In the Supreme Court of the State of California

In re JACK WAYNE FRIEND, **On Habeas Corpus**	**CAPITAL CASE** Case No. S256914

First Appellate District, Case No. A155955
Alameda County Superior Court, Case No. 81254
The Honorable Don Clay, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

On September 11, 2019, this Court granted review of the following issues:

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)?

INTRODUCTION

In November 2016, voters passed Proposition 66, which made changes to the way death penalty appeals and habeas petitions are handled. This case presents three issues of first impression related to those amendments.

The first issue[1] involves the interpretation of the term "successive petition" under Penal Code section 1509.[2] The term could be interpreted literally, to mean any petition filed after an inmate's first petition is adjudicated. But that construction would create constitutional concerns in future cases by prohibiting condemned inmates from raising certain types of meritorious habeas claims that they could not have raised earlier. The term could also be construed to track this Court's prior judicial understanding of the circumstances in which a habeas petitioner is justified in raising a claim in a subsequent petition. Although this is a close question, the latter construction is the better one, principally because it preserves a condemned inmate's ability to raise potentially meritorious claims that could not have been raised in the initial petition—and thereby avoids the potential constitutional problems described above.

The next issue addresses appellate review of those petitions dismissed as "successive petitions" under section 1509, subdivision (d). Both parties agree that the dismissal of a successive petition is an appealable, final order and that a trial court's threshold determination that a petition is successive should be reviewable. The parties disagree, however, about the appropriate mechanism for bringing such an appeal. Section

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[1] Although this issue is listed second in the Court's order, the Attorney General addresses it first because the definition of "successive petition" bears on the response to the other two questions.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

1509.1 governs appeals from orders on initial and successive habeas petitions. In the case of successive petitions, subdivision (c) includes a requirement that the petitioner obtain a certificate of appealability, which should be read to accommodate review of a determination that a petition is "successive." Although Friend argues that the appeal of the dismissal of a successive petition is governed by a separate subdivision addressing appeals of "initial petitions," and that a certificate of appealability is unnecessary for such an appeal, those arguments are foreclosed by the statutory text.

The final issue asks whether, under *Landgraf v. USI Film Products* (1994) 511 U.S. 244 and other retroactivity cases, the provisions of Proposition 66 limiting "successive petitions" apply to Friend's current petition when his first habeas petition was adjudicated before Proposition 66's effective date. Applying those provisions cannot have any improper retroactive effect under the circumstances of this case, since Friend's current petition would have been summarily denied under the procedural bars that existed before Proposition 66. More generally, *Landgraf* and other cases on retroactivity confirm that applying Proposition 66 to a successive petition filed after the Proposition's effective date does not have any impermissible retroactive effect, regardless of whether a petitioner's initial petition was adjudicated before that date.

LEGAL BACKGROUND

A. Habeas Corpus and "Abuse of the Writ" Principles Before Proposition 66

The right to habeas corpus is guaranteed by the California Constitution and "may not be suspended unless required by public safety in cases of rebellion or invasion." (Cal. Const., art. I, § 11.) A writ of habeas corpus provides "an avenue of relief to those unjustly incarcerated when the normal method of relief—i.e., direct appeal—is inadequate." (*In re Reno* (2012) 55 Cal.4th 428, 450.) Habeas challenges operate as a "safety valve" or "escape hatch" (*ibid.*), allowing an inmate to attack the validity of a conviction "based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension" (*In re Clark* (1993) 5 Cal.4th 750, 766-767).

To be sure, "habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment." (*In re Reno*, *supra*, 55 Cal.4th at p. 450.) Convictions are presumed fair in habeas proceedings in part to vindicate "society's interest in the finality of criminal proceedings." (*In re Reno*, *supra*, 55 Cal.4th at p. 459.) The availability of the writ is therefore "tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments." (*In re Reno*, *supra*, 55 Cal.4th at p. 451.)

Piecemeal presentation of claims can undermine the interest in finality of judgments. Prior to Proposition 66, this Court crafted "abuse of writ" principles that guard against "successive

petition[s] presenting additional claims that could have been presented in an earlier attack on the judgment." (*In re Clark*, *supra*, 5 Cal.4th at p. 770; see *ibid.* ["piecemeal litigation prevents the positive values of deterrence, certainty, and public confidence from attaching to the judgment"].) Those "strict limits" bar "successive petitions" when, without adequate explanation, a petitioner raises claims that could have been raised in a prior petition. (*In re Reno, supra*, 55 Cal.4th at p. 452.)

But this Court also recognized "exceptions designed to ensure fairness and orderly access to the courts." (*In re Reno*, *supra*, 55 Cal.4th at p. 452.) It permitted second or subsequent petitions for the "rare or unusual claims that could not reasonably have been raised at an earlier time." (*Ibid.*) Thus, a petitioner could justify the failure to assert a claim in earlier habeas proceedings because, for example: "the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made"; counsel failed to afford adequate representation in a prior habeas corpus application; or a claim was based on a change in the law that is retroactively applicable to final judgments. (*In re Clark*, *supra*, 5 Cal.4th at pp. 775, 780.) Even unjustified successive petitions could still be considered, in capital cases, if the denial of relief would result in a "fundamental miscarriage of justice," defined to include circumstances where a petitioner establishes: "(1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would

have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted or sentenced under an invalid statute." (*In re Reno*, *supra*, 55 Cal.4th at p. 472.)

B. Proposition 66

In November 2016, California voters approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. (*Briggs v. Brown* (2017) 3 Cal.5th 808, 822.) Proposition 66 included a "series of findings and declarations to the effect that California's death penalty system is inefficient, wasteful and subject to protracted delay, denying murder victims and their families justice and due process." (*Id.* at p. 823.) Among other things, it expedited direct appeals in capital cases, changed administrative schemes governing confinement of condemned inmates, and altered provisions relating to the Habeas Corpus Resource Center. (*Ibid.*)

As relevant here, Proposition 66 added sections 1509 and 1509.1, which address habeas petitions filed by condemned inmates. Section 1509 "applies to any petition for writ of habeas corpus filed by a person in custody pursuant to a judgment of death" and directs habeas petitions to be heard in the trial court "unless good cause is shown for the petition to be heard by another court." (§ 1509, subd. (a).) An initial petition is timely if

it is filed "within one year of the order entered" appointing the capital inmate counsel under Government Code section 68662. (§ 1509, subd. (c).) An "initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of the available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." (§ 1509, subd. (d).)

Section 1509.1 addresses appellate review of "initial" and "successive" capital habeas petitions. Subdivision (a) governs appeals from proceedings on initial petitions and provides that "[e]ither party may appeal the decision of a superior court on an initial petition under Section 1509 to the court of appeal." (§ 1509.1, subd. (a).) Subdivision (b) describes the issues that may be appealed when a trial court reaches a decision on an initial petition. (§ 1509.1, subd. (b).) Subdivision (c) describes the appellate procedures governing successive petitions. It provides that the "people may appeal the decision of the superior court granting relief on a successive petition," and that the petitioner may appeal the superior court's order "denying relief on a successive petition only if the superior court or the court of appeal grants a certificate of appealability." (§ 1509.1, subd. (c).) A certificate of appealability may issue only if a petitioner shows "both a substantial claim for relief," and a "substantial claim that the requirements of subdivision (d) of Section 1509 have been met." (*Ibid.*) "The jurisdiction of the court of appeal is limited to

the claims identified in the certificate" of appealability "and any additional claims added by the court of appeal[.]" (*Ibid.*)

Neither "initial petition" nor "successive petition" is defined by Proposition 66. Nor did the findings or ballot materials address the meaning of those terms. In fact, the voter guide hardly touched on habeas petitions at all. The uncodified preamble to Proposition 66 included, among its "Findings and Declarations," one finding bearing on habeas proceedings: "A defendant's claim of actual innocence should not be limited, but frivolous and unnecessary claims should be restricted. These tactics have wasted taxpayer dollars and delayed justice for decades." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Proposition 66, § 2, subd. (7), p. 213.)[3] The Attorney General noted in the Official Title and Summary that Proposition 66 would "change[] procedures governing state court appeals and petitions challenging death penalty convictions and sentences," and observed that the measure "designates superior court for initial petitions and limits successive petitions." (*Ibid.*, official title and summary, at p. 104.)

The Legislative Analyst addressed habeas petitions, as relevant here, in two parts. First, the Analyst observed: "In order to help meet the above time frames, the measure places other limits on legal challenges to death sentences. For example, the measure does not allow additional habeas corpus petitions to be filed after the first petition is filed, except in those cases where

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[3] An archived version of the Voter Guide is available electronically at https://tinyurl.com/v7k2kgu.

the court finds that the defendant is likely either innocent or not eligible for the death sentence." (Voter Information Guide, *supra*, analysis by legislative analyst, at p. 104.) Second, the Analyst explained that Proposition 66 "could result in the filing of fewer, shorter legal documents" because of "the limits on the number of habeas corpus petitions that can be filed." (*Id.* at p. 107.)

The proponents and opponents of Proposition 66 did not elaborate on the meaning of "successive petition." In the argument for the measure, proponents generally described how Proposition 66 would "speed up the death penalty appeals system while ensuring that no innocent person is ever executed." (Voter Information Guide, *supra*, argument in favor of Proposition 66, at p. 108.) Opponents claimed that the proposition was "a POORLY WRITTEN, CONFUSING initiative," and that it "REMOVES IMPORTANT LEGAL SAFEGUARDS and could easily lead to fatal mistakes." (*Ibid.*, rebuttal and argument against Proposition 66, at pp. 108-109.)

On November 8, 2016, the voters adopted Proposition 66. It became effective on October 25, 2017, following this Court's opinion in *Briggs v. Brown*, *supra*, 3 Cal.5th at page 862.

STATEMENT OF THE CASE

Friend was convicted of first degree murder and robbery (§§ 187, 190.2, 211). He was eligible for the death penalty because of a robbery-murder special-circumstance allegation (§ 190.2, subd. (a)(17)(A)). (*People v. Friend* (2009) 47 Cal.4th 1, 10.) A mistrial was declared when the jury hung on the special-circumstance allegation. On retrial, another jury found the

special-circumstance allegation true, and fixed Friend's punishment at death. (*Ibid.*) The trial court imposed a judgment of death in June 1992. (*Ibid.*) This Court affirmed that judgment in full on direct appeal. (*Ibid.*)

While the direct appeal was pending, Friend filed his first petition for writ of habeas corpus in this Court. (*In re Friend*, No. S150208, 2007.) The petition raised 17 claims, alleging (among other things) ineffective assistance of trial counsel, prosecutorial misconduct, instructional errors, and generalized attacks on the death penalty. The petition was 394 pages long and supported by eight volumes of exhibits. In July 2015, this Court denied all claims on the merits.[4]

Friend thereafter filed a federal petition for a writ of habeas corpus. (*Friend v. Davis*, No. 3:15-CV-03514-HSG (N.D. Cal. 2016).) That petition was 404 pages long and raised 20 claims with numerous sub-claims. Friend later filed an amended petition raising an additional claim. He acknowledged that he had failed to exhaust—either entirely or in part—six claims, including the one added in the amended petition. In December 2017, the district court granted a stay to allow Friend to return to state court to file an exhaustion petition raising those six claims.

The voters passed Proposition 66 in November 2016 and it became effective on October 25, 2017, following this Court's opinion in *Briggs v. Brown*, *supra*, 3 Cal.5th 808. Six months

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[4] The Court also denied one claim as "procedurally barred under *In re Seaton* (2004) 34 Cal.4th 193, 200, because it should have been raised at trial." (Order, S150208.)

later, Friend filed his second state habeas petition in the Alameda County Superior Court, raising the six unexhausted claims that he had raised in the amended federal petition. In October 2018, after receiving an informal response and reply to the petition, and after taking judicial notice of the trial court file, the superior court entered an order dismissing the petition. The court found that it was a "successive petition" within the meaning of section 1509, subdivision (d) and therefore subject to dismissal unless Friend could show actual innocence or ineligibility for the death penalty. (*In re Friend* (Super. Ct. Alameda County, 2018, No. 81254A) (Or. Denying Petn.) at pp. 4-5.) In concluding that the petition was "successive," the court adopted a definition of "successive petition" to mean one "raising claims that could have been presented in a previous petition." (*Id.* at p. 4.) The court concluded that Friend's claims were successive because they could have been raised in an earlier petition, and that he failed under section 1509, subdivision (d) to even allege actual innocence on five of his six claims. (*Id.* at p. 5.) As to one claim bearing on eligibility for the death sentence, the court held under *People v. Boyce* (2014) 59 Cal.4th 672, that Friend failed to establish that he was ineligible for the death penalty because of an alleged organic brain impairment. (*Id.* at pp. 5-6.) The court denied a certificate of appealability. (*Id.* at p. 7.)

Friend sought review in the Court of Appeal. That court also denied the request for a certificate of appealability, reasoning that Friend failed 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." (*In re Friend* (Cal. Ct. App., July 5, 2019, No. A155955).)

ARGUMENT

I. THE TERM "SUCCESSIVE PETITION" SHOULD BE CONSTRUED TO PRESERVE THE ABILITY TO RAISE CLAIMS THAT COULD NOT HAVE BEEN BROUGHT EARLIER

This case presents a difficult question of first impression concerning the meaning of the term "successive petition" as used in sections 1509 and 1509.1. Although "successive petition" may be interpreted literally to mean any petition filed subsequent to an initial petition, that construction raises constitutional concerns by prohibiting condemned inmates from presenting certain potentially meritorious claims that could not have been brought earlier. This Court could avoid those concerns by construing the term to incorporate well-established judicial exceptions to the procedural bar on subsequent petitions. Under that construction, a "successive petition" would not include subsequent petitions containing the "rare or unusual claims that could not reasonably have been raised at an earlier time." (*In re Reno*, *supra*, 55 Cal.4th at p. 452.) Although the latter construction presents its own complexities, on balance it is the better one. It accounts for the text of Proposition 66, the limited evidence of voter intent, precedent, and considerations of finality and fairness—while avoiding the constitutional concerns that would inevitably arise from a literal interpretation.

A. A Literal Interpretation of Successive Petition Is Plausible as a Textual Matter But Would Create Constitutional Concerns

1. When interpreting voter initiatives, this Court employs standard rules of construction. The Court begins by "examining the words of the statute, affording them 'their ordinary and usual meaning and viewing them in their statutory context[.]" (*People v. Colbert* (2019) 6 Cal.5th 596, 603.)

The ordinary and usual meaning of the word "successive" is "following in uninterrupted order; consecutive." (American Heritage Dict. (4th ed. 2007) p. 1378.) Commonly understood, successive means anything after the first. (*Ibid.*) Construing "successive petition" to mean any "second-in-time petition" or "subsequent petition" would accord with the dictionary definition and that common understanding.

This Court, too, has sometimes used the term "successive petition" to describe a class of all subsequent petitions filed after a first petition is adjudicated, regardless of whether there was an adequate justification for filing the petition after the first one. In *Clark*, for example, the Court observed that, "[o]n occasion, the merits of successive petitions have been considered regardless of whether the claim was raised on appeal or in a prior petition, and without consideration of whether the claim could and should have been presented in a prior petition." (*In re Clark*, 5 Cal.4th at p. 768; see also *id.* at p. 774 ["Before a successive petition will be entertained on its merits the petitioner must explain and justify the failure to present claims in a timely manner in his prior petition or petitions."]; *In re Reno*, 55 Cal.4th at p. 466 ["A

change in the law will also excuse a successive or repetitive habeas corpus petition."].)

A literal reading would also be generally "consistent with the" text and "structure of" sections 1509 and 1509.1. (E.g., *People v. Gonzales* (2018) 6 Cal.5th 44, 55.) For example, section 1509.1, subdivision (a) appears to use the term "successive petition" to refer to any subsequent petition. (§ 1509.1, subd. (a) ["A successive petition shall not be used as a means of reviewing a denial of habeas relief."].) And the uncodified statutory findings declare that the goal of Proposition 66 was to reduce "waste, delays and inefficiencies" in California's death penalty system. (Voter Information Guide, *supra*, text of proposition 66, § 2, at p. 212.) A literal interpretation of "successive petition"—which would cause section 1509, subdivision (d) to bar almost all subsequent petitions except those involving claims of actual innocence or ineligibility—would presumably advance that goal.

Moreover, Proposition 66 describes only two types of petitions: "initial" and "successive." (§§ 1509, 1509.1.) Construing "successive petition" to cover all second-in-time or subsequent petitions is consistent with that structure. In contrast, construing the term to describe only some subsequent petitions would either create a third class of petition that is not described in sections 1509 or 1509.1, or require characterizing petitions that are subsequent but not "successive" as "initial

petitions." (See *post*, pp. 32-34.)[5] A literal interpretation is also in harmony with the appellate review provisions in section 1509.1, which provide instructions on when "initial" or "successive" petitions are appealable, but do not address any other type of petition. (§§ 1509.1, subds. (a)-(c); see also § 1509, subd. (d) [describing limits on stays of execution "for the purpose of considering a successive or untimely petition," but not addressing any other class of petitions].)

Finally, the literal interpretation finds some additional support in "the materials that were before the voters." (*People v. Valencia* (2017) 3 Cal.5th 347, 364.) For example, the legislative analyst observed that the measure "does not allow additional habeas corpus petitions to be filed after the first petition is filed, except in those cases where the court finds that the defendant is likely either innocent or not eligible for the death sentence." (Voter Information Guide, *supra*, analysis by legislative analyst, at p. 104.) The analyst also explained that Proposition 66 "could result in the filing of fewer, shorter legal documents" because of "the limits on the number of habeas corpus petitions that can be filed." (*Id.* at p. 107.)

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[5] By avoiding a class of petitions that are neither initial nor successive, a literal interpretation is also generally consistent with the instruction in section 1509, subdivision (a), that "[t]his section applies to *any* petition for writ of habeas corpus filed by a person in custody pursuant to a judgment of death. A writ of habeas corpus *pursuant to this section is the exclusive procedure* for collateral attack on a judgment of death." (§ 1509, subd. (a), italics added.)

2. The central problem with the literal interpretation is that it would likely create constitutional concerns in future proceedings, by barring condemned inmates from litigating certain potentially meritorious claims that they could not have raised earlier. (Cf. OBM 25-36.) For example, an inmate would be unable to seek state habeas relief upon learning—after his initial petition had been adjudicated—that his attorney "used deception to insinuate himself into the representation" and that his attorney's representation was marred by insurmountable conflicts of interest. (*In re Gay* (2020) 8 Cal.5th 1059, 1084; cf. *Ellis v. Harrison* (9th Cir. 2020) 947 F.3d 555, 556 [inmate learned a decade after conviction that his attorney was a "virulent racist"].) An inmate might also be barred from raising egregious *Brady* claims based on material evidence that had been suppressed for years.[6] The literal interpretation could create substantial questions about whether a statutory prohibition on raising such claims violates the rights to due process or to the effective assistance of counsel. (See, e.g., *Clark*, *supra*, 5 Cal.4th at p. 780.)

A literal interpretation of "successive" could also raise concerns under California's Suspension Clause, which directs that "[h]abeas corpus may not be suspended unless required by

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[6] As Friend observes, this case does not present the question of what "actual innocence" means under section 1509, subdivision (d). (OBM 26, fn. 5.) But there could be *Brady* claims that are meritorious but do not meet this Court's test for what constitutes actual innocence. (See *In re Lawley* (2008) 42 Cal.4th 1231, 1239.)

public safety in cases of rebellion or invasion." (Cal. Const., art. I, § 11.) If this Court were to adopt the literal interpretation, it would be required to address novel questions regarding the meaning of California's Suspension Clause and whether a categorical bar on successive petitions except in cases of actual innocence or ineligibility for the death penalty violates the Clause for inmates with meritorious claims that could not have been raised earlier. (Cf. *Lott v. State* (2006) 334 Mont. 270 [concluding that a limitation on successive petitions is unconstitutional as applied to an inmate].)[7] Those constitutional questions would have to be litigated, in the years to come, in light of the circumstances of particular cases and particular claims.[8]

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[7] In *Felker v. Turpin* (1996) 518 U.S. 651, the United States Supreme Court concluded that limits on successive petitions under federal law did not violate the Suspension Clause of the United States Constitution. The Court observed that the "new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" (*Id.* at p. 664.) The federal law's limits on "second or successive" petitions do not include all subsequent petitions.

[8] Under a literal interpretation, absent a successful as-applied constitutional challenge to Proposition 66, dismissed claims could be addressed on their merits only in a federal forum. Federal habeas courts will not ordinarily consider claims that a state court refused to hear based on an adequate and independent state procedural ground, unless the inmate can satisfy the requirements of the "procedural default" doctrine. (*Johnson v. Lee* (2016) 136 S.Ct. 1802, 1803-1804.)

B. "Successive Petition" May—and Should—Be Construed to Preserve the Opportunity to Raise Claims That Could Not Have Been Filed Earlier

1. Those difficult constitutional questions may be avoided by adopting an interpretation of "successive petition" that preserves an inmate's opportunity to raise the "rare or unusual claims that could not reasonably have been raised at an earlier time." (*In re Reno*, *supra*, 55 Cal.4th at p. 452.) This Court follows "the usual rule that a statute will be interpreted to avoid serious constitutional questions if such an interpretation is fairly possible." (*People v. Buza* (2018) 4 Cal.5th 658, 682.) Indeed, it recently invoked that interpretive rule when construing a different provision of Proposition 66. (See *Briggs*, *supra*, 3 Cal.5th at pp. 857-861 [construing five-year review limit in one way when the most natural reading would pose "serious separation of powers problems"].)

Here, too, it is fairly possible to interpret Proposition 66 in a way that avoids the constitutional concerns. As explained above, this Court has generally prohibited "*unjustified* successive collateral attacks on a judgment of conviction." (*Clark*, *supra*, 5 Cal.4th at p. 769, italics added.) Unjustified "successive petitions" are those presenting claims that could have been raised in a prior petition, without any adequate explanation for the failure to raise them earlier. (*In re Reno, supra*, 55 Cal.4th at p. 452.) This Court has also acknowledged the need for a "safety valve" allowing subsequent petitions in rare cases where the particular circumstances would justify the failure to present the claim in a prior petition. (*In re Reno*, *supra*, at p. 452.) A

petitioner may justify the failure to assert a claim in earlier habeas proceedings because, for example: "the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made"; counsel failed to afford adequate representation in a prior habeas corpus application; or a claim was based on a change in the law that is retroactively applicable to final judgments. (*In re Clark*, *supra*, 5 Cal.4th at pp. 775, 782.)[9]

On several occasions, this Court has used the term "successive petition" in a way that tracks the recognized exceptions for subsequent petitions. In *Briggs*, for example, the Court noted that "[w]e have used 'successive petition' to refer to one raising claims that could have been presented in a previous petition." (*Briggs*, *supra*, 3 Cal.5th at p. 836, fn. 14.) Similarly, in *Clark*, the Court observed that "[e]ntertaining the merits of successive petitions is inconsistent with our recognition that delayed and repetitious presentation of claims is an abuse of the writ." (*In re Clark*, *supra*, 5 Cal.4th at p. 769; see also *id.* at p. 770 ["Successive petitions also waste scarce judicial resources as the court must repeatedly review the record of the trial in order to assess the merits of the petitioner's claims and assess the

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[9] Simply alleging ineffective assistance of prior habeas counsel has never been adequate to excuse a subsequent petition. Instead, this Court has imposed specific pleading requirements, and the failure to comply with those requirements requires the summary denial of a subsequent petition. (*In re Clark*, 5 Cal.4th at p. 780; see also *In re Reno*, *supra*, 55 Cal.4th at pp. 464-465.)

prejudicial impact of the constitutional deprivation of which he complains"]; *In re Reno*, *supra*, 55 Cal.4th at p. 453 [same].)[10]

These cases support the view that "successive petition" is a term of art in habeas jurisprudence, describing a petition composed entirely of claims that would constitute an abuse of the writ. This Court normally "employ[s] a presumption that when the language of a statute uses a term that has been judicially construed, the term is used in the precise sense which the court gave it." (*In re Derrick B.* (2006), 39 Cal.4th 535, 540; see also *City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191.) Under that longstanding approach, the Court could construe "successive petition" in section 1509, subdivision (d) to have the meaning recognized in *Briggs* and other cases—i.e., to refer to a petition "raising claims that could have been presented in a previous petition," without adequate justification. (*Briggs*, *supra*, 3 Cal.5th at p. 836, fn. 14.)

That interpretation would mean that section 1509, subdivision (d) largely codifies the prior judicial standards

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[10] The superior court in this case effectively adopted the construction of "successive petition" advanced in *Briggs*. (*In re Friend* (Super. Ct. Alameda County, 2018, No. 81254A) (Or. Denying Petn. at 5).) The Attorney General also adopted that construction in his Answer to the Request for Certificate of Appealability. (*In re Friend* (Cal. Ct. Appp., 2018, A155955) (Ans. to Request for Cert. of App. at 3) [relying on "clearly established definition" of successive petition that "already exists," i.e., "successive petition as one where there is shown no change in the facts or the law substantially affecting the rights of the petitioner, and the petitioner knew, [or] should reasonably have been aware of, facts at the time of the previous attacks on the judgment."].)

governing when a subsequent petition may be considered on the merits. (See *In re Reno*, *supra*, 55 Cal.4th at p. 452; *In re Clark*, *supra*, 5 Cal.4th at pp. 775, 782; *ante*, pp. 13-15.) If a petitioner adequately "justifies the piecemeal presentation" of his claims, such as by demonstrating that "the factual basis for a claim was unknown to" him (*In re Clark*, *supra*, at pp. 774, 775), the subsequent petition presenting that claim would not be "successive" for purposes of section 1509, subdivision (d). But Proposition 66 would alter the circumstances in which a petitioner may obtain judicial review of a claim in the absence of such a justification. Whereas pre-existing authority recognized four circumstances that would amount to a "fundamental miscarriage of justice" warranting review of such a claim (*In re Clark*, *supra*, at pp. 797-798; see *ante*, pp. 14-15), Proposition 66 narrows that list to just two circumstances: "actual innocence" and "ineligibility" (§ 1509, subd. (d)).

The term-of-art approach to interpreting "successive petition" draws further support from federal precedent. In construing 28 U.S.C. § 2244, the federal statute governing "second or successive petitions," the United States Supreme Court declined to construe the term "successive" literally to mean any petition filed after the first petition. Instead, it held that "the phrase 'second or successive' is not self-defining" and that it "takes its full meaning from … case law." (*Panetti v. Quarterman* (2007) 551 U.S. 930, 943-944.) The Court relied on prior federal cases allowing the filing of subsequent petitions under certain circumstances to conclude that petitions qualifying for those

exceptions did not come within the meaning of "second or successive" under federal law. (*Ibid.*; see also *id.* at p. 944 [Court has "declined to interpret 'second or successive'" to refer to all subsequent petitions].) A similar reading is available here, as a matter of text and precedent.

And that reading is not inconsistent with the rather limited evidence of voter intent on this issue. As noted above, some parts of the voter materials refer to barring petitions "after the first petition is filed, except in those cases where the court finds that the defendant is likely either innocent or not eligible for the death sentence." (Voter Information Guide, *supra*, analysis by legislative analyst, at p. 104; see *id.* at p. 107; see *ante*, pp. 17-18, 24.) But other materials suggest a different intent. In particular, the uncodified preamble suggests a concern with limiting "frivolous and unnecessary claims[.]" (Voter Information Guide, *supra*, text of Proposition 66, § 2, subd. (7), at p. 213.) That concern is entirely consistent with an interpretation that would preserve an inmate's ability to file subsequent petitions raising claims that could not have been brought earlier.

On the whole, the voter materials are ambiguous.[11] They do not establish that the voters clearly intended to foreclose state habeas review of potentially meritorious claims that could not have been raised earlier. Voters were never told, for example, about the existing "strict limits" on second-in-time petitions (*In re*

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[11] For example, the official Title and Summary states only that Proposition "limits successive petitions" (Voter Information Guide, *supra*, official title and summary, at p. 104), but offers no insight into how "successive petition" should be defined.

Reno, supra, 55 Cal.4th at p. 452), and the materials are silent about the substantial consequences that would flow from a literal interpretation of "successive petition." As this Court has explained, when a measure makes substantial changes to an existing legal regime, "we would anticipate that this intent would be expressed in some … obvious manner[.]" (*People v. Skinner* (1985) 39 Cal.3d 765, 776.) Here, neither Proposition 66 nor the materials considered by the voters expressed any obvious intent to embrace the dramatic change in law that would result from the literal interpretation. And "in the case of a voters' initiative," this Court "may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Valencia*, *supra*, 3 Cal.5th at p. 375; see also *id.* at p. 364 ["We cannot presume that … voters intended the initiative to effect a change in the law that was not expressed or strongly implied either in the text of the initiative or the analyses and arguments in the official ballot pamphlet."]; *id.* at p. 386 (conc. op. of Kruger, J.).)

2. This alternative construction is not without its own interpretive difficulties. A construction of "successive petition" that excludes petitions containing the "rare or unusual claims that could not reasonably have been raised at an earlier time" (*In re Reno, supra*, 55 Cal.4th at p. 452) raises the question of how to characterize those petitions for purposes of other provisions in Proposition 66. If those petitions are treated as "initial petitions," then courts will have to confront how to apply the statute of limitations in section 1509, subdivision (c), which

requires initial petitions to be filed within one year of an order regarding the appointment of counsel. (§ 1509, subd. (c).) The courts will have to consider, for example, whether that provision is subject to equitable tolling for petitions containing claims that could not reasonably have been raised at an earlier time, or whether some other mechanism permits a subsequent order regarding counsel that would restart the clock. (Cf. *Holland v. Florida* (2010) 560 U.S. 631, 649 [AEDPA's one-year statute of limitations subject to equitable tolling for exceptional circumstances]; *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 105-111 [discussing equitable tolling doctrine].)

Alternatively, a justified second-in-time petition could be treated as neither "initial" nor "successive." That would create a class of petitions not expressly referenced by sections 1509 or 1509.1, and would complicate appellate review of such petitions. Section 1509.1 governs the appeal of "initial" and "successive" petitions only (see § 1509.1, subds. (a), (c)), and nothing else in Proposition 66 addresses appellate review of any other type of petition.

But this Court suggested in *Briggs* that pre-existing review mechanisms persist when not impliedly repealed by section 1509.1. (See *Briggs*, *supra*, 3 Cal.5th at p. 840, fns. 18-19.) For example, the Court acknowledged that section 1506 would allow appellate review by this Court of a decision by a Court of Appeal that had "determine[d] that good cause exists under section 1509, subdivision (a) for it to hear a capital habeas corpus petition" in

the first instance. (*Id.* at p. 840, fn. 19; see § 1506, subd. (a).) The same principle would appear to allow for appellate review of petitions that are neither "initial" nor "successive." Petitioners seeking relief under these limited circumstances could, for example, file a habeas petition in the appropriate court of appeal.[12] Under section 1509, subdivision (a), a court of appeal considering such a petition could find "good cause" to entertain that petition for the purpose of addressing the issues resolved against the petitioner in the superior court. If the court of appeal denied relief, a petitioner could file a petition for review in this Court under section 1506. (§ 1506, subd. (a).) By the terms of section 1506, the People, too, could appeal any ruling by the superior court to this Court. (*Ibid.*) In short, while the term-of-art interpretation of "successive petition" presents its own challenges, they are not insurmountable.

3. When this Court "lack[s] definitive guidance in" an enactment's language or history, it may adopt an interpretation "which is faithful to its language, which produces fair and reasonable results in a majority of cases, and which can be readily understood and applied by trial courts." (*In re Reeves* (2005) 35 Cal.4th 765, 771.) "Stated differently, [w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation."

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[12] Section 1509.1, subdivision (a) provides that "a successive petition shall not be used as a means of reviewing the denial of habeas relief," but that provision governs the appeal of "initial petitions."

(*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305, internal quotations omitted.)

The question concerning the proper interpretation of the term "successive petition" in section 1509, subdivision (d), is a close one. The ordinary tools of statutory interpretation—the text, the structure, and the ballot materials—do not definitively resolve it. While a literal definition of "successive" may find more support in the text and structure of the statute, it would entail a departure from how the term has often been understood in habeas jurisprudence, and it would have the sweeping consequence of depriving condemned inmates of the ability to raise certain potentially meritorious constitutional claims that were not previously available to them. The historical record does not establish any clear intent on the part of the voters to make such a dramatic break from existing law. Perhaps most significantly, the literal definition would create concerns of a constitutional dimension in future cases. (See *ante*, pp. 25-26.) Because it is "fairly possible" to avoid those "serious constitutional questions" (*Buza, supra*, 4 Cal.5th at p. 682) by adopting the term-of-art interpretation of "successive petition"—the same interpretation recognized by this Court in *Briggs*—the Court should adopt that interpretation.

That interpretation would not open habeas proceedings to abusive writ practices. It would instead largely codify the "strict limits" that restrict subsequent petitions to the "rare or unusual claims that could not reasonably have been raised at an earlier

time." (*In re Reno*, *supra*, 55 Cal.4th at p. 452.)[13] Indeed, as shown in the next section, Friend himself cannot meet those limits. Nor would the term-of-art interpretation render Proposition 66 void of purpose. Proposition 66 codifies "abuse of the writ" principles that were previously recognized only in case law; it narrows the circumstances when "unjustified" petitions may be considered; and it enacts several other reforms related to capital litigation. It should not, however, be read to prohibit condemned inmates from raising potentially meritorious constitutional claims that they could not reasonably have been expected to raise at an earlier time.[14]

C. Under Any Definition of "Successive," Friend's Petition Is Barred by Proposition 66

Friend's exhaustion petition raises six claims, all of which could have been raised earlier. All are based primarily on the

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[13] This Court has already implied that there is at least one such exception to the limits on successive petitions. In *In re Christopher Self* (S200464) this Court denied two method-of-execution claims "as premature and without prejudice to renewal after an execution date is set." A strict interpretation of "successive" could be read to preclude the petition this Court invited Self to file.

[14] If this Court instead adopts the literal interpretation, it should expressly leave open the possibility that condemned inmates may raise as-applied constitutional challenges to section 1509, subdivision (d), in cases where it operates to foreclose a meritorious claim that could not reasonably have been raised earlier. (Cf. *Briggs*, 3 Cal.5th at p. 848 [observing that "[g]oing forward, prisoners may seek to challenge such limitations in the context of their individual cases"].)

record at trial and therefore could have been brought either on direct appeal or included in the first habeas petition filed in 2007. Friend does not attempt to justify his failure to raise most of the claims in his first petition; his petition is therefore a "successive" one and subject to the requirements of section 1509, subdivision (d). Because Friend did not allege actual innocence or make a plausible showing of ineligibility for the death penalty, the lower courts properly denied Friend a certificate of appealability.[15]

1. Friend offers no justification for his piecemeal presentation of claims

As this Court instructed in *Clark*, "the petitioner … bears the initial burden of alleging the facts on which he relies to explain and justify delay and/or a successive petition." (*Clark, supra,* 5 Cal.4th at p. 798, fn. 35.) Except for limited references to the failure of appellate and original habeas counsel to assert claims, Friend offers no explanation for his piecemeal presentation of claims, nor even acknowledge that the claims could have been raised previously as required by this Court's abuse of the writ requirements.[16] With limited exceptions,

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[15] Friend did not claim to meet the requirements of section 1509, subdivision (d) in his petition; nor did he claim that he could meet any of the fundamental miscarriage of justice exceptions that would have permitted the court to consider unjustified successive claims on the merits before Proposition 66. Friend has, instead, relied on his assertion in his opening brief that the petition is "justified" due to the failure of prior habeas counsel to raise these claims.

[16] *In re Reno, supra,* 55 Cal.4th at p. 453 ["we conclude a petitioner's failure … to make a plausible effort to explain why

Friend's claims rely on the trial record, exhibits from his initial habeas petition, and cases decided prior to either his direct appeal briefing or his initial habeas petition. Even where Friend refers to evidence that post-dates his earlier proceedings, he provides no explanation for why he could not have obtained the same or similar information at an earlier stage.

In Claim One, Friend contends that the prosecutor violated *Batson*/*Wheeler* when exercising peremptory strikes of potential jurors. (Petn. 7-17.)[17] To support his claim, Friend relies principally on the record of trial from his case as well as habeas records and statements by the prosecutor from other trials as early as 1980. (*Ibid.*) He nowhere explains why he could not have raised the same claim based on the same evidence at trial, on appeal, or in his initial habeas petition.[18] Friend also cites to jury notes by the same trial prosecutor from the federal habeas case of a different capital defendant, *Stanley v. Davis,* Case No. 3:07-cv-04727-EMC (N.D. Cal.), which were disclosed in habeas proceedings for that defendant in 2016. (Petn. 15-16.) Friend uses those notes now to support his assertion that the prosecutor engaged in a pattern of *Batson*/*Wheeler* violations. But Stanley's direct appeal discussing the same *Batson*/*Wheeler* allegations was

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the claims raised are properly before the court, can be considered an abuse of the writ process"].

[17] See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

[18] As an example, one study Friend points to was offered as an exhibit in *In re Schmeck*, No. S131578, which was filed in February 2005. (Petn. 13-15.)

decided in 2006, prior to Friend's initial habeas petition being filed. (*People v. Stanley* (2006) 39 Cal.4th 913, 935-945.) Friend nowhere contends that he could not have relied on information from the direct appeal in *Stanley* to raise his *Batson*/*Wheeler* claim earlier. The same is true of two other cases cited by Friend involving the same assertion of *Batson*/*Wheeler* error against the same prosecutor. (Petn. 13-14, citing *People v. Young* (2005) 34 Cal.4th 1149 and *People v. Schmeck* (2005) 37 Cal.4th 240.) They were both decided prior to the filing of Friend's initial petition.[19] Friend offers no explanation why he could not have reviewed transcripts or interviewed defense counsel from those cases to obtain similar evidence to support a claim of a pattern or practice earlier. (See *In re Reno, supra*, 55 Cal.4th at pp. 461-462; *In re Robbins* (1998) 18 Cal.4th 770, 780.)

Friend also fails to justify the failure to raise the allegations in Claim Two earlier. Claim Two alleges ineffective assistance of trial counsel, based upon the trial record or on information previously available. (Petn. 20-57.) Again, Friend fails to explain why he could not have raised such claims on direct appeal, or in his first habeas petition. Even as to the portion of the claim alleging a failure to develop impeachment evidence against a prosecution witness, Friend fails to show when such evidence was obtained and why it could not have been found earlier. (Petn. 57-60.)

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[19] A fourth case petitioner cites, *People v. Tate* (2010) 49 Cal.4th 635, was decided after Friend's initial petition was filed, but no *Batson/Wheeler* claim was raised.

Claim Three, alleging organic brain injury, relies entirely on evidence existing at the time of trial, on direct appeal, or at the time of Friend's initial habeas petition. Friend asks to expand the United States Supreme Court's decision in *Atkins v. Virginia* (2002) 506 U.S. 304, which held that the Eighth Amendment prohibits the execution of a person suffering from an intellectual disability, to extend to circumstances involving "organic brain injury." (Petn. 61-65.) But Friend fails to explain why this claim could not have been brought as part of his direct appeal—when his opening brief was filed long after *Atkins* was decided—or as a part of the initial habeas petition.[20]

Claim Four asserts that Friend was denied due process when Justices Chin and Corrigan failed to recuse themselves from his direct appeal, and when Justice Corrigan did recuse herself from review of the initial habeas petition. (Petn. 65-68.) Friend offers no justification for his failure to bring this claim earlier.

Claims Five and Six relate to an alleged *Miranda* violation and his appellate counsel's failure to include the claim on direct appeal. (Petn. 68-73.)[21] As explained in the next section, Friend at least attempts to excuse his failure to present these claims earlier, but fails to adequately plead this justification.

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[20] Nor does Friend satisfy section 1509, subdivision (d)'s ineligibility-for-the-death-sentence exception. A claim of organic brain damage is inadequate under *Atkins* to prohibit imposition of the death penalty. (*In re Friend* (Super. Ct. Alameda County, 2018, No. 81254A) (Or. Denying Petn.) at pp. 5-6.)

[21] *Miranda v. Arizona* (1966) 384 U.S. 436.

2. Friend does not adequately allege ineffective assistance of counsel

Friend's allegations of ineffective assistance of appellate and prior habeas counsel do not justify his failure to pursue any of his six claims earlier. In sum, Friend proffers: (1) a "general allegation" alleging ineffective assistance at the beginning of the petition (Petn. 6)[22]; and (2) a footnote asserting that habeas counsel was ineffective for failing to raise Claims Five (Petn. 46, fn. 20) and Six (Petn. 72-73).

In his opening brief in this Court, Friend asserts wide-ranging claims of ineffective assistance of counsel to justify his failure to present these claims in an earlier petition. (OBM 43-55.) But Friend was required to raise the reason for his inability to present claims in the petition itself (*In re Reno, supra,* 55 Cal.4th at pp. 453, 458-459), and his effort to expand his explanation in his opening brief fails to satisfy that requirement.

In any event, Friend's claims of ineffective assistance of counsel are inadequately pleaded and supported. To justify a subsequent petition on these grounds, "[t]he petitioner must … allege with specificity the facts underlying the claim that the inadequate presentation of an issue or omission of any issue reflects incompetence of counsel, … and that counsel's failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of

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[22] The petition states: "To the extent that any error or deficiency alleged was due to defense counsel's failure to investigate and/or litigate in a reasonably competent manner on Mr. Friend's behalf, he was deprived of the effective assistance of counsel."

criminal defendants." (*Clark, supra,* 5 Cal.4th at p. 780.) The "mere omission of a claim 'developed' by new counsel does not raise a presumption that prior habeas corpus counsel was incompetent, or warrant consideration of the merits of a successive petition." (*Ibid.*) "Nor will the court consider on the merits successive petitions … which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services … to demonstrate that a different or better defense could have been mounted had trial counsel or prior habeas corpus counsel had similar advantages." (*Ibid.*)

Friend fails to satisfy those standards. His claims of ineffective assistance are conclusory, and are not supported by any documentation establishing a plausible basis for such a claim. Friend does include a declaration from Evan Young, his former habeas and appellate counsel, to support some claims of the current petition. But it omits any discussion of her strategic or tactical reasoning for decisions that are now challenged as incompetent. (Petn., Exhibit 1.) Young made one statement about her decision not to pursue the *Batson*/*Wheeler* claim in the first petition, saying that "[t]here was no strategic reason not to include these claims." (*Ibid.*) That is exactly the type of conclusory statement that this Court held was insufficient in *Reno*. (*Reno, supra,* 55 Cal.4th at pp. 494-495, 500-501.) Otherwise, Young's declaration is silent regarding her choice of what issues to pursue.

Because Friend fails to adequately justify his failure to raise claims that could have been pursued earlier, his petition is successive and he was required to establish that he meets the requirements of section 1509, subdivision (d). As the superior court correctly observed, however, Friend failed even to allege actual innocence, and the one claim that attempts to invoke ineligibility for the death penalty fails as a matter of law.

II. THE DISMISSAL OF A SUCCESSIVE PETITION IS AN APPEALABLE ORDER SUBJECT TO THE REQUIREMENTS OF SECTION 1509.1, SUBDIVISION (C)

The second issue asks whether the dismissal of a condemned inmate's successive petition under section 1509, subdivision (d) is an appealable order, subject to the certificate of appealability requirements set forth in section 1509.1, subdivision (c). The parties agree that a trial court's order dismissing a successive petition under section 1509, subdivision (d) is a final, appealable order. (See generally OBM 73-92.) But they disagree about whether such appeals are governed by section 1509.1, subdivision (a) or (c), and whether a certificate of appealability is required to appeal. The text and structure of section 1509.1 are best read to designate subdivision (c) as the provision governing the appeal of the dismissal of a "successive petition." Subdivision (c) includes the requirement that a petitioner obtain a certificate of appealability establishing a "substantial claim for relief," and "a substantial claim that the requirements of subdivision (d) of Section 1509 have been met." Those requirements should be construed to permit review of whether a petition was properly deemed "successive." That construction remains faithful to the

text while giving effect to the voters' intent to screen out frivolous claims.[23]

A. The Dismissal of a Successive Petition Is a Decision Denying Relief Governed by Section 1509.1, Subdivision (c)

Appeals from the denial of habeas relief on "initial" or "successive" petitions are governed by section 1509.1.[24] Subdivision (a) provides for appeals of decisions on initial petitions, which may be appealed by either party. (§ 1509.1, subd. (a).) Subdivision (c) governs appellate review for decisions on successive petitions. (§ 1509.1, subd. (c).) It provides that "the people may appeal the decision of a superior court granting relief on a successive petition" and that a 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." (*Ibid.*) A certificate of appealability may issue only if a petitioner shows "both a substantial claim for relief, which shall be indicated in the certificate, and a

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[23] The following analysis presumes the Court adopts an interpretation of "successive petition" that would preserve an inmate's ability to raise claims that could not have been raised earlier. If the Court instead construes "successive petition" literally, section 1509.1, subdivision (c) would still govern the dismissal of a subsequent petition under section 1509, subdivision (d).

[24] As discussed *ante* at pp. 32-34, section 1509.1 may not cover the appeal of decisions on some petitions if this Court construes "successive petition" to incorporate the judicially-recognized exceptions for justified successive claims under *Clark*.

substantial claim that the requirements of subdivision (d) of Section 1509 have been met." (*Ibid.*)

An order dismissing a successive petition under section 1509, subdivision (d) is a "decision of the superior court denying relief on a successive petition." (§ 1509.1, subd. (c).) Although section 1509, subdivision (d) speaks of *dismissing* petitions, and section 1509.1, subdivision (c) speaks of decisions *denying* relief, nothing in the text of section 1509.1 or the voting materials suggests a distinction that would exclude dismissal orders from its scope. When a court dismisses a successive petition for failing to adequately establish actual innocence or ineligibility for the death penalty, the petitioner has been "denied" habeas relief. (Black's Law Dictionary (11th ed. 2019) ["denial" means "refusal or rejection," "esp., a court's refusal to grant a request presented in a motion or petition"]; see also OBM 84-87.) That dismissal operates as a final judgment, which under ordinary circumstances is subject to some form of appellate review.[25] "It has long been the rule in this state that an order of dismissal is to be treated as a judgment for the purposes of taking an appeal[.]" (*Herrscher v. Herrscher* (1953) 41 Cal.2d 300, 303-304.) Construing section 1509.1, subdivision (c) to cover dismissals of "successive petitions" accords with that long-established principle of appellate review. (Cf. *Slack v. McDaniel* (2000) 529 U.S. 473,

[25] Before Proposition 66, inmates were not entitled to appeal, but could effectively obtain review 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.)

483 [rejecting reading of a statute that would terminate appellate review of dismissal orders].)

That reading also finds support in the parallel appellate provision governing "initial petitions," which similarly does not distinguish between dismissals and denials. Proposition 66 requires the dismissal of untimely initial petitions that fail to comply with the requirements of section 1509, subdivision (d). (§ 1509, subd. (d) ["An initial petition which is untimely under subdivision (c) … shall be dismissed"].) Section 1509.1, subdivision (a) controls appeals on "initial petitions" and provides that "either party may appeal the decision of a superior court on an initial petition under Section 1509 to the court of appeal." The provision prescribes a deadline for such appeals, which is triggered by the court's decision either "granting or denying the habeas petition." (§ 1509.1, subd. (a).) It identifies no deadline expressly prompted by a dismissal order. As with dismissal of successive petitions, however, nothing in the text or the voting materials suggests that the electorate intended to deprive petitioners of appellate review when untimely initial petitions are dismissed. To the contrary, section 1509.1, subdivision (a) provides review for all "decision[s] of a superior court on an initial petition," without qualification. By tying appellate filing deadlines to orders categorized as those either "granting" or "denying" relief, the electorate signaled that orders "denying" habeas relief encompass dismissals of untimely petitions.

When a successive petition has been dismissed by the superior court for failure to fulfill the requirements of section

1509, subdivision (d), a petitioner may appeal under the plain language of section 1509.1, subdivision (c) "only if" he obtains a certificate of appealability establishing "a substantial claim for relief" and "a substantial claim that the requirements of subdivision (d) of Section 1509 have been met." (§ 1509.1, subd. (c).) A trial court dismissing a petition as successive will make two essential determinations: first, that the petition raises claims that could have been raised earlier without adequate justification; and second, that the petitioner fails to adequately allege or show actual innocence or ineligibility for the death penalty. The certificate of appealability requirement does not insulate either conclusion from review. A petitioner with a substantial claim that his petition is not successive—and therefore not subject to the requirements of section 1509, subdivision (d)—will have a "substantial claim that the requirements of section 1509, subdivision (d) have been met." (§ 1509.1, subd. (c).) Either the superior court or court of appeal may therefore issue a certificate of appealability if the petitioner has both a substantial claim for relief on one of his substantive claims and a substantial claim that his petition is not "successive." (§ 1509.1, subd. (c).) A substantial showing of innocence or ineligibility is not necessarily required. (§ 1509.1, subd. (c).)

That reading gives force to the certificate of appealability requirement, while at the same time assuring review of a superior court's determination that a petition is successive. It operates in a way that is similar to an analogous certificate of

appealability requirement under federal law. The federal habeas statute permits a certificate of appealability only after an applicant has "made a substantial showing of the denial of a constitutional right." (28 U.S.C. § 2253(b)(2).) In *Slack v. McDaniel*, *supra*, 529 U.S. 473, the Supreme Court acknowledged that the issue of appealability was "somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds." (*Id.* at p. 483.) But the Court concluded that the statutory language could be read to allow certificates of appealability for dismissal orders, where "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." (*Ibid.*) That construction gave "meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims," while at the same time assuring review of a procedural ruling dismissing a petition before merits review. (*Id.* at p. 484.)

The same is true under the proffered construction of the relevant "substantial claim" requirement here.[26] A habeas petitioner with a substantial claim for relief will thus be able to

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[26] Friend appears to concede that this reading of section 1509.1, subdivision (c) is at least plausible. (OBM 89-92.) The lower courts properly denied Friend a certificate of appealability in this case because he failed to show a substantial claim for relief or a substantial claim that his petition is not successive. (See *ante*, pp. 21, 36-43.) Either deficiency is sufficient to deny Friend a certificate of appealability.

obtain meaningful review of the determination that his petition is successive. And appellate courts will have ample opportunity to "provide guidance to superior courts grappling with the complicated question of which petitions are successive and to correct erroneous determinations." (OBM 82.)[27]

B. Friend's Alternative Theories Are Unsupported by the Text or Purpose of Proposition 66

Friend presumes incorrectly that section 1509.1, subdivision (c) cannot ensure meaningful review of the threshold determination that a petition is successive. As shown above, however, section 1509.1, subdivision (c) does allow for meaningful review.

Friend's primary alternative is that appellate review of the dismissal of a "successive petition" should occur under section 1509.1, subdivision (a), which governs appeals of "the decision of a superior court on an initial petition under section 1509 to the court of appeal." (§1509.1, subd. (a); OBM 75-84.) Although Friend acknowledges that subdivision (a) explicitly covers the appeal of decisions on "initial petitions," he contends that "the phrase 'initial petition under Section 1509' here is not meant as a term of limitation," but should instead "be read to include any petition that is not properly deemed successive." (OBM 76-77.) But Friend does not explain how or when a court would assess whether a petition is "properly deemed successive" so that section

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[27] As Friend observes, the court in *In re Lucero* (Cal. Ct. App. Dec. 30, 2019, No. E074350) made just that determination in granting a certificate in that case. (OBM 91-92.)

1509.1, subdivision (c) would apply. (OBM 77.) Because any petitioner whose petition has been dismissed as successive will presumably assert that the court improperly determined the petition was successive, nearly all successive petitions dismissed under Friend's reading could be appealed as "initial" petitions under subdivision (a). That cannot be squared with the text of section 1509.1, subdivision (a), which covers only "initial petitions," or the existence of subdivision (c), which specifically addresses the appeal of orders on successive petitions.

As a second alternative, Friend argues that a dismissal order may be reviewed under section 1509.1, subdivision (c), but without having to meet the certificate of appealability requirements. (OBM 87-89.) His argument has no textual support, and he concedes that it would effectively treat such appeals as if they were proceeding under subdivision (a). (OBM 87.) Friend's argument is also inconsistent with Proposition 66's goal of curbing abusive writ practices. The electorate intended to restrict "frivolous and unnecessary claims" (Voter Information Guide, *supra*, text of Proposition 66, § 2, subd. (7), p. 213), and that goal is advanced by the certificate of appealability requirement. (Cf. *Gonzalez v. Thaler* (2012) 565 U.S. 134, 145 ["The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels."].)

III. SECTIONS 1509 AND 1509.1 APPLY TO FRIEND'S EXHAUSTION PETITION

The last issue concerns the intended scope of sections 1509 and 1509.1, and asks whether "the statutory provisions

governing" successive petitions may "be applied to this petition when petitioner's first habeas corpus petition was filed before the statutes took effect." (Or. Granting Petn. for Review, citing *Landgraf v. USI Film Products, supra,* 511 U.S. at pp. 269-270.) Because this Court would have denied this petition as procedurally barred under precedent that existed before Proposition 66, section 1509 cannot have any impermissible retroactive effect under the circumstances of this case. In any event, as a general matter, applying Proposition 66 to a successive petition filed after the Proposition's effective date does not have any impermissible retroactive effect under *Landgraf* or other controlling precedent, regardless of whether a petitioner's initial petition was adjudicated before the effective date.

A. Friend Cannot Claim Any Impermissible Retroactive Effect Under the Particular Circumstances Here

Friend cannot complain of any impermissible retroactive effect under the circumstances of this case because his successive petition would have been summarily denied under pre-Proposition 66 standards—the same result required by section 1509. Friend's petition raises claims that he could have brought on direct appeal or in his first habeas petition. (See *ante*, pp. 36-43.) He has not justified his failure to assert these claims in an earlier proceeding; nor has he argued that the "fundamental miscarriage of justice" exceptions identified in *Clark* would warrant consideration of any of the claims on the merits. (See

ante, pp. 36-43 & fn. 15.)[28] His petition would therefore have been procedurally barred under precedent that existed before Proposition 66. And, as explained above, his petition was properly dismissed under the standards adopted by Proposition 66—regardless of how the Court construes the phrase "successive petition" in section 1509, subdivision (d).

Friend therefore cannot invoke any of the harms that retroactivity analysis is designed to guard against. Section 1509 does not "impair rights" he "possessed when he" filed his first petition, "increase" his "liability for past conduct," or "impose new duties with respect to transactions already completed." (*Landgraf*, *supra*, 511 U.S. at p. 280.) In analogous circumstances—involving "the same 'general prospectivity principle[s]'" that govern in this Court (*Myers v. Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841)—federal courts have held that applying newly-enacted limits on "second or successive" petitions raises no issue of "genuine retroactive effect" if a petitioner "would have been precluded from filing his second habeas petition" under pre-enactment law. (*In re Minarik* (3d

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[28] Friend did not invoke any of the fundamental miscarriage of justice exceptions to seek merits review in any of the proceedings below. (See Petn.; see also *Reno*, *supra*, 55 Cal. 4th at p. 473 [even "general allegations" invoking fundamental miscarriage of justice exceptions are "wholly inadequate" to obtain review of successive claims].) Instead, Friend argued only that his claims are not "successive" because he has adequately explained the failure to bring them earlier. (OBM 43-44.)

Cir. 1999) 166 F.3d 591, 608.)[29] Friend had no existing right to merits review of his successive claims prior to the enactment of Proposition 66. He cannot be heard to complain he has no right to merits review now.[30] Indeed, Friend appears to concede that he needs to establish that his petition would have been reviewed on the merits under pre-Proposition 66 standards to trigger any issue of impermissible retroactive effect. (See, e.g., OBM 61

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[29] See also *In re Sonshine* (6th Cir. 1997) 132 F.3d 1133, 1135 ["Sonshine would not have prevailed under pre-AEDPA law, as his petition would have been denied as an abuse of the writ. AEDPA's restrictions thus do not attach new legal consequences for Sonshine, and AEDPA has no impermissibly retroactive effect on this case."]; *United States v. Ortiz* (D.C. Cir. 1998) 136 F.3d 161, 167 [same]; see generally *Cal. for Disability Rights v. Mervyn's* (2006) 39 Cal.4th 223, 231 [a party cannot challenge the application of a new statute if it does not "substantially affect existing rights and obligations"].

[30] In a footnote, Friend asserts that the new certificate of appealability requirements cannot be applied to his appeal "without violating retroactivity principles." (OBM 88-89, fn.15.) But that kind of procedural requirement does not have retroactive effect when an appeal is filed after the effective date of the statute. (See, e.g., *Slack*, *supra*, 529 U.S. at p. 482 [certificate of appealability requirement applies to appeals of petitions filed before the statute went into effect, as long as the appeal was filed post-enactment]; *Landgraf*, *supra*, 511 U.S. at p. 275 ["Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."]; *Cal. for Disability Rights*, *supra*, 39 Cal.4th at pp. 231-232 ["application of the new law to pending cases properly governed the conduct of proceedings following the law's enactment without changing the legal consequences of past conduct"].)

["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."].) That concession is fatal to his retroactivity argument.

B. Applying Proposition 66 to Petitions Filed After Its Effective Date Does Not Have Any Improper Retroactive Effect

In any event, the requirements of sections 1509 and 1509.1 properly apply to "successive petitions" filed after those sections took effect, regardless of whether a petitioner's initial petition was adjudicated before the effective date.[31] The voters intended Proposition 66 to apply to all petitions filed after its effective date. And applying the Proposition in that way imposes no improper retroactive effect.[32]

1. Legal standards

Statutes are presumed to operate prospectively. (*Myers*, *supra*, 28 Cal.4th at p. 840.) This "antiretroactivity" presumption

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[31] As explained below, the conclusion is the same no matter how the Court construes "successive petition," though the analysis is substantially simpler under a term-of-art approach.

[32] Of 737 condemned inmates, approximately 266 have had their initial habeas petitions adjudicated. Those 266 inmates could in theory claim that applying the terms of Proposition 66 to a successive petition raises impermissible retroactive effects. Approximately 60 have pending subsequent petitions. This case does not address whether applying the terms of Proposition 66 to subsequent petitions that were filed before the effective date of Proposition 66, but are still pending now, raises retroactivity concerns. Friend filed his petition at least six months after *Briggs* settled the effective date of section 1509.

is rooted in "considerations of fair notice, reasonable reliance, and settled expectations" (*Landgraf*, *supra*, 511 U.S. at p. 270), and avoids taking away or impairing "vested rights acquired under existing laws" (*id.* at p. 269). Both this Court and the United States Supreme Court therefore require clear evidence to rebut the presumption of prospective application before a statute will be allowed to have retroactive effect. (*Myers*, *supra*, 28 Cal.4th at p. 841; see also *ibid.* ["California courts apply the same 'general prospectivity principle' as the United States Supreme Court."].) If voters have "expressly prescribed the statute's proper reach," however, or if there is clear evidence of retroactive intent, there is "no need to resort" to those "judicial default rules." (*Landgraf*, *supra*, at p. 280; see also *Lindh v. Murphy* (1997) 521 U.S. 320, 325-326.)

When a statute contains no clear evidence of intent to apply retroactively, a "court must determine whether the new statute would have retroactive effect[.]" (*Landgraf*, *supra*, 511 U.S. at p. 280.) A statute has retroactive effect only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date. (*Id.* at pp. 269-270 & fn. 23.) If application of such a statute would impair vested rights, the anti-retroactivity presumption bars its application. (*Cal. for Disability Rights v. Mervyn's* (2006) 39 Cal.4th 223, 231.) If, however, applying a new statute does not "substantially affect existing rights and obligations," then application of the new statute "is permitted, because the application is prospective." (*Ibid.*) A statute does not

have retroactive effect if it "does not change existing law" (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 301-302), or "merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment" (*In re E.J.* (2010) 47 Cal.4th 1258, 1274).

2. Voters intended sections 1509 and 1509.1 to apply to petitions filed after the effective date of Proposition 66

The temporal reach of a statute is an issue of legislative intent. If voters "expressly prescribe[]" a "statute's proper reach," or if there is clear evidence of retroactive intent, there is "no need to resort" to an analysis of retroactive effect. (*Landgraf*, *supra*, 511 U.S. at p. 280; see also § 3.)

The text of section 1509 reflects that the electorate "expressly prescribed the statute's proper reach" and intended for its provisions to apply to all successive petitions filed after Proposition 66 took effect, no matter when the petitioner's first petition was adjudicated. (*Landgraf, supra*, 511 U.S. at p. 280.) Section 1509, subdivision (a), for example, states that its requirements apply "to *any petition* for writ of habeas corpus filed by a person in custody pursuant to a judgment of death." (§ 1509, subd. (a), italics added.) Subdivision (d), governing successive petitions, carves out no exceptions. And subdivision (g) provides for the transfer of *all* pending petitions (whether successive or not) to the sentencing court. (§ 1509, subd. (g).) Those provisions reflect the voters' intent to subject all habeas petitions filed after Proposition 66's effective date to the requirements of section 1509. (Cf. *Mancuso v. Herbert* (2d Cir. 1999) 166 F.3d 97, 101

[relying on statute's general applicability to all pending petitions to conclude that limitations on successive petitions applied].)

The purpose of Proposition 66 also supports applying its provisions to all successive petitions filed after its effective date. As the Court of Appeal observed in *In re Robinson* (2019) 35 Cal.App.5th 421, "Proposition 66 was enacted to '[r]eform the existing inefficient appeals process for death penalty cases,' in part by removing the backlog of habeas petitions pending before the Supreme Court by redistributing those petitions to the pertinent superior courts around the state for orderly disposition." (*Id.* at pp. 426-427, quoting Prop. 66, § 2, Finding 6.) And that "purpose is furthered by subjecting *all* pending petitions to the Proposition 66's new process, not just *some* of them." (*Ibid.*)

3. Proposition 66 has no improper retroactive effect because it does not attach new legal consequences to prior events

Even if the intent of the voters did not resolve the issue, controlling precedent supports the conclusion that applying the "successive petition" requirements of Proposition 66 does not have any impermissible retroactive effect. Assessing whether a statute has improper retroactive effect "is not always a simple or mechanical task." (*Landgraf*, *supra*, 511 U.S. at p. 268.) A "statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." (*Id.* at p. 269.) Instead, a law is retrospective if it "change[s] the legal consequences of an act completed before the

law's effective date." (*Tapia*, *supra*, 53 Cal.3d at p. 288.) Applying those standards, this Court has held that laws expanding tort liability, removing immunity, and increasing punishment for past criminal conduct had improper retroactive effect. (*Cal. for Disability Rights*, *supra*, 39 Cal.4th at p. 231.) "In each of these cases, application of the new law to pending cases would improperly have changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct." (*Ibid.*)

By contrast, a statute that changes the "rules of conduct of pending litigation without changing the legal consequences of past conduct is not made retroactive merely because it draws upon facts existing prior to its enactment." (*Cal. for Disability*, *supra*, 39 Cal.4th at p. 231, internal quotations omitted.) Applying that standard, this Court has concluded that statutes are prospective in effect when they impose new certificate of merit requirements to bring lawsuits, eliminate the right under anti-SLAPP law to dismiss certain public-interest lawsuits, or change the mechanism for appeal. (*Ibid.*) "Instead, the effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." (*Ibid.*)

Section 1509 does not "change[] the legal consequences of an act completed before the law's effective date." (*Tapia*, *supra*, 53 Cal.3d at p. 288.) It does not change any consequences of a petitioner's "primary conduct," his criminal acts. (*Lindh*, *supra*, 521 U.S. at p. 341 [dis. opn. Rehnquist, J.]; see also *ibid.* ["Obviously, the AEDPA in no way purports to regulate that past

conduct."].)[33] A habeas proceeding is "a collateral proceeding that, in effect, attacks the judgment of the prior state proceeding." (*Id.* at p. 342.) Proposition 66 can thus be described as "alter[ing] the standard under which that prior judgment is evaluated, and is in that sense entirely procedural." (*Ibid.*) Such a procedural rule governing habeas relief does "not address criminal defendants, or even state prosecutors; it prescribes or proscribes no private conduct." (*Id.* at p. 344.) "Instead, it is addressed directly to … courts," and is akin to jurisdiction-ousting statutes that have been found to be prospective in effect. (*Id.* at pp. 344-345 [collecting cases].) Because modifications to a court's authority to issue a writ are "procedural, prospective, and addressed to courts," applying section 1509 to successive petitions filed after Proposition 66's effective date finds support in the nearly "uniform body of" United States Supreme Court cases "applying such changes to all pending" habeas petitions. (*Id.* at p. 345.)

That conclusion finds further support in the Ninth Circuit's decision in *United States v. Villa-Gonzalez* (9th Cir. 2000) 208 F.3d 1160, 1163-1164. There, the court examined whether new limits to filing "second or successive" federal habeas petitions could apply if an inmate had filed an initial petition before

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[33] Although the quoted language appears in the dissenting portion of *Lindh*, the majority held only that the particular provision of AEDPA at issue in that case did not apply to pending petitions because the statute was clearly drafted *not* to apply to pending petitions. (*Lindh*, *supra*, 521 U.S. at p. 326.) That is not true of sections 1509 and 1509.1.

AEDPA was enacted. (*Ibid.*) Although the circumstances in which an inmate could file a second or successive petition had narrowed, the court concluded that those changes did not make AEDPA impermissibly retroactive because they did not affect the inmate's "vested (and exhausted) right to file his first motion" or "impose a new duty or disability with respect to the resolution of his first motion." (*Id.* at p. 1163.) The inmate "had no vested right to file a second or successive motion under the pre-AEDPA standards solely because he filed his first motion before the AEDPA was enacted." (*Ibid.*) And the "mere fact that the new limitations on his filing of the second motion draw upon the antecedent fact that he filed a pre-AEDPA motion does not make the application of the new provisions to his most recent motion retroactive." (*Ibid.*) The same is true here.

To be sure, other circuits have analyzed this question differently. The Fifth and Seventh Circuits have applied a "reliance" test to determine whether AEDPA had impermissible retroactive effect, requiring proof that a petitioner actually and detrimentally relied on the availability of pre-AEDPA standards to avoid the second or successive petition requirements in AEDPA. (See, e.g., *Graham v. Johnson* (5th Cir. 1999) 168 F.3d 762, 783–86 [requiring showing actual detrimental reliance]; *Alexander v. United States* (7th Cir. 1997) 121 F.3d 312, 314 [same]; see also *Pratt v. United States* (1st Cir. 1997) 129 F.3d 54, 59 [indicating that it would require showing that actual reliance was objectively reasonable].) Still other circuits have held that AEDPA's new restrictions could have improper retroactive effect

even absent a showing of reliance, although they ultimately rejected the challenges when they determined that the petitions were successive under the prior standard. (*See In re Minarik*, *supra*, 166 F.3d at pp. 601, 605-607; *Daniels v. United States* (10th Cir. 2001) 254 F.3d 1180, 1198.)

Even if proof of reliance were required to establish retroactive effect (*I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 323), however, Friend himself fails to establish that he reasonably relied on the pre-Proposition 66 standards. As demonstrated above, each of the claims in his successive petition is based wholly or in part on evidence available at the time of trial and thus should be barred under *Clark*. With the exception of one claim (the alleged *Miranda* violation), his petition provides no excuse for his failure to bring the claims in the first petition.[34] For the *Miranda* claim, he does allege that prior habeas counsel was ineffective, but he fails to sufficiently plead and support that claim. Friend was represented by counsel, who reviewed the record and determined what claims to raise, and neither Friend nor his counsel had any incentive to refrain from raising any colorable claim.

Friend does assert that he might have acted differently in one respect, by requesting the appointment of a second habeas counsel while his 2007 petition was pending to evaluate whether

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[34] As previously noted, justification for piecemeal presentation of claims must be included in the petition. (*In re Reno, supra,* 55 Cal.4th at p. 453, 458-459; *Briggs*, *supra*, 3 Cal.5th at p. 844.)

any amendments should have been made. (OBM 64.)[35] This argument ignores the fact that prior habeas counsel was a Senior Deputy Public Defender who was joined by a Supervising Deputy Public Defender on the brief. Both were experienced attorneys. There is no basis for assuming that a request for a third attorney would have been granted.

Generally, it is only the *unexpected* circumstance—one that could not engender reliance or an ability to structure actions differently—that permits a court to consider a subsequent petition on the merits. (*In re Reno*, *supra*, 55 Cal.4th at p. 452 [successive petitions permitted only for "rare or unusual claims that could not reasonably have been raised at an earlier time"]; see also OBM 66.) As Friend himself concedes, "successive petitions" under pre-Proposition 66 law ordinarily could be considered on the merits based on circumstances out of the inmate's control. (OBM 23-34.) An inmate cannot reasonably rely on circumstances he cannot anticipate.[36]

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[35] Friend's assertion that he "might" have acted differently is insufficient to establish actual reliance. (OBM 64-68.)

[36] Friend asserts that the statutory definition of "successive" extinguishes his state-law right to effective habeas counsel. (OBM 61-64.) For the reasons discussed in section I, that concern is eliminated if this Court construes "successive petition" as a term of art. If the Court adopts a literal interpretation of successive petition and a serious question arises about an inmate's right to counsel, "the interest in avoiding the adjudication of constitutional questions" may "counsel against a retroactive application." (*Landgraf*, *supra*, 511 U.S. at p. 268, fn. 21.) Those inmates would no doubt raise as-applied constitutional challenges to the application of Proposition 66 (see

To be sure, as Friend has observed, the Sixth Circuit in *In re Hanserd* (6th Cir. 1997) 123 F.3d 922, 931, held that a petitioner need only show that he "might have acted differently had he known of that new consequence" in concluding that new limits on filing second or successive petitions has retroactive effect. For all the reasons noted above, however, this Court's retroactivity jurisprudence better supports the views of the courts that have reached the opposite conclusion.

While the forgoing analysis applies whether the Court adopts a literal or term-of-art interpretation to the phrase "successive petition," the question of impermissible retrospective effect is greatly simplified if this Court agrees that the phrase "successive petition" incorporates *Clark*'s allowances for petitions raising claims that could not reasonably have been asserted before. Under that construction, the analysis of whether a petitioner may file a justified subsequent petition is governed by essentially the same standards under section 1509 as it would have been before Proposition 66. Read that way, section 1509 does not "substantially affect existing rights and obligations" (*Cal. for Disability Rights*, *supra*, 39 Cal.4th at p. 231), because it largely "does not change existing law" (*Tapia*, *supra*, 53 Cal.3d at pp. 301-302). (See also discussion *ante* at pp. 27-36.) Although Friend reserves the prospect that Proposition 66 may have a retrospective effect by limiting *Clark*'s fundamental miscarriage

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discussion *ante*, p. 36, fn. 14), beyond limited retroactivity concerns.

of justice exceptions for unjustified successive petitions (OBM 61, fn. 13), he has never claimed that he himself can satisfy any of the exceptions that the voters eliminated.[37]

CONCLUSION

The Court of Appeal's judgment should be affirmed.

Dated: May 29, 2020 Respectfully submitted,

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[37] Section 1509, subdivision (d) contains just two exceptions, for actual innocence and ineligibility for the death sentence. While *Clark* and *Robbins* recognized other "miscarriage of justice" exceptions, this Court has seldom if ever found those exceptions satisfied. (*In re Reno, supra,* 55 Cal.4th at pp. 455-456.)

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and **13,977** contains words.

Dated: May 29, 2020

XAVIER BECERRA
Attorney General of California

s/ Alice B. Lustre
ALICE B. LUSTRE
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *In Re Jack Wayne Friend, on H.C.* Case No.: S256914

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General 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 Attorney General is deposited with the United States Postal Service 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. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On May 29, 2020, I electronically served the attached ANSWER BRIEF ON THE MERITS by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 29, 2020, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following:

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Alameda County Superior Court
Attn: The Honorable C. Don Clay
1225 Fallon Street
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 29, 2020, at San Diego, California.

B. Romero
Declarant

B. Romero
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **FRIEND (JACK WAYNE) ON H.C.**
Case Number: **S256914**
Lower Court Case Number: **A155955**

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California Dept of Justice, Office of the Attorney General

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