IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re JACK WAYNE FRIEND, On Habeas Corpus.	**CAPITAL CASE** Case No.: S256914 Court of Appeal Case No.: A155955 Alameda County Superior No.: 81254

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

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I. INTRODUCTION

As both parties advocate, the Court should construe "successive petition" as used in Proposition 66 to mean a petition asserting, without adequate justification, claims that could have been presented in a prior petition, *see In re Robbins*, 18 Cal. 4th 770, 788 n.9 (1998); *In re Clark*, 5 Cal. 4th 750, 768, 782 (1993), instead of adopting a literal interpretation of the term to mean any petition filed after an inmate's first petition is adjudicated. Retaining the *Clark*/*Robbins* definition of successive petition not only avoids constitutional challenges to Proposition 66, it promotes this Court's interest in ensuring that state courts remain the primary forum for adjudicating capital prisoners' federal constitutional claims.

While the *Clark*/*Robbins* definition of successive petition would eliminate some of the retroactivity concerns discussed in the briefs, some would remain. In addressing those retroactivity issues, the Court should not be guided by Respondent's reliance on *In re Robinson*, 35 Cal. App. 5th 421 (2019). The *Robinson* Court did not address a retrospective application of Proposition 66; the court nonetheless broadly concluded that Proposition 66 can be applied to capital habeas corpus petitions filed before the enactment of Proposition 66. *Id.* at 426. This position is not advocated by either party here. Nor was it advocated in *Robinson*; the parties there never briefed retroactivity and the court did not engage in a retroactivity analysis. *Robinson* is therefore not instructive in a retroactivity analysis and has only served to mislead lower courts.

II. ARGUMENT

A. A Literal Interpretation Of Successive Petition Will Make Federal Court The Primary Forum For Adjudicating Newly Discovered Claims

The parties agree that adopting a literal definition of successive petition would raise constitutional challenges to Proposition 66. Opening Brief 25-38; Answer Brief 25-26. A literal definition would also undermine the State's interest in ensuring finality of its criminal judgments and having the first opportunity to review claims alleging constitutional error in securing those judgments. *See In re Reno*, 55 Cal. 4th 428, 495 n.30 (2012) ("As we have explained, our procedural rules are designed to regularize the postconviction review process, upholding the finality of judgments while leaving open a safety valve for the presentation of legitimate claims.").

As Respondent correctly notes, *if* a literal definition of successive petition survives constitutional challenges, then the primary forum for adjudicating successive claims based on newly discovered evidence, or new law, will shift from state to federal court. Answer Brief 26 n.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."). Respondent's implication, however, that claims barred by a literal interpretation of successive petition will likely not be considered on the merits in federal court, presents an incomplete picture of how the federal courts are likely to treat such claims. Answer Brief 26 n.8 ("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.").

In federal court, a petitioner can overcome a procedural default by showing "cause for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).[1] A petitioner can show cause by demonstrating the factual or legal basis for a claim was not reasonably available to counsel. *Strickler v. Greene*, 527 U.S. 263, 283 & n.24 (1999). To satisfy the prejudice prong, a petitioner must demonstrate actual prejudice because of the alleged constitutional violation, *Coleman*, 501 U.S. at 750, which overlaps with the merits of the claim. *See United States v. Frady*, 456 U.S. 152, 170 (1982) (explaining that "actual" prejudice infects the "entire trial with error of constitutional dimensions"); *see, e.g., Banks v. Dretke,* 540 U.S. 668, 691 (2004) ("[P]rejudice within the compass of the 'cause and prejudice' requirement exists when the suppressed evidence is 'material' for *Brady* purposes.").

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[1] This analysis assumes the federal court determines the procedural bar applied in state court is adequate and independent, which is unlikely if Proposition 66 is applied retroactively. *See Walker v. Martin*, 562 U.S. 307, 316 (2011) ("To qualify as an adequate procedural ground, a state rule must be firmly established and regularly followed." (internal quotation marks omitted)); *Fields v. Calderon*, 125 F.3d 757, 761 (9th Cir. 1997) (explaining the requirement that the state procedural rule be in existence at the time of the claimed default avoids the unfairness of applying a new rule retroactively).

Under a literal interpretation of successive petition, federal courts faced with newly discovered but successive claims by California prisoners – claims not considered successive under the *Clark*/*Robbins* definition – will find cause for the default because the basis of the claim was not previously available. *See*, *e.g.*, *id.* at 698 (holding that the petitioner had shown cause to overcome procedural default where newly discovered evidence showed the prosecutor had suppressed information about an informant). The federal court would then analyze the merits of the claim, which overlaps with the prejudice analysis, de novo. *See Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2017) (explaining that cause and prejudice are reviewed de novo); *see also Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) (holding a federal court reviews a habeas claim de novo when it was not adjudicated on the merits in state court). Thus, a literal interpretation of successive petition would not preclude federal merits review of newly discovered claims; it would make federal courts the primary forum for adjudicating them. This would undermine the State's interest in ensuring finality of its criminal judgments and having the first opportunity to review claims alleging constitutional error in securing those judgments. *In re Harris*, 5 Cal. 4th 813, 831 (1993) (The State has a "powerful interest in the finality of its judgments.").

Retaining the *Clark*/*Robbins* definition of successive petition, however, ensures an avenue for federal petitioners to exhaust their claims based on newly discovered evidence or new law in state court, thus allowing state courts to remain the primary

forum for adjudicating state prisoners' federal constitutional rights. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief."); *see also* Answer Brief 27 ("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.").

B. The Court Should Not Rely On *Robinson* In Addressing The Retroactivity Question

While Respondent argues that voters intended Penal Code sections 1509 and 1509.1[2] to apply to petitions filed *after* the effective date of Proposition 66, it cites language from *In re Robinson*, 35 Cal. App. 5th at 426-27, stating the purpose of Proposition 66 "is furthered by subjecting *all* pending petitions to the [sic] Proposition 66's new process, not just *some* of them." Answer Brief 57. Although *Robinson* did not address retrospective application of Proposition 66, the court nonetheless broadly concluded that "Proposition 66's procedures can be applied to habeas corpus petitions filed by capital defendants prior to the enactment of Proposition 66." *Robinson*, 35 Cal. App. 5th at 426. This Court should not rely on *Robinson* in addressing the retroactivity question in the present case (or any case) because

[2] All further statutory references are to the Penal Code.

Robinson did not address retrospective application of Proposition 66.

In *Robinson*, the petitioner filed his initial petition for writ of habeas corpus in this Court in February 2006, and amended it in October 2007. In October 2014, this Court issued an order to show cause on three claims and referred those claims to the Los Angeles Superior Court for an evidentiary hearing and a report and recommendation to this Court; the hearing took place in September 2016 and May 2017. *Id.* at 424. Proposition 66, which enacted sections 1509 and 1509.1, took effect on October 25, 2017. *Id.* at 425. In February 2018, this Court transferred the three claims previously referred to the superior court to that court for adjudication and denied all remaining claims. *Id.* In September 2018, the superior court denied relief on the three claims. *Id.* at 424.

Robinson filed both a petition for writ of habeas corpus and a notice of appeal under Penal Code section 1509.1 in the Court of Appeal. *See Robinson*, 35 Cal. App. 5th at 425. The Court of Appeal requested briefing regarding whether the superior court's order was appealable under section 1509.1 and whether this Court's transfer order was made under section 1509 or this Court's inherent authority. *Id.* Although unnecessary to its conclusion, the Court of Appeal's analysis queried whether Proposition 66 applies to capital petitions filed before its enactment and broadly concluded that "Proposition 66's procedures can be applied to habeas corpus petitions filed by capital defendants prior to the

enactment of Proposition 66." *Id.* at 426. The court therefore held the superior court's denial was appealable under 1509.1. *Id.*

Robinson, however, did not involve a retrospective application of Proposition 66. Statutes are not retrospective when "they relate[] to the *procedure* to be followed in the *future*." *See Tapia v. Superior Court*, 53 Cal. 3d 282, 288 (1991) (emphasis added). Unlike the present case, *Robinson* addressed a purely procedural statute that applied to an appeal initiated after Proposition 66 took effect.

A statute is retroactive if it defines past conduct as a crime, increases the punishment for such conduct, eliminates a defense to a criminal charge based on such conduct, or otherwise changes "'the legal effects of past events.'" *Id.* (quoting *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, 30 Cal. 2d 388, 394 (1947)); *see* Opening Brief 55-68. Applying section 1509.1(a) to the *initial* petition in *Robinson* simply changed the procedure by which the petitioner sought review; it had no legal consequence on his claims. Before Proposition 66 took effect, a petitioner could obtain review of the superior court's denial of his habeas petition by "filing a new petition in a higher court." *Briggs v. Brown*, 3 Cal. 5th 808, 825 (2017). After Proposition 66, a petitioner can obtain review by "appeal[ing] from a superior court's decision on an initial habeas corpus petition to the Court of Appeal." *Id.* at 825. The change in law did not preclude Robinson from raising any claim he sought to present. No substantive aspect of his appeal was foreclosed. Instead, it affected only the format of the appeal. Thus, there was no retroactive application involved.

Sections 1509(d) and 1509.1(c), however, which are implicated in this case, are not simply procedural mechanisms that change the way a petitioner seeks review of his claims. Rather, they impose restrictions on the types of claims that a petitioner can advance, foreclosing merits review that was available before Proposition 66. *See* Opening Brief 57-58. Thus, *Robinson* does not inform the retroactivity analysis the Court must engage in here. *See Aetna Cas. & Sur. Co.*, 30 Cal. 2d at 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, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.").

Moreover, although the petition in *Robinson* had been filed before Proposition 66's effective date, the superior court denied it after Proposition 66 became effective. Thus, when Robinson sought review of the superior court's denial, section 1509.1 was the law. In determining that section 1509.1 governed the case – as opposed to pre-Proposition 66 habeas procedures, in which a petitioner seeking review of a superior court denial had to file a new petition in a higher court – the Court of Appeal did not address a question of retroactivity. Applying section 1509.1's purely procedural appellate mechanism in a case denied *after* 1509.1 took effect is a prospective application of the law. *See Mayfield v. Woodford*, 270 F.3d 915, 921-22 (9th Cir. 2001) (en banc) (explaining that the merits of Mayfield's claims are governed by pre-AEDPA standards because his habeas petition was filed before

AEDPA was enacted, but that his appeal of the district court's dismissal of his habeas petition is governed by AEDPA's certificate of appealability requirements because the appeal was initiated after the effective date of AEDPA).

Because *Robinson* did not involve a retrospective application of Proposition 66, it is unsurprising that the parties never briefed retroactivity and that the court did not engage in a retroactivity analysis. The opinion never mentions Penal Code section 3, which generally prohibits retrospective application of laws, and the decision does not discuss California case law addressing retroactivity. *Compare Robinson*, 35 Cal. App. 5th at 426-27[3] *with* Opening Brief 55-61, 68-73.[4] *Robinson*'s broad declarations that Proposition 66's procedures can be applied to petitions filed before its enactment are dicta and should not be relied upon in a retroactivity analysis. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (noting that when an issue is not

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[3] The *Robinson* Court cited cases relying on various canons of statutory construction, but none of the cases addressed retroactivity. *See generally McMillin Albany LLC v. Superior Court*, 4 Cal. 5th 241 (2018); *People v. Pennington*, 3 Cal. 5th 786 (2017); *City of Montebello v. Vasquez*, 1 Cal. 5th 409 (2016); *Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745 (2018).

[4] These same concerns prompted the Office of the State Public Defender to file a request for depublication of *Robinson*. *In re Robinson*, California Supreme Court Case No. S256035 (July 11, 2019).

raised in briefs or argument or discussed in the opinion of the court, the case is not a binding precedent on such issues).[5]

Because *Robinson* did not involve a retrospective application of Proposition 66, the Court should not rely on that case in addressing the retroactivity issues presented here.

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[5] Nevertheless, lower courts are misguidedly relying on *Robinson* to assert that section 1509(d) applies retroactively to petitions filed *before* its enactment. *See, e.g.*, *In re Lucero*, San Bernardino Superior Court Case No. CHCJS1900003 (Nov. 22, 2019 Order at 7); *In re Andrews*, Los Angeles Superior Court ("LASC") Case No. A364296 (July 19, 2019 Order at 2); *In re Carey*, LASC Case No. TA042208 (July 19, 2019 Order at 2); *In re Carrasco*, LASC Case No. BA109453 (July 19, 2019 Order at 2); *In re Champion*, LASC Case No. A365075 (July 19, 2019 Order at 2); *In re Collins*, LASC Case No. LA009810 (July 19, 2019 Order at 2); *In re Cox*, LASC Case No. A758447 (July 19, 2019 Order at 1); *In re Farnam*, LASC Case No. A780838 (July 19, 2019 Order at 2); *In re Fuiava*, LASC Case No. BA115681 (July 19, 2019 Order at 2); *In re Gonzales*, LASC Case No. A524625-01 (July 19, 2019 Order at 1); *In re Harris*, LASC Case No. YA020916 (July 19, 2019 Order at 2); *In re Hawthorne*, LASC Case No. A386104 (July 19, 2019 Order at 2); *In re Hinton*, LASC Case No. TA011942 (July 19, 2019 Order at 2); *In re Howard*, LASC Case No. A646953 (July 19, 2019 Order at 2); *In re Lewis*, LASC Case No. BA001542 (July 19, 2019 Order at 2); *In re Navarette*, LASC Case No. KA002007 (July 19, 2019 Order at 2); *In re Valdez*, LASC Case No. KA007782 (July 19, 2019 Order at 2); *In re Williams*, LASC Case No. A579310 (July 19, 2019 Order at 2); *In re Watkins*, LASC Case No. KA005658 (July 19, 2019 Order at 2); *see also In re Ledesma*, Santa Clara Superior Court Case No. 72102 (Oct. 25, 2019 Order at 2) (""[T]he general retroactivity of Penal Code section 1509 was upheld in *In re Robinson* (2019) 35 Cal.App.5th 421, 426-27."). This position was not advanced by either party in *Robinson* and is not advanced by either party here.

III. CONCLUSION

Amici Curiae request this Court adopt the parties' agreed-upon definition of "successive petition" and not rely upon *Robinson* in analyzing the remaining issues of retroactivity.

Respectfully submitted,

DATED: August 10, 2020

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In accordance with California Rule of Court 8.204(c)(1), I hereby certify that the number of words contained in this brief is 2,710 words as calculated using the word count feature of the computer program used to prepare the brief.

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