IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Respondent's Answer Brief on the Merits ("ABM") reveals that the parties agree in important ways across all three issues: First, the phrase "successive petition" in Penal Code section 1509, subdivision (d) (hereafter "section 1509(d)")[1] is a "term of art in habeas jurisprudence" that describes unjustified second and subsequent applications. (ABM 29.) Second, this agreed-upon definition ameliorates some of the retroactivity concerns that would result from an alternative, literal definition of "successive petition." (ABM 62-63 & fn. 36.) Third, section 1509.1 allows the courts of appeal to review a superior court order dismissing a "successive petition," including the threshold determination that the petition is successive. (ABM 43.)

Friend focuses here on the remaining disputes: whether his petition is successive under the parties' agreed-upon definition; whether, even under that definition, Proposition 66 still creates retroactivity problems as applied to prisoners like Friend whose petitions straddle its enactment; and how best to interpret section 1509.1 to preserve meaningful appellate review.

ARGUMENT

I. The parties agree that the term "successive petition" retains its pre–Proposition 66 meaning, but Respondent misperceives that Friend's petition is successive using that definition

A. The parties advocate the same definition of "successive petition," and for good reason

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[1] All further statutory references are to the Penal Code unless otherwise noted.

The parties agree that the term "successive petition" describes "a petition composed entirely of claims that would constitute an abuse of the writ." (ABM 29). That is, a "successive petition" is a second or subsequent petition composed entirely of unjustified claims. (ABM 29 [defining a successive petition as one "'raising claims that could have been presented in a previous petition,' without adequate justification," quoting *Briggs v. Brown* (2017) 3 Cal.5th 808, 836, fn. 14]; Opening Brief on the Merits ("OBM") 43 [defining a successive petition as one "presenting claims, without adequate justification, that could have been raised in a previous collateral challenge"].)

Conversely, "[i]f a petitioner adequately 'justifies the piecemeal presentation' of his claims . . . , the subsequent petition presenting that claim would not be 'successive' for purposes of section 1509, subdivision (d)." (ABM 30, quoting *In re Clark* (1993) 5 Cal.4th 750, 774; accord, OBM 24 ["If the claims could not reasonably have been raised in a prior petition, or if the petitioner adequately explains the need to present previously omitted claims, then the 'subsequent' petition is not considered 'successive,'" quoting *In re Robbins* (1998) 18 Cal.4th 770, 788, fn. 9].)[2]

This consensus is well founded. "'[I]f a word is obviously transplanted from another legal source . . . , it brings the old soil

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[2] The parties further agree that inadequate representation in a prior habeas proceeding is one justification for filing a subsequent petition. (ABM 27-28 ["A petitioner may justify the failure to assert a claim in earlier habeas proceedings because . . . counsel failed to afford adequate representation in a prior habeas corpus application."]; OBM 34-35.)

with it.'" (*Hall v. Hall* (2018) 138 S.Ct. 1118, 1128, quoting Felix Frankfurter (1947) *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537.) The parties agree the voters did not "express[] any obvious intent to embrace the dramatic change in law" that would result from departing from the Court's prior construction. (ABM 31-32; cf. *Hall*, 138 S.Ct. at p. 1129 [observing that if the Federal Rules of Civil Procedure governing consolidated and separate trials were meant to transform the meaning of the term "consolidation into something sharply contrary to what it had been, we would have heard about it"].) And the parties further agree that, voter intent aside, adopting a literal interpretation of "successive petition" would jeopardize the statute's constitutionality. (ABM 25-26.)

Respondent anticipates that retaining the pre–Proposition 66 definition of "successive petition" will pose one of two "interpretive difficulties" (ABM 32), but concludes that these difficulties are surmountable (ABM 34). Friend agrees that these limited "difficulties" do not warrant abandoning the Court's longstanding definition of "successive petition." The courts of this State are empowered and competent to fashion processes resolving the interpretive challenges Respondent anticipates. (Cf. Code Civ. Proc., § 187 ["When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be

adopted which may appear most conformable to the spirit of this Code."]; *McDonald v. Antelope Valley Cmty. Coll. Dist.* (2008) 45 Cal.4th 88, 100 [noting "the judiciary's inherent power 'to formulate rules of procedure where justice demands it'"].) On balance, these difficulties pale in comparison to the challenge of avoiding the constitutional problems attending a literal interpretation of "successive petition," which Friend and Respondent have both explained. (OBM 25-36; ABM 25-26.)

Finally, Respondent submits that the question of how to interpret "successive petition" "is a close one." (ABM 35.) Accepting *arguendo* Respondent's view that the statute is susceptible to two plausible constructions, the ambiguity itself militates in favor of the parties' agreed-upon interpretation. (*In re Jeanice D.* (1980) 28 Cal.3d 210, 217 ["It is, of course, an established principle that ambiguities in penal statutes must be construed in favor of the offender, not the prosecution."].) This canon of construction has particular force here given the severe consequences to condemned offenders flowing from a literal definition. (See *People v. Weidert* (1985) 39 Cal.3d 836, 848 ["the degree of strictness in construing penal statutes should vary in direct relation to the severity of the penalty"].)

B. Respondent is incorrect that Friend's petition is successive under the parties' agreed-upon definition

Respondent gives two reasons the instant petition is successive under the parties' agreed-upon definition, one procedural and one substantive. First, Respondent asserts that in the superior court Friend did not allege the justifications for

filing a subsequent petition in the correct pleading. (ABM 37-41.) Second, Respondent asserts that, substantively, Friend's explanation for bringing the instant petition is inadequate. (ABM 41-43.) Both arguments fail.

1. Friend's argument that his petition is not successive was before the superior court

Respondent contends that Friend offered no justification in the superior court for filing a second habeas petition. (ABM 37.) To the contrary, in response to the State's allegation that section 1509(d) required dismissing the instant petition (4 CT2 831), Friend argued in his informal reply that the court should find that the term "successive" in section 1509 retained its meaning from *Clark* and *Robbins*, and that his petition was not successive under that definition. (4 CT2 840-55.)[3] Specifically, Friend argued that his petition was not successive because the ineffective assistance of counsel explained the omission of each of the six claims from his prior habeas application. (4 CT2 847-55.)

Notwithstanding the arguments in Friend's informal reply, Respondent argues that this Court's decision in *Reno* required Friend to address these issues in the petition. (ABM 37-38, 41 & fn. 16.) As just noted, however, the superior court undisputedly had before it and acknowledged Friend's arguments regarding what definition of "successive" should apply and the parameters of how Proposition 66 should interact with this Court's jurisprudence regarding second and subsequent petitions. (Super.

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[3] Friend uses the same format for record citations explained in footnotes one and three of the opening brief.

Ct. Order at pp. 4-5.) The fact that these arguments were raised in the informal reply, rather than in the petition, did not negatively affect the superior court's ability to consider how procedural bars should apply going forward.

Moreover, for three reasons, *Reno* does not support requiring a petitioner to affirmatively plead the potential application of a procedural bar in this instance.

First, *Reno* was premised on the fact that under California law the procedural and timeliness bars, and related exceptions, were well established and understood. (*In re Reno* (2012) 55 Cal.4th 428, 458 [noting 18 years had passed since the Court decided *Clark*]; *id.* at p. 510 ["Attorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed."]; *id.* at p. 511 ["[I]f a petition raises a claim that according to controlling legal authority is procedurally improper, the petition must disclose that fact and forthrightly address why the court should nevertheless consider the claim."].) Here, however, Friend was litigating immediately following enactment of a new statutory scheme and it was not clear what the parameters of the procedural bars would be or how Respondent would argue the bars should be applied. There were no rulings, from this Court or any other, regarding the meaning of the term "successive petition" in section 1509(d), the continued applicability of the pre–Proposition 66 procedural bars and exceptions, or the applicability of section 1509(d) and its exceptions.

The uncertainty that existed is underscored by the facts

that in the superior court Respondent asserted no procedural bars beyond those in section 1509(d) (4 CT2 831-34), and that Respondent's position on the meaning of the term "successive petition" evolved as the litigation progressed.[4] (Compare 4 CT2 830 [Respondent asserting that the instant petition is successive simply because this Court had denied a previous petition for habeas corpus], with Answer to Req. for Cert. of Appealability at p. 1 (July 1, 2019, No. A155955) [Respondent asserting that a "clearly established definition already exists" for "successive petition," citing *Clark*, *supra*, 5 Cal.4th at pp. 769-71], and ABM 29.) In these novel circumstances, the justifications in *Reno* for requiring the petitioner to preemptively address procedural bars are inapposite.

Second, *Reno* addressed "second and subsequent petitions" filed in this Court, where condemned prisoners generally filed habeas petitions before Proposition 66. (See *Reno*, *supra*, 55 Cal.4th at p. 443.) *Reno*'s pleading requirements reflected the burden on this Court of addressing all habeas petitions, many of which are lengthy.[5] (*Id.* at p. 515 [noting evaluation of second and subsequent petitions "requires several weeks if not months of

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[4] The State was represented by the Alameda County District Attorney in the Superior Court and by the Office of the Attorney General of California in proceedings in the Court of Appeal.

[5] The Court in *Reno* found that the petition in that case "exemplifie[d] abusive writ practices" in that it was 521 pages long and raised 143 claims, many of which had been addressed previously. (*Reno*, *supra*, 55 Cal.4th at pp. 443, 514.) In contrast, Friend's petition raised just six claims, none of which had been raised previously, and was only 74 pages long. (1 CT2 1-81.)

dedicated work by members of the court" and these petitions "have created a significant threat to our capacity to timely and fairly adjudicate such matters"].) Because Proposition 66 distributes petitions among the many superior courts, it is not clear that the same concern applies.

Third, the Rules of Court adopted after Proposition 66 require that "[b]efore dismissing a successive petition under Penal Code section 1509(d), a superior court must provide notice to the petitioner and an opportunity to respond." (Cal. Rules of Court, rule 4.576(a).) Although not yet in effect when Friend filed his petition,[6] this rule suggests, contrary to Respondent's argument, that following the implementation of Proposition 66, a petitioner should not plead procedural bars until asked to do so by the superior court. At the very least, this rule confirms there was (and continues to be) uncertainty about the pleading requirements.

2. Friend adequately justified raising his claims in a second petition

Respondent also argues that Friend did not adequately justify filing a second petition, and that the petition is therefore "successive." (ABM 37-42.) Respondent's primary objection is that Friend has not explained why he could not previously have raised the six claims in the instant petition. (ABM 37-40.) This objection is misplaced. Friend has not asserted that these claims could not have been raised previously. To the contrary, his argument in the

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[6] The rules became effective April 25, 2019. (Cal. Rules of Court, rule 4.576.)

informal reply filed in the superior court was that they *should* have been raised, and that initial habeas counsel's failure to raise them justifies their subsequent presentation under *Clark*.[7] (4 CT2 847-55.) Thus, it is no answer for Respondent to argue, for example, that information supporting Friend's *Batson* challenge was available at the time of his initial habeas petition. (ABM 38-39 & fn. 18; see also ABM 39-40 [making similar argument regarding Claims 2 and 3].) Indeed, that argument supports Friend's contention that his initial habeas counsel should have marshaled it.

Respondent also argues that Friend has inadequately alleged ineffective assistance of habeas counsel (ABM 41-42), but this argument must be rejected. Respondent's application of law to facts comprises only one paragraph and asserts, without elaboration, that Friend's allegations are "conclusory." (ABM 42.) Respondent makes virtually no effort to address the specific allegations in Friend's informal reply and summarized in the opening brief.[8]

Further, Respondent dismisses the declaration from initial habeas counsel as insufficient to affirm that there was no strategic basis for omitting a *Batson/Wheeler* claim or corollary ineffective-assistance-of-counsel claim. (ABM 42.) Counsel's declaration states, "There was no strategic reason not to include

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[7] The superior court did not address these arguments. (Super. Ct. Order at pp. 4-5.)

[8] Instead, Respondent appears to address only the allegations and arguments contained in the petition. (See ABM 36-42.)

these claims." (1 CT2 112.) Respondent contends this statement is "conclusory" and "[o]therwise, Young's declaration is silent regarding her choice of what issues to pursue." (ABM 42.) This argument is misleading. Young's statement that there was *no* strategic reason not to include the claims clearly indicates that the omission was not a choice but an oversight. Had counsel considered the claims and made an affirmative choice not to include them, presumably there would have been *some* strategic basis for not including them, even if it proved ill-advised.

Because Respondent has not rebutted Friend's allegation that prior counsel's inadequate assistance justifies the current presentation of these claims, the Court should conclude that the instant petition is not successive. Alternatively, Friend requests a remand so the superior court can evaluate whether the instant petition is successive using the correct definition.

II. The parties agree their definition of "successive petition" resolves certain retroactivity concerns, but Respondent is incorrect that it resolves all of them or that the voters intended the remaining retroactive effects

A. Retaining the prior judicial construction of "successive petition" avoids some of the retroactive effects caused by application of Proposition 66 in this case, but not all of them

As Respondent observes, a term-of-art interpretation of "successive petition" will obviate some of the possible harm arising from Proposition 66 to which the anti-retroactivity presumption is directed. If the definition is unchanged, then application of section 1509(d) to a petition asserting inadequate habeas representation as a justification for piecemeal litigation

will not automatically impair the statutory right to effective habeas counsel. (See ABM 62, fn. 36; OBM 61-63.) Application of section 1509(d) would also be less likely to upset certain of the expectations prisoners and their counsel reasonably formed about filing first-in-time habeas petitions in reliance on the old rules. (See ABM 63; OBM 64-68.) Avoiding these retroactive effects is another good reason to adopt the parties' agreed-upon definition of "successive petition."[9]

But Respondent's view that retaining the old definition avoids all retroactive impact is mistaken. Even if Proposition 66 did not change the definition of "successive petition," it appears to have changed the consequences of filing one. (OBM 61, fn. 13.) Before Proposition 66, a prisoner could avoid a procedural dismissal of a successive petition by demonstrating one of four fundamental-miscarriage-of-justice exceptions described in *Clark*, *supra*, 5 Cal.4th at pp. 797-98. (ABM 14-15.) Yet Respondent asserts that these four equitable exceptions were replaced by the two statutory exceptions in section 1509(d) (ABM 30), and the superior court reached the same conclusion below. (Super. Ct. Order at 4.)

Thus, even if the instant petition were "successive" under the prior judicial construction as Respondent asserts (ABM 36),

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[9] The parties also agree that this case does not present the question whether applying Proposition 66 to prisoners who filed a second or subsequent petition *before* the initiative became effective would be impermissibly retroactive. (AMB 54, fn. 32.) If the Court decides that Proposition 66 governs Friend's petition, it should nonetheless reserve that question.

section 1509(d) imposes on "successive petitions" new and more restrictive procedural hurdles arising from the filing of an initial, pre–Proposition 66 petition that would bar claims previously reviewable. Applying the statute therefore would still change the legal consequences of the initial, pre–Proposition 66 petition and, for reasons already articulated (OBM 57-61), have a retroactive effect. (See *Aetna Cas. & Sur. Co. v. Indus. Acc. Comm'n* (1947) 30 Cal.2d 388, 395; see also *In re Hanserd* (6th Cir. 1997) 123 F.3d 922, 931, 933-34; *In re Minarik* (3d Cir. 1999) 166 F.3d 591, 600.)[10]

B. Respondent is incorrect that application of Proposition 66 would have only prospective effects

Respondent first suggests that section 1509(d) cannot change the legal consequences of Friend's initial petition because the statute is "'entirely procedural' and addresses the courts' power rather than parties' rights or obligations. (ABM 58-59, quoting *Lindh v. Murphy* (1997) 521 U.S. 320, 342 (dis. opn. of C.J. Rehnquist).)

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[10] Respondent mistakenly asserts that "Friend did not invoke any of the fundamental miscarriage of justice exceptions to seek merits review in any of the proceedings below." (ABM 52, fn. 28; see also ABM 51 [similar]; ABM 63-64 [similar].) Friend invoked the equitable exceptions in the superior court (4 CT2 855-58), the court of appeal (Req. for Cert. of Appealability at pp. 19-21 (June 26, 2019, NO. A155955)), and in this Court (Pet. for Rev. at pp. 27-29 (Sept. 11, 2019, No. S256914)). The superior court did not evaluate whether Friend satisfied any of the *Clark* miscarriage-of-justice exceptions.

Respondent's reliance on Chief Justice Rehnquist's dissent in *Lindh* is inapt. The Chief Justice did not speak for the high court. Instead, the *Lindh* majority recognized that rules of collateral proceedings that "change standards of proof and persuasion in a way favorable to a State" go "beyond 'mere' procedure to affect substantive entitlement to relief." (*Lindh*, *supra*, 521 U.S. at p. 327.) Because application of section 1509(d) to the exclusion of the *Clark* equitable exceptions may impair a petitioner's right to relief, it can have retroactive effect notwithstanding Respondent's characterization of the statute as "procedural." (*Ibid.*; see also *Aetna Cas. & Sur. Co.*, *supra*, 30 Cal.2d at p. 394 ["If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed[.]"]; *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 231 ["We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies."].)

Respondent's next argument is that in *United States v. Villa-Gonzalez* (9th Cir. 2000) 208 F.3d 1160 the Ninth Circuit decided *per curiam* that the limits for successive collateral attacks on federal convictions enacted by the Antiterrorism and Effective Death Penalty Act ("AEDPA") did not operate retroactively as applied to a second-in-time challenge filed after

AEDPA when the initial challenge predated it. (ABM 59-60; OBM 60, fn. 12.)[11]

But the Court should also reject *Villa-Gonzalez* as a basis to find that application of Proposition 66 to the instant petition would operate prospectively only. For one thing, *Villa-Gonzalez* undervalued prisoners' interest in fair notice—a concern that guides retroactivity analysis. (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 270.) This Court recently declined to bar a condemned prisoner's second habeas petition as successive because his *first* petition predated *Clark*, which "clarified that the successiveness bar is nondiscretionary." (*In re Gay* (2020) 8 Cal.5th 1059, 1071, fn. 3.) The Court observed that because the first petition was filed before *Clark*, the prisoner "would not have been on notice that failure to raise issues in his first petition would necessarily preclude their later consideration." (*Ibid*.) The same concern for fair notice animating *Gay* militates against adopting the *Villa-Gonzalez* approach to California's newly enacted limitations on subsequent petitions.

Moreover, the Ninth Circuit's cursory ruling in *Villa-Gonzalez* did not acknowledge the contrary approaches taken by several of its sister circuits (OBM 59-60 & fn. 12), let alone distinguish them (*Villa-Gonzalez*, *supra*, 208 F.3d at p. 1163). By contrast, the Fourth Circuit expressly disagreed with *Villa-*

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[11] Thus, like Friend's case and unlike *Landgraf*, *Lindh*, and the many condemned prisoners who filed second or subsequent petitions before Proposition 66 was enacted, *Villa-Gonzalez* did "not involve an action that was pending when the law at issue was enacted." (*Villa-Gonzalez*, *supra*, 208 F.3d at p. 1163.)

Gonzalez and provided another reason the Ninth Circuit's approach was incorrect: "The AEDPA amendment of § 2255 *indisputably* attaches a new legal consequence to the filing of a first § 2255 motion: rather than showing that a second or successive motion is not an abuse of the writ, a movant must satisfy the more stringent gatekeeping standards." (*In re Jones* (4th Cir. 2000) 226 F.3d 328, 332, emphasis added.) As interpreted by Respondent and the superior court, the same is true of section 1509(d). Because Respondent concedes that a California statute operates retroactively when "it attaches new legal consequences to . . . an event, transaction, or conduct that was completed before the law's effective date" (ABM 55), the Court should decline to follow the approach taken in *Villa-Gonzalez* for this reason as well.

As an alternative to the Ninth Circuit's approach, and in line with tests applied in the Fifth and Seventh Circuits, Respondent also argues that Friend could not demonstrate that section 1509 has a retroactive effect if the Court required proof that he "actually and detrimentally relied on the availability of pre-[initiative] standards." (ABM 60.) As Friend already noted, this Court has not made evidence of detrimental reliance dispositive. (OBM 60, fn. 12; see also *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472; *Aetna Cas. & Sur. Co.*, *supra*, 30 Cal.2d at pp. 391-95.) In *Gay*, for example, the Court did not discuss whether and to what extent the prisoner consciously relied on the pre-*Clark* approach to procedural bars when he filed his initial petition before declining to impose the

limitations adopted in *Clark* on his subsequent one. (*Gay*, *supra*, 8 Cal.5th at pp. 1071, fn. 3 & 1091-92.)[12]

Respondent's emphasis on reliance also overlooks other interests served by the anti-retroactivity presumption, including fair notice and settled expectations. (*Landgraf*, *supra*, 511 U.S. at p. 270.) Friend's approach advances those interests. Just as a prisoner before Proposition 66 could expect that a subsequent petition would not be deemed successive if it were adequately justified, he could also expect that even an unjustified second petition could be reviewed to avoid a fundamental miscarriage of justice. As in *Gay*, before Proposition 66 a prisoner like Friend "would not have been on notice that failure to raise issues in his first petition would *necessarily* preclude their later consideration," even if preclusion resulted in a fundamental miscarriage of justice. (*Gay*, *supra*, 8 Cal.5th at p. 1071, fn. 3, emphasis added.)

In any event, Friend's approach *does* serve the reliance interest partly animating anti-retroactivity. Respondent argues that "it is only the *unexpected* circumstance—one that could not engender reliance or an ability to structure actions differently—

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[12] The Sixth Circuit explained in similar circumstances why proof of conscious reliance "has never been the touchstone of retroactivity analysis" (*Hanserd*, *supra*, 123 F.3d at p. 932, fn. 17): it was not dispositive in *Landgraf*. In declining to apply a new law expanding employer liability for preenactment discrimination, the high court in *Landgraf* "did not speculate as to whether the employer had consciously relied on the old law in allowing discrimination against the plaintiff." (*Id.* at p. 931.)

that permits a court to consider a subsequent petition on the merits." (ABM 62.) But even if a prisoner could not anticipate any particular circumstance or contingency, he could have relied on the safety valve this Court has always held open in the event *some* contingency arose revealing a miscarriage of justice. It is not the emergence of any particular unexpected development on which prisoners relied, but rather the promise from this Court that "[t]he magnitude and gravity of the penalty of death" mean that "the important values which justify limits on untimely and successive petitions are outweighed by the need to leave open this avenue of relief." (*Clark*, *supra*, 5 Cal.4th at p. 797.)

Although prisoners' reliance interests may be somewhat protected if "successive petition" retains its prior construction, section 1509(d) nonetheless upends this Court's assurances if it eliminates the fundamental-miscarriage-of-justice exceptions. In that case, the statute leaves undisturbed one layer of protection (the ability to obtain merits review of a justified subsequent petition), but it unexpectedly withdraws a second layer of protection on which prisoners may have reasonably relied (the fundamental-miscarriage-of-justice exceptions for unjustified and therefore "successive" petitions). This alteration still "change[s] 'the rules of the game' in the middle of a contest," and it therefore has a retroactive effect. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1194; see also *Landgraf*, *supra*, 511 U.S. at p. 282, fn. 35 [declining to apply statute retroactively notwithstanding that "concerns of unfair surprise and upsetting expectations" were "attenuated"].)

C. Respondent is also incorrect that the initiative or voter guide reveals a clear intent for Penal Code section 1509, subdivision (d) to apply to prisoners whose petitions straddle Proposition 66's enactment

Respondent does not dispute that section 1509(d) lacks any language expressing clear legislative intent for the provision to apply in ways that have retroactive effect. (ABM 56-57; OBM 69-71.) Instead, Respondent argues that subdivisions (a) and (g) reflect that voters intended section 1509 as a whole to apply to all petitions filed after Proposition 66, even if the initial petition was filed before its enactment and application of the statute would have retroactive effect, and that subdivision (d) "carves out no exception" to this general intent. (ABM 56.)

Respondent is mistaken. First, the language in subdivision (a) states simply that section 1509 applies to "any petition filed by a person in custody pursuant to a judgment of death." Respondent offers no basis to conclude that such general language expressly prescribes the statute's "temporal reach" (ABM 56) rather than an intent to limit its application to petitions filed by condemned rather than non-condemned prisoners. (Cf. *Evangelatos*, *supra*, 44 Cal.3d at p. 1209, fn. 13 [concluding that the statutory phrase "[i]n any action" provided "no indication that a retroactive application was contemplated" and instead was meant to "negate[] any implication that the new . . . rule was to apply only to a specific category of tort cases"].)

Second, Respondent overlooks that because subdivision (g) includes language suggesting that it may operate retroactively

and subdivision (d) does not, the voters may have intended for the latter to apply prospectively only. (See *Lindh*, *supra*, 521 U.S. at p. 336; *People v. Buycks* (2018) 5 Cal.5th 857, 881.) Even if Respondent's alternative view were plausible—that language in subdivision (g) authorizes other parts of section 1509 to be applied retroactively—the ambiguity forecloses retrospective applications of subdivision (d). (E.g., *People v. Brown* (2012) 54 Cal.4th 314, 324.)[13]

Besides the statutory text, Respondent also asserts that section 1509(d) may be applied even when it would have retrospective effect because doing so furthers the purpose of Proposition 66. (ABM 57.) Again, Respondent is incorrect. Even if giving a statute retroactive effect would advance its goals, that is not a sufficient basis to overcome the presumption that statutes operate prospectively only. (*Landgraf*, *supra*, 511 U.S. at pp. 285-86 ["It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity."]; accord, *Evangelatos*, *supra*, 44 Cal.3d at p. 1213 ["Most statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute

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[13] Respondent cites no California law to support its textual analysis and instead relies on *Mancuso v. Herbert* (2d Cir. 1999) 166 F.3d 97, 101. (ABM 56-57.) *Mancuso* reached the same conclusion as *Villa-Gonzalez* (OBM 60, fn. 12), and should be rejected for the reasons described above.

retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively."].)

For their erroneous view to the contrary, Respondent cites only *In re Robinson* (2019) 35 Cal.App.5th 421. (ABM 57.) But in that case the court considered the discrete question of whether, procedurally, an order denying an initial petition filed before Proposition 66 was appealable pursuant to section 1509.1 rather than reviewable by filing a new petition. (See *Robinson*, 35 Cal.App.5th at p. 426.) The provisions governing adjudication of successive petitions—and the substantive rights implicated by applying those provisions–were not at issue. Any suggestion in *Robinson* that those provisions were intended to have retroactive effect therefore was dictum. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 933 ["The holding of a case is coextensive with its particular facts."].)[14]

In sum, neither the text of Proposition 66 nor the purpose of the initiative evidences clear intent for the retroactive effects that would result if section 1509(d) were applied to prisoners like Friend. "Requiring clear intent assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." (*Landgraf*, *supra*, 511 U.S. at pp. 272-73.) Absent such intent, the Court must

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[14] Moreover, the court of appeal's decision overlooks Penal Code section 3 and the relevant retroactivity precedents. Any dicta in *Robinson* suggesting that the provisions of Proposition 66 governing successive petitions were intended to have retroactive effect therefore is also unpersuasive.

conclude that the statute cannot be applied where, as here, it would operate retroactively.

III. The parties agree that the dismissal of a successive petition is an appealable order under Penal Code section 1509.1, although they advocate different mechanisms for review

Again the parties are in substantial agreement: an order dismissing a successive petition under section 1509(d) is appealable under section 1509.1. (ABM 43.) The parties also agree on two subsidiary issues: such an appeal may proceed pursuant to section 1509.1, subdivision (c) (hereafter "section 1509.1(c)") because the voters did not intend for dismissals to be treated differently than denials for purposes of review (ABM 45-46; OBM 85-87); and, assuming the certificate of appealability ("COA") requirement in section 1509.1(c) applies, a COA may issue if the prisoner has a substantial claim that his petition is not successive and a substantial claim for relief. (ABM 47-49; OBM 89-92.)

As alternatives to this agreed-upon approach, Friend proffered two other ways to interpret section 1509.1. First, he suggested that section 1509.1, subdivision (a) (hereafter "section 1509.1(a)") could be interpreted to permit plenary appellate review of whether a petition is successive. (OBM 75-84.) Second, he suggested that section 1509.1(c) could be interpreted to require a COA before the courts of appeal review the merits of any claims for relief in a successive petition, but not before the appellate court conducts plenary review of the threshold successiveness question. As Respondent observes (ABM 50), the practical effect of both interpretations is the same: they provide

condemned petitioners with one clean shot at appellate review of the successiveness determination, unencumbered by procedural hurdles intended only for abusive filings.

Respondent raises three objections to these alternatives, but each concern is overstated. First, Respondent questions "how or when a court would assess whether a petition is 'properly deemed successive'" so that it could determine whether to apply the COA requirement. (ABM 49-50.) But Respondent does not explain why a prisoner challenging the dismissal of a successive petition could not file a pleading in the court of appeal challenging the successiveness determination and, in the alternative, applying for a COA; or why an appellate court, presented with such a pleading, could not determine that a petition was not successive or, in the alternative, grant or deny a COA. In *Lucero*, for example, the Fourth District Court of Appeal preliminarily determined that the petition dismissed by the superior court as successive was not successive at all, and then concluded that the prisoner could prosecute his appeal under section 1509.1(a). (Order at p. 2, *In re Lucero* (Cal.Ct.App. Dec. 30, 2019, No. EO74350).) Had the court of appeal instead affirmed the superior court's determination that the petition was successive, it could have then evaluated whether to grant a COA pursuant to section 1509.1(c).

Second, Respondent worries that if "nearly all" condemned prisoners challenge a superior court finding that their petitions are successive and appeal "under subdivision (a)," then section 1509.1(a) would be used more frequently than intended and

section 1509.1(c) would not serve its intended function. (ABM 50.) Practically, however, it will make little difference whether prisoners appeal the successiveness determination under section 1509.1(a) or under section 1509.1(c). Either way, the appellate court will determine whether the petition is successive. If it is not successive, then the prisoner need not satisfy the remaining requirements in section 1509.1(c) and the appeal will proceed instead pursuant to section 1509.1(a). If the petition is successive, then the appeal will proceed pursuant to section 1509.1(c) and the court will apply the COA standard. Both subdivisions (a) and (c) still do work.

Third, Respondent objects that Friend's alternatives contravene "Proposition 66's goal of curbing abusive writ practices." (ABM 50.) Not so. Under either alternative, once the appellate court has affirmed a superior court finding that a petition is successive, it could not review the merits unless the petitioner established he had a substantial claim for relief and a substantial claim that section 1509(d) is satisfied. (§ 1509.1(c).) The COA requirement therefore would still advance Proposition 66's goal of screening successive petitions.

Ultimately, Friend agrees that the statute can be interpreted as Respondent suggests. But Respondent's challenges to Friend's alternative interpretations do not present adequate bases to dismiss them. These alternatives, like the parties' agreed-upon interpretation of section 1509.1, balance the voters' intent to reduce merits consideration of successive petitions while also preserving meaningful appellate review.

CONCLUSION

The judgment of the Court of Appeal should be reversed. Friend requests that the Court adopt the parties' agreed-upon definition of "successive," determine that the instant petition is not successive, and remand the case with directions that the superior court review its merits.

Dated this 10th day of July, 2020.

Respectfully submitted,

Jon M. Sands
Federal Public Defender
District of Arizona
Lindsey Layer
Assistant Federal Public Defender

s/ Stanley Molever
Stanley Molever
Assistant Federal Public Defender
Counsel for Petitioner-Appellant

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c), counsel for Jack Friend certifies based on the word count of the computer program used to prepare this brief that it contains 5,784 words, excluding the tables and cover information required under rule 8.204, the quotation of issues required by rule 8.520(b)(2), the signature block, the proof of service, and this certificate.

Dated this 10th day of July, 2020.

Jon M. Sands
Federal Public Defender
District of Arizona
Lindsey Layer
Assistant Federal Public Defender

s/ Stanley Molever
Stanley Molever
Assistant Federal Public Defender
Counsel for Petitioner-Appellant

PROOF OF ELECTRONIC SERVICE

I, Daniel Juarez, declare as follows:

I am employed in the County of Maricopa, State of Arizona. I am over the age of eighteen years and am not a party to this action. My business address is Office of the Federal Public for the District of Arizona, 850 W. Adams St., Suite 201, Phoenix, AZ 85007. I am familiar with the business practice at the Office of the Federal Public Defender for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Federal Public Defender is deposited with the United States Postal Service or a commercial carrier with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. 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 July 10, 2020, I served the attached application by transmitting a true copy via this Court's TrueFiling system to the following parties:

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I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct, and that I signed this document on July 10, 2020, in Phoenix, Arizona.

s/Daniel Juarez
Assistant Paralegal
Capital Habeas Unit

PROOF OF SERVICE BY MAIL

I, Sally Jones, declare as follows:

I am employed in the County of Maricopa, State of Arizona. I am over the age of eighteen years and am not a party to this action. My business address is Office of the Federal Public for the District of Arizona, 850 W. Adams St., Suite 201, Phoenix, AZ 85007. I am familiar with the business practice at the Office of the Federal Public Defender for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Federal Public Defender is deposited with the United States Postal Service or a commercial carrier with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. 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.

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District Attorney's Office
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I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct, and that I signed this document on July 10, 2020, in Phoenix, Arizona.

s/Sally Jones
Clerical Assistant
Capital Habeas Unit

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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7/10/2020
Date

/s/Stan Molever
Signature

Molever , Stan (298218)

Last Name, First Name (PNum)

Federal Public Defender - District of Arizona

Law Firm