the ineffectiveness of prior counsel justifies presenting this clam now.

2. Claim 2.A

Counsel at Friend's second trial deficiently failed to rehabilitate prospective jurors or to object when they were impermissibly stricken for cause under *Wainwright v. Witt* (1985) 469 U.S. 412. (*See People v. Armstrong* (2019) 6 Cal.5th 735, 755.) The superior court removed ten jurors because it erroneously determined that they were unqualified to serve based on their statements about the death penalty, without adequately addressing whether they could perform their duties.

Four of the jurors were dismissed after they said they could not consider the death penalty based on a rendition of the facts of

the case given by the court. The trial court's ruling essentially turned the *Witt* standard on its head by excusing those jurors who stated they would not vote for the death penalty based solely on the guilt-phase verdict, when arguably those prospective jurors who *would* vote for death based only on the guilt-phase verdict should have been excluded, or at least educated about the role of aggravation and mitigation. (*See* 5 RT2 980-92 [prospective juror F.S.]; 5 RT2 992-97 [F.A. W.]; 1 RT2 209-20 [H.S.]; 1 RT2 267-78 [D.A.].) Two jurors were dismissed because the court mistakenly characterized their ambivalence about the death penalty as a refusal to consider it, despite their statements to the contrary. (*See* 2 RT2 282-306 [R.A.]; 1 RT2 164-70 [S.M.].) And four other jurors were removed based on incorrect applications of the standards for qualifying capital jurors. (12 RT2 2196-2209 [J.A.]; 8 RT2 1423-26 [T.L.]; 4 RT2 671-75 [V.D.]; 10 RT2 1668-82 [C.E.].)

Each of the ten was improperly excused, yet counsel failed to object to all but two of them and in most instances did not ask a single question to clarify the juror's position or attempt rehabilitation. (*See* 5 RT2 980-92 [F.S.]; 5 RT2 992-97 [F.A. W.]; 1 RT2 209-20 [H.S.]; 1 RT2 267-78 [D.A.]; 2 RT2 282-306 [R.A.]; 1 RT2 164-70 [S.M.]; 12 RT2 2196-2209 [J.A.]; 8 RT2 1423-26 [T.L.]; 4 RT2 671-75 [V.D.]; 10 RT2 1668-82 [C.E.].) Had counsel performed competently, the court could not have excluded these jurors under *Witt*. Because the exclusion of impartial jurors "can never be treated as harmless error" (*Gray v. Mississippi* (1987)

481 U.S. 648, 668), the prejudice must be presumed. (*Cf. Armstrong, supra*, 6 Cal.5th at p. 764.)

Again, however, prior habeas counsel neglected to raise trial counsel's ineffectiveness in this respect. These omissions were neither strategic nor reasonable: Counsel understood the importance of the issue because she argued on direct appeal that the trial court improperly struck the jurors. Further, trial counsel's inadequate participation in jury selection "was clear and apparent on the face of the . . . transcript." (*Richardson v. Superintendent Coal Twp. SCI* (3d Cir. 2018) 905 F.3d 750, 763.) Failure to include this claim fell below the standard of care, and Friend would have been entitled to relief had it been presented. (*See Clark*, 5 Cal.4th at p. 780.)

3. Claims 2.C. and 2.D

Trial counsel failed to investigate red flags indicating Friend had organic brain damage, including that he suffered several head injuries and had used alcohol, inhalants, and other drugs extensively, and that his background and impairments are consistent with Fetal Alcohol Spectrum Disorder (FASD).[11] Instead of pursuing these issues, counsel deficiently waited until the last minute to have him evaluated by an expert and then failed to provide the expert with information relevant to making an accurate diagnosis. (*See Wiggins v. Smith* (2003) 539 U.S. 510,

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[11] (*See, e.g.*, Pet. for Writ of Habeas Corpus, Vol. 1, Exs. 4, 7, 10, 16, 18, 19; Vol. 7, Ex. 102; Vol. 8, Ex. 111, *In re Friend* (Cal., Feb. 13, 2007, Case No. S150208); 28 RT2 4376-77, 4384-91; 29 RT2 4470, 4478; 30 RT2 4601-07; 1 CT2 212-20.)

534; *Rompilla v. Beard* (2005) 545 U.S. 374, 390-92; *People v. Wilson* (2005) 36 Cal.4th 309, 317, 323; *see also Frierson v. Woodford* (9th Cir. 2006) 463 F.3d 982, 991.)

The deficient performance was prejudicial. Evidence of brain damage has significant influence on jurors. (*E.g.*, *Sears v. Upton* (2010) 561 U.S. 945, 955-56; *Rompilla*, *supra*, 545 U.S. at p. 392.) Had counsel conducted an adequate investigation, neuropsychological testing would have revealed organic brain impairment. (1 CT2 131-35; *see also* 1 CT2 114-19, 143-61.) And qEEG results indicate that the majority of harm to Friend's brain occurred in the developmental, i.e. prenatal, period and is not the result only of Traumatic Brain Injury or Friend's own substance abuse. (1 CT2 143-61.) Because trial counsel failed to investigate and adequately prepare the expert they did retain, the jurors were left with inaccurate testimony, including that there was "no evidence of him having organic brain injury." (29 RT2 4540.) Had trial counsel offered evidence of brain damage, "there is a reasonable probability that at least one juror would have struck a different balance." (*Wiggins*, *supra*, 539 U.S. at p. 537.)

Prior habeas counsel also failed to present these claims. As the exhibits to the 2007 petition reflect, counsel were on notice that Friend had suffered several head injuries and had abused substances extensively starting at a young age, and there were significant indications that Friend was exposed to alcohol in utero. Counsel had a neuropsychological evaluation conducted that was consistent with more recent testing indicating impairments consistent with FASD. (1 CT2 115-19.) Yet counsel

never conducted further testing or raised a claim regarding Friend's brain damage or FASD-consistent symptoms. Given Friend's history and the effect of evidence of brain damage, counsel's failure to conduct additional testing and raise these issues was unreasonable. Had counsel investigated and presented this evidence to demonstrate trial counsel's ineffective assistance, there is a reasonable probability of relief.

4. Claim 2.E

Although the State disclosed that witness Amanda Van Meter would testify at the penalty phase that Friend assaulted her in 1977, defense counsel relied on the prosecution to provide information about Van Meter rather than independently investigate. (4 CT 1029-30; 26 RT2 4099-4101, 4116, 4130-32, 4166-67.) Counsel's failure to investigate was objectively unreasonable. (*See Elmore v. Ozmint* (4th Cir. 2011) 661 F.3d 783, 859 [defense counsel's obligations "cannot be shirked because of the lawyer's unquestioning confidence in the prosecution"]; *see also Porter v. McCollum* (2009) 558 U.S. 30, 39-40; *People v. Ledesma* (1987) 43 Cal.3d 171, 208-10.) Van Meter's allegation was arguably the most damaging evidence introduced in aggravation. Had counsel investigated, they would have learned that Van Meter has a significant history of substance abuse and criminal charges. (2 CT2 257-367.) Trial counsel's failure to investigate and present evidence that would have undermined damaging aggravation erodes confidence in the outcome. (*Porter*, 558 U.S. at pp. 42-44.)

Nonetheless, prior habeas counsel did not raise this claim. Had counsel conducted an adequate investigation, they could have demonstrated that Van Meter was an impeachable witness and thereby supported a claim that trial counsel's failure to do the same was reversible error. (*Porter*, *supra*, 558 U.S. at pp. 42-44.)

5. Claim 3

The rationale of *Atkins v. Virginia* (2002) 536 U.S. 304, 321, excluding the intellectually disabled from capital punishment, applies with equal force to persons like Friend with organic brain impairment. First, inflicting capital punishment on such a population makes no measurable contribution to the limited, acceptable goals of punishment: retribution and deterrence. (*See Penry v. Lynaugh* (1989) 492 U.S. 302, 335-36.) That intellectually disabled murderers are less morally blameworthy dictates that those with organic brain impairment should likewise not be executed for retribution. (*See Atkins*, 536 U.S. at p. 318.) And imposing such a sentence does not serve deterrence, as brain impairment prevents impulse control and reasoned decisionmaking. (*See id.* at pp. 319-20; *Skipper v. South Carolina* (1986) 476 U.S. 1, 13 (conc. opn. of Powell, J.) ["[T]he death penalty has little deterrent force against defendants who have reduced capacity for considered choice."].) Second, symptoms of organic brain impairment undermine the procedural protections that capital jurisprudence guards. (*See Atkins*, 536 U.S. at p. 320.) Like the intellectually disabled, persons with organic brain damage "may be less able to give meaningful

assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." (*Id.* at pp. 320-21.) Moreover, evidence of organic brain damage similarly may act as a "two-edged sword" by increasing the likelihood the defendant will be perceived as a future danger. (*Id.* at p. 321.)

Counsel failed to raise this claim in Friend's 2007 habeas petition despite the evidence of organic impairment cited above. Counsel should have been aware that the unconstitutionality of executing those with such impairment was a timely and relevant issue and raised this claim. (*See, e.g., Martinez Ramirez v. Schriro* (D. Ariz. Mar. 20, 2007, No. CV 97- 1331-PHX-JAT) 2007 WL 864415, *7 [petitioner analogized to *Atkins* to argue that brain damage and other impairments rendered him ineligible for the death penalty].)

6. Claim 4

Justices Corrigan and Chin worked in the Alameda County District Attorney's Office, which prosecuted Friend in this case. Justice Chin did not recuse himself from either the direct appeal or first habeas proceedings, notwithstanding that he recused himself in another capital case out of Alameda County handled by the same prosecutor and from the same period as Friend's. (*See In re Schmeck* (Cal. Nov. 13, 2013, No. S131578) 2013 Cal. Lexis 3574.) Justice Corrigan did recuse herself from the habeas proceedings (Order (July 29, 2015, No. S150208)), but she did not recuse herself from the direct appeal (Opinion (July 20, 2009, No. S027264)). Friend's case began in 1984 and thus overlapped with

Justice Corrigan's time in the Alameda County District Attorney's office. Justice Corrigan would have worked with and potentially supervised members of the District Attorney's office who prosecuted Friend. (*See Williams v. Pennsylvania* (2016) 136 S.Ct. 1899, 1908 [noting that it would be difficult for a former supervising attorney not to view allegations or findings of misconduct as criticism].)

A court reviewing a claim of judicial bias must ask "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" (*Williams, supra,* 136 S.Ct. at p. 1905, quoting *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 881.) "[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." (*Ibid.*, quoting *In re Murchison* (1955) 349 U.S. 133, 136-37; *see also Rippo v. Baker* (2017) 137 S.Ct. 905, 907 (per curiam).) The potential for bias here is evident in Justice Corrigan's decision to recuse herself in the habeas proceedings.

A judge's unconstitutional failure to recuse him or herself is structural error and is not subject to harmless error analysis. (*Williams, supra,* 136 S.Ct. at p. 1909.) Justice Corrigan's and Justice Chin's decision not to recuse themselves resulted in a "probability of actual bias" that is "too high to be constitutionally tolerable." (*People v. Freeman* (2010) 47 Cal.4th 993, 996.) Under these circumstances, it was unreasonable for habeas counsel not to raise the issue.

7. Claims 5 and 6

When Friend was arrested, he insisted on a lawyer even though his *Miranda* rights were not read or explained. (3 RT 483-86, 491.) Friend signed a *Miranda* waiver form, but at that time the form had not been fully filled out. (3 RT 490.) Officers ignored Friend's pleas for counsel and interrogated him late into the night and early morning hours, using an array of misleading statements and lies to elicit information (*e.g.*, 34 RT 6233-34) and culminating in multiple recorded statements. In response to a motion to suppress (4 CT 925-26, 1054-87; 32 RT 5996-97), the trial court ruled that Friend's statements were not obtained in violation of *Miranda* (32 RT 5996-97).

The court's ruling violated Friend's rights under the Fifth, Sixth, and Fourteenth Amendments. (*See Rhode Island v. Innis* (1980) 446 U.S. 291, 300-01.) "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484.) Appellate counsel's failure to raise the issue was ineffective, especially because this error was preserved. (*Evitts*, *supra*, 469 U.S. at p. 396.) Had counsel raised this issue on appeal, the Court would have granted relief. (*See Edwards*, 451 U.S. 477.) Nonetheless, prior counsel unreasonably omitted this issue in the direct appeal and in habeas proceedings.

Because the omission of each of the foregoing claims is adequately explained by prior counsel's ineffectiveness, the instant petition is not successive. (*See Clark*, *supra*, 5 Cal.4th at p. 780.)

II. Proposition 66's provisions governing successive petitions cannot be applied to Friend's petition because they would be impermissibly retroactive

If the Court determines that Proposition 66 makes all second and subsequent petitions successive, then the new statutes governing such petitions cannot be applied to Friend because they would have a retroactive effect. "[S]tatutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Aetna Cas. & Sur. Co. v. Indus. Acc. Comm'n* (1947) 30 Cal.2d 388, 393 (*Aetna*).) Because Proposition 66 does not reflect that the voters intended retroactive application, the Court should conclude that the provisions governing successive petitions cannot be applied here.

A. Applying the successive petition provisions in sections 1509 and 1509.1 would change the legal consequences of preenactment conduct and thereby have a retroactive effect

In *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 280, the U.S. Supreme Court reiterated that a statute operates retroactively when applying it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." In that case, the high court declined to apply the 1991 Civil Rights Act to pending cases because the statute expanded employer liability for preenactment discrimination by

its employees. (*Id.* at pp. 281-84.) The court recognized the unfairness of applying a statute that, *inter alia*, "would have an impact on private parties' planning" and would "attach an important new legal burden" to preenactment conduct. (*Id.* at pp. 282-83.)

California law is similar, recognizing that a statute operates retroactively if it affects rights, obligations, acts, transactions, and conditions performed or in existence before the statute's adoption (*Strauss v. Horton* (2009) 46 Cal.4th 364, 471, *abrogated on other grounds by Obergefell v. Hodges* (2015) 135 S.Ct. 2584); imposes new duties or attaches new disabilities with respect to past transactions (*id.* at p. 471); increases a party's liability for past conduct (*Myers v. Phillip Morris Companies Inc.* (2002) 28 Cal.4th 828, 839); or otherwise changes the legal consequences of past events or the parties' past conduct (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288-91).

"The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" (*Martin v. Hadix* (1999) 527 U.S. 343, 357-58, quoting *Landgraf, supra*, 511 U.S. at p. 270.) In determining whether a statute is retroactive, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." (*Landgraf*, 511 U.S. at p. 270.)

Applying the new statutes governing "successive petitions" to Friend's petition would give them retroactive effect for several

reasons. It would impose new procedural barriers to the instant petition based on the filing of his 2007 petition, extinguish his state-law right to effective habeas counsel, and unsettle the reasonable expectations of prisoners like Friend who filed preenactment petitions.

1. Application of Proposition 66 would trigger new procedural hurdles based on past events

If the new provisions are applied to a petitioner like Friend who filed his first petition before Proposition 66's enactment, it will change the legal effects of the preenactment filing by triggering procedural barriers to subsequent petitions that would not have otherwise existed. (*See Tapia*, *supra*, 53 Cal.3d at pp. 288-91; *In re E.J.* (2010) 47 Cal.4th 1258, 1273 ["[T]he critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date."]; *People v. Grant* (1999) 20 Cal.4th 150, 157.)

In Section I, Friend demonstrated that a "successive petition" is one presenting claims, without an adequate explanation, that could have been raised in a prior collateral challenge (*see Clark*, *supra*, 5 Cal.4th at p. 774; *Robbins*, *supra*, 18 Cal.4th at p. 788, fn. 9), and that the instant petition would not be subject to the procedural bar on successive petitions. Under pre–Proposition 66 law, Friend could obtain merits review. (*Ibid.*)

If, however, Proposition 66 changed the definition of "successive petition" to mean any subsequent petition, then

section 1509(d) would retroactively attach to Friend's 2007 petition the legal effect of triggering new, insurmountable procedural barriers and requiring dismissal of the instant petition, thus preventing merits review where previously it would have been available. (*See I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 321, 323, 325 [interpreting *Landgraf* to preclude application of a new law even though the right impaired by that law was the mere possibility of obtaining discretionary relief].)

In other words, Friend's 2007 filing initially created the legal effect of requiring that any subsequent petitions satisfy *Clark* and *Robbins*. If Proposition 66 changes the term "successive petition" to mean any second or subsequent petition, then the initiative changes the effect of filing the 2007 petition. Rather than satisfy *Clark* and *Robbins*, the 2007 filing would require that all subsequent petitions, including the instant petition, be subjected to the procedural limitations in section 1509(d). (*See Landgraf, supra*, 511 U.S. at pp. 269-70.) Application of section 1509(d) therefore would change "the legal effects of past events" and operative retroactively. (*Aetna, supra*, 30 Cal.2d at p. 394-95; *see also Landgraf*, 511 U.S. at p. 282 fn. 35 ["[A] degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past."].)

This analytic approach to retroactivity and conclusion follow from *Landgraf* and this Court's precedents, and it is consistent with the approach taken by several of the federal circuit courts of appeal. In 1996 Congress enacted the

Antiterrorism and Effective Death Penalty Act (AEDPA), erecting statutory gatekeeping restrictions on "second or successive" collateral challenges. (28 U.S.C. §§ 2244, subd. (b) & 2255, subd. (h).) After AEDPA was enacted, petitioners argued that applying AEDPA's new, more rigorous restrictions on second-in-time petitions would have a retroactive effect because doing so would change the legal consequences of their first, pre-AEDPA challenges.

In *In re Hanserd* (6th Cir. 1997) 123 F.3d 922, 924, the court considered whether applying AEDPA's restrictions to a second-in-time motion to vacate a federal conviction would be retroactive because the prisoner filed a first such motion before AEDPA. To determine whether "applying the relevant new law would attach new legal consequences to conduct antedating the Act's passage such that applying it would have impermissible retroactive effect," the Sixth Circuit compared "how Hanserd's claim would fare procedurally under the pre-and post-AEDPA law." (*Id.* at pp. 924-25.) The court concluded that Hanserd would have been entitled to raise his claim in a second-in-time motion prior to AEDPA but that the "AEDPA standard would not allow such a § 2255 motion." (*Id.* at pp. 928-29.) "Applying the new statute would thus attach a severe new legal consequence to his filing a first motion: he would have lost his right to challenge his sentence." (*Id.* at p. 931, citing *Landgraf, supra*, 511 U.S. at p. 280.) Because AEDPA's limitations would deprive Hanserd of his right to challenge his sentence based on preenactment conduct, the court declined to apply them in his case. (*Id.* at pp. 933-34.)

The Courts of Appeals for the Third Circuit and the District of Columbia Circuit took similar approaches. In *In re Minarik* (3d Cir. 1999) 166 F.3d 591, 600, the court held that

> [i]n those cases where a prisoner in state custody had a right to prosecute a second or successive petition prior to AEDPA's passage, but would be deprived of that right by these new gatekeeping provisions, we conclude that applying the AEDPA standard would have a 'genuine retroactive effect' because it would attach a new and adverse consequence to pre-AEDPA conduct—the prosecution of the original proceeding.

(*See also United States v. Ortiz* (D.C. Cir. 1998) 136 F.3d 161, 166 [concluding in case where petitioner filed collateral challenges straddling AEDPA's enactment that applying AEDPA would be impermissibly retroactive if the petitioner would have satisfied the pre-AEDPA standard for obtaining review of a second-in-time challenge but could not satisfy the statute as amended by AEDPA].)[12]

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[12] Other federal circuits would not find a particular application of AEDPA to be retroactive in similar circumstances unless the petitioners consciously relied on pre-AEDPA law when they filed their first petition. (*See, e.g., In re Jones* (4th Cir. 2000) 226 F.3d 328, 331, 332, fn. 1; *Graham v. Johnson* (5th Cir. 1999) 168 F.3d 762, 783; *In re Davenport* (7th Cir. 1998) 147 F.3d 605, 608). The Third Circuit persuasively demonstrated why that approach is wrong (*Hanserd, supra*, 123 F.3d at pp. 933-34), and this Court also has not made evidence of conscious reliance dispositive of retroactivity analysis (*see, e.g., Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1194). Unlike several of their sister circuits, the Second and Ninth Circuits did not discern retroactivity concerns from applying AEDPA's restrictions on second petitions when the first petition predated the statute. (*See United States v. Villa-Gonzalez* (9th Cir. 2000) 208 F.3d 1160; *Mancuso v. Herbert* (2d Cir. 1999) 166 F.3d 97, 101.)

Thus, the Court should conclude that Proposition 66 would have a retroactive effect if applied to a petitioner, like Friend, who would have been able to obtain review of claims presented in a subsequent petition under pre–Proposition 66 law but whose claims would now be dismissed. (*Tapia*, *supra*, 53 Cal.3d at pp. 288-91.) In such a case, "[a]pplying the new statute would . . . attach a severe new legal consequence to his filing a first [petition]: he would have lost his right to challenge his sentence." (*Hanserd*, *supra*, 123 F.3d at p. 931, citing *Landgraf*, *supra*, 511 U.S. at p. 280.)[13]

2. Application of Proposition 66 would impair the preenactment right to the effective assistance of habeas counsel

As noted above, an initiative cannot be applied to impair a right acquired under prior law. (*Strauss*, *supra*, 46 Cal.4th at p. 472 ["Were Proposition 8 to be applied to invalidate or to deny recognition to [same-sex] marriages performed prior to" Proposition 8's effective date, "such action would take away or impair vested rights acquired under the prior state of the law and would constitute a retroactive application of the measure."].)

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[13] For the same reason, Proposition 66 could have a retroactive effect if Friend's petition were deemed successive under the *Clark/Robbins* definition and application of the new initiative were held to subject Friend to the unsurmountable section 1509(d) restrictions rather than to the equitable exceptions to the bar on successive petitions announced in *Clark* and controlling when he filed his 2007 petition. (*Clark*, *supra*, 5 Cal.4th at pp. 797-98.) The Court did not request briefing on the applicability of the *Clark* exceptions.

When Friend filed his 2007 petition, California guaranteed the right to counsel in collateral challenges to a death judgment. (Gov't Code, § 68662 (West 2007); *see also In re Morgan* (2010) 50 Cal.4th 932, 940 ["[I]n California an indigent prisoner who is under a court judgment of death has a statutory right to the assistance of appointed counsel to pursue habeas corpus relief."].) This statutory right to counsel includes the right to *effective* counsel. (*Clark*, *supra*, 5 Cal.4th at pp. 779-80 ["Regardless of whether a constitutional right to counsel exists, a petitioner who is represented by counsel when a petition for writ of habeas corpus is filed has a right to assume that counsel is competent and is presenting all potentially meritorious claims."]; *Sanders*, *supra*, 21 Cal.4th at pp. 715-19.) Where a prisoner's state-law right to the effective assistance of habeas counsel was violated, the remedy was a new petition, which could be reviewed on the merits notwithstanding that it was second in time. (*Clark*, 5 Cal.4th at p. 780; *Sanders*, 21 Cal.4th at p. 720.)

The drafters of Proposition 66 recognized the importance of this safety valve and codified a similar remedy in section 1509.1, subdivision (b). Going forward, when a petitioner appeals a superior court order rejecting his habeas petition, he may add claims of "ineffective assistance of trial counsel if the failure of habeas counsel to present that claim to the superior court constituted ineffective assistance." (§ 1509.1, subd. (b).) The petitioner may also obtain a remand and factfinding if necessary to resolve the additional claims. (*Ibid.*) Thus, before Proposition 66, petitioners could file a second-in-time petition to pursue

claims that prior habeas counsel ineffectively omitted. And after Proposition 66 petitioners can seek review of such claims by raising them on appeal.

If Proposition 66 changes the meaning of "successive petition" to refer to any subsequent petition, however, then a second-time-petition is subject to the restrictions in section 1509(d) irrespective of prior habeas counsel's ineffectiveness. Moreover, petitioners like Friend cannot take advantage of new section 1509.1, subdivision (b) to raise the meritorious claims omitted by prior counsel because the time in which to appeal the denial of the pre–Proposition 66 petition has long expired. Thus, if Proposition 66 applies, petitioners like Friend would have no avenue to seek review of claims omitted by ineffective habeas counsel.

Application of Proposition 66 therefore eliminates the remedy for the deprivation of Friend's state-law right to the effective assistance of habeas counsel. And by eliminating the remedy in cases like Friend's, Proposition 66 effectively extinguishes the right. (*Cf. Baldwin v. City of San Diego* (1961) 195 Cal.App.2d 236, 240 ["Destroying enforcement of a vested right is . . . tantamount to destroying the right itself."]; *see also* 7 Witkin, Summary of Cal. Law (11th ed. 2019) Const. Law, § 699.) Because application of Proposition 66 to the instant petition would impair the exercise of a state-law right Friend possessed prior to its enactment, the initiative would operate retroactively.

3. Application of Proposition 66 would unsettle expectations regarding the first habeas petition

When Friend filed his 2007 petition, he could have reasonably expected that his counsel was "competent" and would "present[] all potentially meritorious claims." (*Clark*, *supra*, 5 Cal.4th at p. 780.) He also could have reasonably expected that, should this state-law right be violated, he could vindicate it by pursuing a subsequent petition raising the meritorious claims prior habeas counsel ineffectively omitted. (*Ibid.*). Had Friend known that section 1509(d) would extinguish his right to the effective assistance of habeas counsel, however, he might have acted differently. (*See Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1194 [declining to apply statute that modified "legal doctrine on which many persons may have reasonably relied"].) For example, he might have sought the appointment of second counsel while his 2007 petition remained pending to evaluate whether it should be amended with any potentially meritorious claims that were ineffectively omitted.

This is not the only way application of Proposition 66 would unsettle the expectations of condemned prisoners like Friend and their counsel. For nearly three decades before Proposition 66 was enacted, this Court articulated the scope of counsel's investigative duties and timeliness standards for habeas petitions in the Supreme Court Policies Regarding Cases Arising from Judgments of Death (hereafter "Policies").

As amended in January 2008, the Policies described habeas counsel's duty to investigate thus:

> The duty to investigate is limited to investigating potentially meritorious grounds for relief that come to [habeas corpus] counsel's attention in the course of reviewing appellate counsel's list of potentially meritorious habeas corpus issues, the transcript notes prepared by appellate counsel, the appellate record, trial counsel's existing case files, and the appellate briefs, and in the course of making reasonable efforts to discuss the case with the defendant, trial counsel and appellate counsel.

(Policies, policy 3, std. 1–1.) This Court expressly contrasted the investigative duties imposed by the Policies with the more expansive duties imposed by the American Bar Association's relevant guidelines. (*Reno*, *supra*, 55 Cal.4th at p. 468 ["The ABA Guidelines also are inconsistent with this court's standards. . . . [T]he ABA Guidelines seem to require habeas corpus counsel to reinvestigate the entire case from the ground up, irrespective of the strength of the evidence."].) Thus, prior to Proposition 66, counsel's investigative duty was limited to "follow[ing] up on triggering facts regarding . . . information concerning potentially meritorious claims that came to their attention in the course of representing [the] petitioner." (*Robbins*, *supra*, 18 Cal.4th at p. 809.) Counsel was not expected to investigate claims "grounded on mere speculation or hunch." (*Id.* at p. 781.)

Additionally, although counsel had to raise claims resulting from their investigation promptly to avoid a time bar (Policies, policy 3, stds. 1–1.1, 1–3; *Robbins*, *supra*, 18 Cal.4th at p. 780), this Court's Policies and decisions set out ways for prisoners to obtain review of claims for which the factual or legal basis was unknown in time to file a presumptively timely petition. Initially,

the petitioner could demonstrate the absence of substantial delay in bringing the claim, which was "measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." (*Robbins*, 18 Cal.4th at p. 780; *see also In re Gallego* (1998) 18 Cal.4th 825, 833.) Moreover, even if a petition was substantially delayed, the prisoner could still obtain merits review by establishing good cause for the delay. (*Robbins*, 18 Cal.4th at p. 780.)

Taken together, the Court's policies and precedents therefore encouraged habeas counsel to investigate triggering facts arising from their review of the file and interviews with the client and prior counsel, and then to promptly file a petition raising potentially meritorious claims. Habeas counsel was discouraged from investigating every possible claim that might arise from hunches or speculation, or pleading claims lacking a factual basis based on those hunches with the hope that further investigation would yield supporting evidence. If counsel subsequently discovered a basis for a new potentially meritorious claim, she could file the new claim and argue the absence of substantial delay or good cause. (*E.g.*, *Robbins*, 18 Cal.4th at pp. 788-803.)

Proposition 66 upends this reliance with respect to both the scope of counsel's duty to investigate and the timing of filing claims. If Proposition 66 changes the meaning of "successive petition" such that section 1509(d) applies to all second-in-time petitions, then any claims not raised in the first-in-time petition

are forfeited absent evidence of innocence or ineligibility. Similarly, the explanation for the delayed presentation is no longer relevant.

Thus, Proposition 66 retrospectively requires counsel to have investigated and pleaded all possible claims in the first petition, including claims she could not have known about and claims that were based only on hunches rather than on triggering facts arising from the relevant records and interviews. Counsel who raised only those claims in a first petition that were supported by a sufficient factual basis to establish a prima facie case would have been surprised to learn that in the future no absence of substantial delay or explanation of good cause, however compelling, would justify the filing of a subsequent petition. (*See Landgraf, supra*, 511 U.S. at pp. 265-66 [recognizing that retroactivity presumption "gives people confidence about the legal consequences of their actions"].)

By "chang[ing] the 'rules of the game' in the middle of a contest" for petitioners who, like Friend, filed a first petition before Proposition 66 became effective, application of section 1509(d) would "substantially modif[y] a legal doctrine on which many persons may have reasonably relied in conducting their legal affairs prior to the enactment." (*Evangelatos, supra*, 44 Cal.3d at pp. 1192, 1194.) Unsettling this reliance further counsels against applying Proposition 66 to petitioners like Friend. (*See Landgraf, supra*, 511 U.S. at p. 265 ["Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct

accordingly."]; *Tapia*, *supra*, 53 Cal.3d at p. 300 ["[C]ounsel can only be guided . . . by the . . . rules then in force."]; *Hanserd*, *supra*, 123 F.3d at p. 932 ["Hanserd followed the correct procedure under the old law, and we will not hold that against him."].)

For the foregoing reasons, applying the new statutes governing successive petitions to Friend would have a retroactive effect.

B. The electorate did not intend for these provisions to have retroactive effect

Section 3 declares that "no part" of the Penal Code "is retroactive unless expressly so declared." (*See also* Civ. P. Code § 3; Civ. Code § 3.) "[S]ection 3 erects a strong presumption of prospective operation[.]" (*People v. Brown* (2012) 54 Cal.4th 314, 324.) This presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." (*Landgraf*, *supra*, 511 U.S. at p. 265; *accord Myers*, *supra*, 28 Cal.4th at p. 841.) Consequently, legislation may be applied retroactively only if it is "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (*United States v. Sec. Indus. Bank* (1982) 459 U.S. 70, 79; *accord Myers*, 28 Cal.4th at p. 843.) Only an "express declaration" or "a clear indication" from the electorate can overcome the presumption against retroactivity. (*Tapia*, *supra*, 53 Cal.3d at p. 287.) These rules have been "repeated and followed in innumerable decisions" of the courts of this state. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207.)

Neither the text of Proposition 66 nor the extrinsic evidence manifests an unequivocal intent that its provisions governing successive petitions apply retroactively. Thus, the presumption against retroactivity is unrebutted, and those provisions cannot be applied.

1. The text of Proposition 66 does not reveal an unambiguous intent for the relevant provisions to apply retroactively

The Legislature and electorate can be expected to explicitly state when an enactment is intended to apply retroactively. (*Aetna, supra,* 30 Cal.2d at p. 396 ["[I]t must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended."]; *Myers, supra,* 28 Cal.4th at p. 842 [noting Civil Code section 1646.5, which explicitly states that it "applies to contracts, agreements, and undertakings entered into before, on, or after its effective date; it shall be fully retroactive," and Government Code section 9355.8, which "shall have retroactive application, as well as prospective application"].)

There is no such explicit language in Proposition 66 generally or its provisions governing successive petitions, sections 1509(d) and 1509.1(c), specifically. "[T]he absence of any express provision directing retroactive application strongly supports prospective operation of the measure." (*Evangelatos, supra,* 44 Cal.3d at p. 1209; *see also Helm v. Bollman* (1959) 176 Cal.App.2d 838, 842 [observing that silence "is highly persuasive

that it was not the intent of the Legislature that it be retroactive"].)

Moreover, even without an express declaration the drafters demonstrated they knew how to signal retroactive application when intended. Section 1509, subdivision (g) states that "[i]f a habeas corpus petition is pending on the effective date of this section, the court may transfer the petition to the court which imposed the sentence," suggesting that Proposition 66's venue provision was intended to apply retroactively. The presence of retroactivity language in one section of a statute justifies the inference that its absence in a related section presumes prospective application only. (*See Lindh v. Murphy* (1997) 521 U.S. 320; *accord People v. Buycks* (2018) 5 Cal.5th 857, 881 ["[S]ubdivisions (a) and (f) of section 1170.18 both clearly reflect an intent to have full retroactive application, whereas subdivision (k) uses no similar language. As a result, in the absence of any express declaration of retroactive application, the default presumption applies to subdivision (k) so that its effect operates only prospectively."].)

In contrast to subdivision (g), the text of section 1509(d) is at most ambiguous with respect to retroactivity. Section 1509(d) provides that "an initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed" unless its exceptions apply. Under subdivision (c), an untimely petition is generally one filed more than one year after the appointment of habeas counsel. In context, the phrase "whenever filed" is not a statement of retroactivity. Instead, it

distinguishes how section 1509(d) applies to first and successive petitions: first petitions are subject to section 1509(d) only if they are untimely, while successive petitions are subject to section 1509(d) regardless of whether they are filed within one year of the appointment of habeas counsel. Even if the phrase "whenever filed" could be stretched to signal retroactive intent, at most it is ambiguous. Ambiguous statutes are construed "to be unambiguously prospective." (*Brown, supra*, 54 Cal.4th at p. 324.)

Myers is instructive. The Court considered a legislative enactment that repealed a period of statutory immunity for tobacco companies in product liability actions. Because applying the repeal statute to the companies' conduct during the immunity period would expose them to new liability and therefore be retroactive (*Myers, supra*, 28 Cal.4th at pp. 839-40), the critical question was whether the Legislature had so intended. The statute stated that no bar existed to "claims against tobacco manufacturers . . . by California smokers or others *who have suffered or incurred injuries* . . . from tobacco products." (*Id.* at p. 842.) The same provision expressed the Legislature's intent "to clarify that such claims which *were or are brought* shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense." (*Ibid.*)

The Court concluded that this language did not amount to "the unequivocal and inflexible statement of retroactivity that *Evangelatos* requires." (*Myers, supra*, 28 Cal.4th at p. 843.) The Court observed:

> the time-honored presumption against retroactive application of a statute, as reflected in section 3 of the

> California Civil Code as well as in decisions by this court and the United States Supreme Court, would be meaningless if the vague phrases relied on by plaintiff and the dissent were considered sufficient to satisfy the test of a "clear[ ] manifest[ation]" (*Hughes Aircraft Co. v. U.S. ex rel. Schumer*, *supra*, 520 U.S. at p. 946 [117 S.Ct. at p. 1876]) or an "'unequivocal and inflexible'" assertion (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207, italics omitted) of the Repeal Statute's retroactivity.

(*Id.* at p. 843; *see also Strauss*, *supra*, 46 Cal.4th at p. 471.)

That the phrase "whenever filed" in section 1509(d) is at most ambiguous means that the drafters did not include language that is "'so clear and positive as to leave no room to doubt that [retroactivity] was the intention[.]'" (*Landgraf*, *supra*, 511 U.S. at pp. 271-72, quoting *Chew Heong v. United States* (1884) 112 U.S. 536, 559; *accord Myers*, *supra*, 28 Cal.4th at p. 841.) The text therefore is insufficient to authorize a retroactive application. (*Lindh*, *supra*, 521 U.S. at p. 328, fn. 4 ["[C]ases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation."].)

2. Extrinsic sources do not reflect a clear intent for these provisions to apply retroactively

Because the statutory text does not justify retroactive application, Proposition 66 may not be applied retroactively unless it is "very clear" from other sources that the lawmakers "*must* have intended a retroactive application." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1209, emphasis added; *see also Strauss*, *supra*, 46 Cal.4th at p. 472.)

Here, the relevant extrinsic material regarding Proposition 66, the Voter Information Guide for the 2016 General Election, does not provide the "very clear" evidence necessary to authorize retroactive application of the provisions governing successive petitions. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1209.) There is nothing to indicate that retroactive application of those provisions was specifically contemplated. (*See generally* Voter Information Guide, Gen. Elec. (Nov. 8, 2016) [hereafter "Voter Guide"].) Nor do the ballot materials state that Proposition 66 would create any new legal consequences arising from petitions filed before the measure became effective. (*See Strauss*, *supra*, Cal.4th at p. 472.) There is no clear indication in the Voter Guide that the electorate intended the relevant provisions to apply retroactively, let alone the extent to which they should apply (e.g., unqualifiedly to all second-in-time petitions, or only those filed after Proposition 66, or only those that follow first petitions that were themselves filed after Proposition 66). (*See Evangelatos*, 44 Cal.3d at p. 1217.)

Because the Voter Guide contains no clear evidence of intent that the Proposition 66 provisions governing successive petitions should apply retroactively, they cannot be applied here.

III. The dismissal of Friend's petition pursuant to section 1509(d) is an appealable order under section 1509.1, and section 1509.1(c)'s COA requirement does not apply to—or, alternatively, should be construed to accommodate appellate review of—whether a petition is successive

As set forth in Section I, the consequences of an erroneous finding that a petition is successive, and therefore that the

petition is governed by section 1509(d), are severe. For petitioners who cannot marshal sufficient evidence to demonstrate innocence or ineligibility, the determination that a petition is successive ends the case, putting the underlying claims, as well as any other challenges to section 1509(d) (including, for example, that it cannot be applied without operating retroactively), beyond the courts' power of review. Thus, whether section 1509(d) properly applies to a petition is a critical determination and, in many cases, the dispositive one.

In *Briggs*, the Court held that "[g]oing forward, prisoners may seek to challenge [section 1509(d)'s] limitations in the context of their individual cases." (*Briggs*, *supra*, 3 Cal.5th at p. 848.) Yet the appellate statute Proposition 66 enacted, section 1509.1, does not include an obvious mechanism to challenge the threshold determination made by a superior court that a petition is successive and therefore governed by section 1509(d). To protect the right to challenge the proper application of section 1509(d), give effect to the voters' intent, and preserve Proposition 66's constitutionality, the Court should conclude that a court order dismissing a petition as successive pursuant to section 1509(d) is appealable.

In the following subsections, Friend offers interpretations of section 1509.1 that preserve the right to appeal an adverse determination that a petition is successive. First, Friend submits that such an order is appealable under section 1509.1(a), and therefore that section 1509.1(c) and its COA requirement do not apply. Second, if such an appeal should instead proceed under

section 1509.1(c), then the COA requirement in that subdivision either does not apply to a challenge to the threshold determination regarding section 1509(d)'s applicability or, alternatively, may issue on a substantial showing that the determination was erroneous.

A. An order determining that a petition is successive and dismissing it pursuant to section 1509(d) is appealable under section 1509.1(a)

"[S]ection 1509.1, subdivision (a) grants the Courts of Appeal jurisdiction to review superior court habeas corpus rulings" (*Briggs*, *supra*, 3 Cal.5th at p. 836) and authorizes petitioners to "appeal the decision of a superior court on an initial petition under Section 1509." (§ 1509.1(a).) Section 1509.1(a) applies to an appeal challenging the threshold determination that a petition is successive and dismissing it under section 1509(d) because such a dismissal is a "decision of a superior court" and because for purposes of appeal any petition that is not "successive" is treated as "an initial petition under Section 1509." Consequently, any appeal from a superior court's erroneous determination that a petition is successive properly falls within section 1509.1(a). This interpretation of section 1509.1(a) is supported by the statutory text and purpose, the ballot pamphlet, and constitutional and practical considerations.

1. A dismissal pursuant to section 1509(d) is a type of appealable "decision" within the meaning of section 1509.1(a)

Again, the Court looks first to the statutory text. Section 1509.1(a) reads:

> Either party may appeal the decision of a superior court on an initial petition under Section 1509 to the court of appeal. An appeal shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision granting or denying the habeas petition. A successive petition shall not be used as a means of reviewing a denial of habeas relief.

Section 1509.1(a) thus empowers capital petitioners to appeal adverse rulings that are made in a "decision" of the superior court. Further, it does not limit the type of rulings made in a "decision" that are appealable, including the determination that a petition is successive and therefore that section 1509(d) applies in the first instance. The provision is broadly written, and the only limitation it imposes on the intermediate courts is that it makes an appeal rather than a new petition "the *exclusive* means of reviewing a superior court habeas corpus ruling." (*Briggs*, *supra*, 3 Cal.5th at p. 841 [explaining that section 1509.1(a) "abolish[ed] the existing practice under which review may be obtained by filing a new petition in a higher court"].) In other words, section 1509.1(a) does not impose any limits on the scope of appellate review available under that subdivision, including to foreclose consideration of whether a petition is properly subject to section 1509(d). Consequently, the text supports that a petitioner may appeal a section 1509(d) dismissal because it is an adverse ruling in a superior court "decision."

Section 1509.1(a) does refer to appeals from a decision on "an initial petition under Section 1509," but the Court should conclude that the phrase "initial petition under Section 1509" here is not meant as a term of limitation. Rather, it distinguishes the scenario contemplated in section 1509.1(c), in which a

superior court disposed of a petition properly deemed successive. For purposes of appealing under section 1509.1, "an initial petition under Section 1509" should be read to include any petition that is not properly deemed successive. It makes little sense that the appeal of the determination that a petition is successive would fall under section 1509.1(c). An appeal under section 1509.1(c) assumes that the subject petition is successive and that section 1509(d) properly applies. Where the appeal challenges that threshold determination, section 1509.1(a) governs.

This construction is consistent with Proposition 66's goal of punishing abusive habeas practices by erecting procedural barriers to successive petitions. Section 1509.1(c) makes a COA prerequisite to appeal, issuing "only if the petitioner has shown both a substantial claim for relief, which shall be indicated in the certificate, and a substantial claim that the requirements of subdivision (d) of Section 1509 have been met." Where the petition is not successive, it would make no sense to impose section 1509.1(c)'s restrictions. As set forth in Section I, a prisoner who is not at fault for needing to file a second-in-time petition has never been deemed to have filed an abusive petition that is subject to the successiveness bar. (*See Clark*, *supra*, 5 Cal.4th at pp. 774-75.) Such a petition has long been treated as though it were initial for purposes of avoiding that bar. Similarly, construing section 1509.1(a) to accommodate appellate review of a determination that the prisoner has presented a successive petition provides him with an opportunity to show that he has an

adequate explanation and therefore that he is not subject to the onerous restrictions reserved for abusive filings, including the COA requirement in section 1509.1(c).

That the drafters did not specifically state in section 1509.1(a) that a prisoner could appeal an adverse ruling that his petition is successive is of no moment. Before Proposition 66 prisoners could file an original petition in this Court urging it to find that the petition was not successive, or, if they first sought relief in a lower court, could essentially obtain review of an adverse determination by filing a new habeas petition in a higher court. (*Briggs*, *supra*, 3 Cal.5th at p. 825; *Clark*, *supra*, 5 Cal.4th at p. 767, fn. 7.) Although section 1509.1(a) replaces the prior practice of filing new original petitions with straightforward appellate review, it does not "clearly state[]" that Proposition 66 also abrogates the right to obtain review of whether the petition is successive. (*In re S.B.* (2009) 46 Cal.4th 529, 537 ["[I]f the Legislature intends to abrogate the statutory right to appeal, that intent must be clearly stated."].)

As noted above, in *Briggs* the Court contemplated that petitioners could continue to challenge the successiveness determination under the new appellate scheme. (*Briggs*, *supra*, 3 Cal.5th at p. 848.) Any doubt that this was the voters' intent must be resolved in Friend's favor given the weighty interests affected by a determination that a petition is successive. (*See S.B.*, *supra*, 46 Cal.4th at p. 537 ["The right of appeal is remedial and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected

by a judgment."]; *Briggs*, 3 Cal.5th at pp. 835-36 [construing section 3604.1(c) to preserve the appellate courts' ability to review rulings in method-of-execution challenges brought in habeas proceedings despite statutory language facially depriving them of jurisdiction]; § 4 [penal provisions must be construed "to promote justice"].)

That section 1509.1(a) provides the appropriate mechanism for an appeal like Friend's is supported by a recent order from the Fourth District Court of Appeal. In *In re Lucero*, a condemned prisoner filed a second-in-time petition to raise a claim of false evidence under section 1473, which the superior court dismissed as successive. (Order at p. 1, *In re Lucero* (Cal. Ct. App. Dec. 30, 2019, No. E074350).) The appellate court "made a *preliminary* determination" that the prisoner's petition was not successive, as noted above, and held that "he may appeal the denial of his petition under Penal Code section 1509.1, subdivision (a)." (*Id.* at p. 2.) The court's analysis recognizes that only a petition properly deemed to be successive should be "required to meet the additional requirements of" section 1509(d) (*ibid.*), which section 1509.1(c) facially appears to impose.

2. Extrinsic material supports fulsome appellate consideration of whether section 1509(d) applies

The Voter Guide further supports that a finding of successiveness is appealable under section 1509.1(a). The supporters of Proposition 66 assured the electorate that its reforms would be consistent with, and indeed would promote, fairness on appeal. For example, it promised that "[t]he State

Supreme Court will be empowered to oversee the system and ensure appeals are expedited *while protecting the rights of the accused.*" (Voter Guide, *supra*, Argument in Favor of Prop. 66, p. 108, emphasis added.) The supporters similarly indicated that Proposition 66's reforms to the review process were designed to ensure fairness and justice for defendants: "Proposition 66 reforms the death penalty so the system is *fair to both defendants* and the families of victims. Defendants now wait five years just to be assigned a lawyer, delaying justice, *hurting their appeals*, and preventing closure for the victims' families. Proposition 66 fixes this by streamlining the process to *ensure justice for all.*" (Voter Guide, Rebuttal to Argument Against Prop. 66, p. 109, emphasis added.) Proposition 66's findings and declarations echo this sentiment. (*E.g.*, Voter Guide, Text of Prop. 66, § 2, p. 213 ["Reforming the existing inefficient appeals process for death penalty cases will *ensure fairness for both defendants* and victims." (emphasis added)].)

Nothing in the ballot materials suggested that prisoners could not appeal an adverse ruling that turned on the question of whether a petition was successive. The Legislative Analyst's description of the new habeas procedures does not contain any restrictions on the scope of appellate review, and it suggested to the voters that appellate review would be meaningful. (Voter Guide, *supra*, Analysis by the Legislative Analyst, p. 105.) The voters cannot be presumed to have intended to restrict appellate review in a way "that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in

the official ballot pamphlet." (*Farmers Ins. Exch. v. Superior Court* (2006) 137 Cal.App.4th 842, 857-58.)

3. Precluding appellate review of whether section 1509(d) applies would be unconstitutional

Having demonstrated above that whether a petition is successive is a complex and fundamental question, it follows that section 1509(d)'s applicability deserves full appellate review. (*Cf. In re Martin* (1962) 58 Cal.2d 133, 139 [explaining that the interest of the State that justice be done in criminal cases "reinforce[s] the appellant's claim that his appeal be considered on the merits"].) Interpreting section 1509.1(a) to foreclose review of whether section 1509(d) applies, however, would short-circuit the appeal. For petitioners who cannot satisfy its exceptions, an erroneous conclusion that section 1509(d) applies functionally ends the proceeding. There would be no opportunity to challenge the correctness or constitutionality of applying section 1509(d) in the first instance, or, therefore, to ultimately obtain merits review. (*Cf. Briggs*, *supra*, 3 Cal.5th at p. 848.)

Thus, interpreting section 1509.1(a) to foreclose review of section 1509(d)'s application would unconstitutionally restrict the jurisdiction of the appellate courts. Article VI, section 10 of the California Constitution grants original jurisdiction in habeas proceedings to the "Supreme Court, courts of appeal, superior courts, and their judges." In *Briggs*, the Court rejected a facial challenge to section 1509.1(a) as violating article VI, section 10 of the California Constitution, because the appellate courts retain jurisdiction in habeas proceedings, now exercised through

statutory appeals rather than through new petitions. (*Briggs*, *supra*, 3 Cal.5th at p. 841.) But the Court also suggested that restrictions on the scope of review that "prevent a court from exercising its writ jurisdiction" would violate this provision of the constitution. (*Ibid.*; *see also id.* at p. 833 ["[A] statute may not substantially impair the courts' original writ jurisdiction."].) Construing section 1509.1(a) to foreclose review of a determination that section 1509(d) applies would, in practice, foreclose appellate review entirely for petitioners like Friend. Consequently, such an interpretation would unconstitutionally impair the appellate courts' jurisdiction over habeas cases.

Further, and for the reasons discussed in Section I, because the application of section 1509(d) would foreclose review of constitutional errors, such an interpretation of the statute would violate the California Constitution's Suspension Clause (*cf. Reno*, *supra*, 55 Cal.4th at p. 450; *Lott*, *supra*, 334 Mont. at pp. 278-79) and render California's habeas procedures constitutionally inadequate as a matter of state and federal due process (*see* Cal. Const. art. I, § 15; *cf. Allen*, *supra*, 756 So.2d at p. 54; *see also Evitts*, *supra*, 469 U.S. at p. 401; *Woodard*, *supra*, 523 U.S. at p. 293).

4. Practical considerations necessitate appeal of the successiveness question

If section 1509.1(a) does not allow consideration of whether a petition is successive, the appellate courts will be deprived of opportunities to provide guidance to superior courts grappling with the complicated question of which petitions are successive and to correct erroneous determinations. Moreover, the practices

of the superior courts would ossify. The lower courts would settle into practices respecting the application of section 1509(d) and petitioners would have no opportunities through appeal to persuade higher courts to review or revise them. This harm would be aggravated because the State presumably could appeal a superior court's determination that a petition was *not* successive and subject to section 1509(d). (*See* § 1509.1(a).) Unless section 1509.1(a) accommodates petitioners' challenges to the threshold determination, the State can appeal it as of right if it loses, but petitioners cannot appeal it at all.

For all these reasons, the Court should conclude that where, as here, a prisoner appeals from a section 1509(d) dismissal to challenge the threshold determination that his petition is successive, the dismissal is a "decision of a superior court" from which appeal is taken under section 1509.1(a). (*See People v. Morrison* (2019) 34 Cal.App.5th 980, 993 ["Once the intention of the Legislature is ascertained, it will be given effect even though it may not be consistent with the strict letter of the statute."], quoting *People v. Ali* (1967) 66 Cal.2d 277, 280; *In re Michele D.* (2002) 29 Cal.4th 600, 606 ["[T]he language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature [or the voters] did not intend."]; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 979 [adopting nonliteral construction of Proposition 64 based on evidence of enactment's purpose]; *Briggs*, *supra*, 3 Cal.5th at p. 857 [recognizing that the Court may exercise its power of reformation to "preserve a statute's constitutionality"].) Because

section 1509.1(a) is the appropriate basis for the appeal, section 1509.1(c) and its COA requirement simply are not implicated.

B. If section 1509.1(a) is not the proper basis to appeal a section 1509(d) dismissal, then section 1509.1(c) is

If the Court concludes that a section 1509(d) dismissal is not appealable pursuant to section 1509.1(a), then such an order must be appealable under section 1509.1(c). Section 1509.1(c) reads in relevant part:

> The petitioner may appeal the decision of the superior court denying relief on a "successive petition" only if the superior court or the court of appeal grants a certificate of appealability. A certificate of appealability may issue under this subdivision only if the petitioner has shown both a substantial claim for relief, which shall be indicated in the certificate, and a substantial claim that the requirements of subdivision (d) of Section 1509 have been met.

For the reasons that follow, and assuming *arguendo* that section 1509.1(a) is not the proper mechanism for appeal, the Court should conclude that a superior court ruling "dismiss[ing]" a petition pursuant to section 1509(d) is a type of order "denying relief" that is appealable under section 1509.1(c). The Court should further conclude either that the COA requirement in section 1509.1(c) does not extend to the threshold determination that section 1509(d) applies to a petition, or that a COA may issue when the petitioner makes a substantial showing that his petition is not successive and presents a substantial claim for relief.

1. Section 1509.1(c) permits appeals from section 1509(d) dismissals

Initially, section 1509.1(c) applies to orders "denying relief on a successive petition." Here, the superior court applied section 1509(d), which requires that a successive petition be "dismissed" unless its exceptions are satisfied. Although the statute refers to a dismissal in section 1509(d) and a denial in section 1509.1(c), a dismissal is a type of denial, and therefore any distinction between a dismissal and denial does not affect whether the order is appealable.

A dismissal pursuant to section 1509(d) turns on two findings: the petition is successive, and the court has not found that the defendant is innocent or ineligible. If both findings are made, the petition "shall be dismissed," and the court refuses to allow the petitioner to proceed further, although it has not reached the merits of the underlying claims. In this way, section 1509(d) operates as a procedural bar (*cf. Sanders*, *supra*, 21 Cal.4th at p. 724 (conc. opn. of Mosk, J.) [using "dismiss[al]" to refer to an adverse disposition based on a time bar]), and the resulting procedural dismissal operates like a summary denial (*e.g.*, *Reno*, *supra*, 55 Cal.4th at pp. 455-56 ["Faced with a petitioner who had filed a successive and repetitive petition raising untimely claims, . . . we simply denied the petition summarily and did not consider the substantive merits of the claims."], citing *Clark*, *supra*, 5 Cal.4th at p. 799; *Maas v. Superior Court* (2016) 1 Cal.5th 962, 974 ["If . . . the court determines that the petition fails to state a prima facie case for relief or that the claims are procedurally barred, the petition will

be summarily denied."]).[14] Thus, a section 1509(d) dismissal is a type of denial—a summary denial—and it leads to the same result. A denial as used in section 1509.1(c) therefore encompasses a section 1509(d) dismissal.

That a dismissal is a particular type of denial is further supported by the common definitions of both words. "Denial" means "[a] refusal or rejection; esp., a court's refusal to grant a request presented in a motion or petition." (Black's Law Dictionary (11th ed. 2019).) A denial therefore fairly encompasses any ruling refusing a petitioner's request for relief, including a procedural dismissal. (*See* Black's Law Dictionary (11th ed. 2019) [defining "dismiss" as "[t]o send (something) away; specif., to terminate (an action or claim) without further hearing, esp. before the trial of the issues involved"].) A dismissal and a denial thus are functionally interchangeable for purposes of whether the order is appealable. (*Cf.* Cal. Rule of Court 8.490(b)(1) [treating denials and dismissals interchangeably for purposes of finality]; *Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149, 158 [acknowledging a "distinction without a difference" between dismissal and summary denial]; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699 [recognizing that a dismissal is treated as a final

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[14] Indeed, in the proceedings below the superior court "dismissed" Friend's claims pursuant to section 1509(d) and "denied" the petition. (*E.g.*, Super. Ct. Order at 5 ["The Petition is DENIED for the reasons stated below."]; *id.* at 5 ["[T]his court dismisses those claims pursuant to Penal Code section 1509, subdivision (d)."].)

judgment for purposes of appeal when it prevents further proceedings].)

A contrary conclusion—that a section 1509(d) dismissal is not appealable under section 1509.1(c)—would frustrate the voters' intent and render section 1509.1 unconstitutional for the reasons described in the preceding section. It would also lead to the absurd result of immunizing erroneous determinations that a petition is successive, which for prisoners who cannot satisfy section 1509(d) is the end of the case. Instead, to serve the voters' intent and avoid an unconstitutional result, the Court should conclude that a "decision of the superior court denying relief on a successive petition" includes a decision determining that the petition is successive and dismissing it pursuant to section 1509(d). (*See S.B., supra*, 46 Cal.4th at p. 537.)

2. The COA requirement does not apply to the threshold determination that a petition is successive or otherwise subject to section 1509(d)

Assuming the Court finds that a dismissal is appealable under section 1509.1(c), its COA requirement should not apply to the threshold determination that a petition is properly governed by section 1509(d). Practically, interpreting section 1509.1(c) this way would lead to the same result as permitting petitioners to appeal the threshold determination that their petition is successive under section 1509.1(a). In this section, however, Friend assumes for the sake of argument that the text of section 1509.1(a) cannot sustain the interpretation he advocates in section III.A.

Proposition 66's restrictions on successive petitions were intended to screen out frivolous claims. (*See* Voter Guide, Text of Prop. 66, § 2, p. 213 ["[F]rivolous and unnecessary claims should be restricted."].) This is accomplished, in part, by the COA requirement in section 1509.1(c). But the COA requirement should not be extended beyond its purpose of limiting the claims for relief that may be reviewed through a successive petition. (§ 1509.1(c) ["The jurisdiction of the court of appeal is limited to the *claims* identified in the certificate and any additional *claims* added by the court of appeal within 60 days of the notice of appeal." (emphasis added)].) Because the COA mechanism is intended to impose requirements before an appellate court can review the merits of claims presented in a successive petition, it should not be construed to burden review of the threshold question of whether the petition is successive. Such an interpretation would require prisoners to satisfy frequently insurmountable procedural obstacles to obtain review of the determination that those obstacles should apply in the first instance. And, as noted above, extending the COA requirement to the question of whether a petition is successive would, in many instances, dispose of the entire case. For the reasons explained in Section III.A., such an interpretation would contravene the voters' intent and render the statute unconstitutional.[15]

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[15] The successiveness determination would not be the only issue immunized by such a broad reading of the COA requirement. A prisoner without a showing of innocence or ineligibility likewise could not obtain a COA to challenge the determination that section 1509(d) could be applied without violating retroactivity

The interpretation of section 1509.1(c) that better serves the voters' intent is that the provision requires prisoners to obtain a COA before the appellate court can consider claims for relief, but not before the court can exercise plenary review of threshold or procedural issues, including whether the petition is successive. This interpretation of section 1509.1(c) would allow the appellate court to exercise typical review of the determination that a petition was successive and consider whether the resulting punitive obstacles correctly apply. Assuming the court decided the threshold issue adversely to the prisoner, however, this interpretation would still restrict review of the underlying claims absent the showing required for a COA. This approach balances the intent of the voters to leave prisoners with meaningful appellate rights while ensuring that where section 1509(d) has been properly applied, reviewing courts cannot entertain claims absent a showing that they have merit and that the petitioner is innocent or ineligible.

3. Alternatively, a COA may issue on the question of whether section 1509(d) applies

If section 1509.1(c)'s COA requirement does extend to a challenge to the threshold determination that a petition is subject to section 1509(d), the statute should be interpreted such that a COA may issue based on a substantial showing that section 1509(d) does not apply in the first instance, including because the petition is not successive, as long as the petitioner also demonstrates a substantial underlying claim for relief.

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principles.

As noted, a COA may issue under section 1509.1(c) "only if the petitioner has shown both a substantial claim for relief, which shall be indicated in the certificate, and a substantial claim *that the requirements of subdivision (d) of Section 1509 have been met*" (emphasis added). One reading of the italicized phrase is that a petitioner must demonstrate that the exceptions to section 1509(d) have been satisfied—he has a substantial showing of innocence or ineligibility. Reviewed in context, however, the most persuasive reading of the italicized text is that section 1509.1(c) permits a COA to issue when the petitioner has set forth a substantial argument that section 1509(d) does not apply at all—not only that the exceptions in section 1509(d) are satisfied. In other words, a petitioner may obtain a COA if he substantially disputes that the preconditions for section 1509(d)'s application have been triggered—for example, he makes a substantial showing that the petition is not successive. (*See* The American Heritage Dictionary of the English Language (5th ed. 2015) [defining "requirement" as "a prerequisite"].) On this reading, section 1509.1(c) permits a COA to issue when a petitioner substantially challenges that the prerequisites to section 1509(d)'s application have been met.

This interpretation is supported by section 1509.1(c)'s text. A showing of innocence or ineligibility would satisfy section 1509(d). If this were the only way to meet section 1509.1(c)'s requirements, however, then the drafters could have simply stated that a COA may issue only if the petitioner has a substantial claim that he or she is innocent or ineligible. Instead,

the drafters used broader language, permitting a COA to issue on a substantial showing more generally that "the requirements of subdivision (d) of Section 1509 have been met."

Like the previous argument, this interpretation of section 1509.1(c) would not detract from the COA's screening function. Where section 1509(d) indisputably applies because a petition is plainly successive, the appellate courts will still be able to employ the COA requirement to "screen[] out issues unworthy of judicial time and attention and ensure[] that frivolous claims are not" permitted to go forward. (*Gonzalez v. Thaler* (2012) 565 U.S. 134, 145; *see also Slack*, *supra*, 529 U.S. at p. 484.)

Yet this interpretation would also fairly permit petitions to proceed further where they make threshold showings that the superior court's procedural determination was erroneous, so long as they have "a substantial claim for relief." (§ 1509.1(c); *see also Slack*, *supra*, 529 U.S. at p. 483 [rejecting State's argument that "no appeal can be taken if the district court relies on procedural grounds to dismiss the petition" and instead holding that "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling"].) Construing section 1509.1(c) to permit a COA on the threshold question of whether section 1509(d) applies to the petition thereby ensures that an erroneous procedural error in the superior court will not foreclose review of substantial underlying claims.

Again, this interpretation of section 1509.1 finds support in the Fourth District Court of Appeal's order in *Lucero*. Although as noted above the court perceived that section 1509.1(a) rather than section 1509.1(c) properly governed the prisoner's appeal based on its preliminary determination that the petition was not successive, the court "issue[d] a certificate of appealability to preserve [its] jurisdiction" pending this Court's decision in Friend's case. (Order at p. 2, *In re Lucero* (Cal. Ct. App. Dec. 30, 2019, No. E074350.) The court limited the COA to whether the petition at issue was successive for purposes of section 1509(d) and whether the underlying claim was meritorious. (*Id.* at pp. 2-3.) As Friend advocates here, the court did not additionally require the prisoner to make a substantial showing of innocence or ineligibility before issuing the COA.

In sum, because it is consistent with the text and serves the voters' intent, and because a contrary conclusion would render section 1509.1 unconstitutional, if the COA requirement extends to a challenge to the threshold determination that section 1509(d) applies, then section 1509.1(c) should be construed to permit a COA to issue when the petitioner makes a substantial showing that his petition is not successive, provided that the petition, like Friend's, also contains "a substantial claim for relief." (§ 1509.1(c); *see also Morrison, supra,* 34 Cal.App.5th at p. 993.)

CONCLUSION

The voters enacted Proposition 66 without providing any new definition of the term successive petition, and therefore they are presumed to have used it in the same way this Court has for

decades. A contrary conclusion—that Proposition 66 silently redefined the term to reference any second or subsequent petition—would implicate serious due process, equal protection, and suspension clause concerns, and applying the new statutes here would give them an impermissibly retroactive effect. Under the correct, longstanding definition, the instant petition is not successive. Finally, the voters' intent to codify full and fair appeals and the requirements imposed by the state and federal constitutions require that section 1509.1 be interpreted to preserve appellate review of whether section 1509(d) applies to a petition in the first instance. The case should be remanded with directions to the superior court to consider each of the claims on the merits.

Dated this 9th day of January, 2020.

Respectfully submitted,

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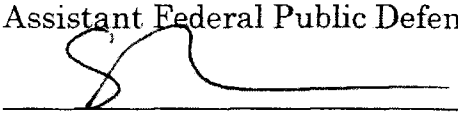

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c), counsel for Jack Friend certifies based on the word count of the computer program used to prepare this brief that it contains 19,798 words, excluding the tables and cover information required under Rule 8.204, the quotation of issues required by Rule 8.520(b)(2), the signature block, the proof of service, and this certificate.

PROOF OF SERVICE

I, Daniel Juarez, declare as follows:

I am employed in the County of Maricopa, State of Arizona. I am over the age of eighteen years and am not a party to this action. My business address is Office of the Federal Public for the District of Arizona, 850 W. Adams Street, Suite 201, Phoenix, Arizona 85007.

I am familiar with the business practice at the Office of the Federal Public Defender for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Federal Public Defender is deposited with the United States Postal Service or a commercial carrier with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system.

On January 9, 2020, I served the attached brief by transmitting a true copy via United States Postal Service on the following parties:

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I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct, and that I signed this document on January 9, 2020, in Phoenix, Arizona.

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