IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE JACK WAYNE FRIEND,
on Habeas Corpus,

No. S256914

On review from the decision of the Court of Appeal,
First Appellate District, Division Three, Case No. A155955,
denying a certificate of appealability regarding
Alameda County Superior Court, Case No. 81254A
The Honorable C. Don Clay, Judge

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION SUPPORTING NEITHER PARTY

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APPLICATION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE SUPPORTING NEITHER PARTY

To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of neither party pursuant to rule 8.520(f) of the California Rules of Court.[1]

Applicant's Interest

CJLF is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance

1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

There is not yet any argument before the court supporting the implementation of Proposition 66's successive petition reform in accordance with its plain meaning, consistent with the clear and unambiguous explanation given to the voters by the Legislative Analyst, and in a manner that will actually implement the unmistakable purpose of the initiative. Argument of that position is essential for an informed decision of this case. The attached brief makes that argument and is ready for immediate filing.

In furtherance of its mission, CJLF has been extensively involved over a long period with efforts to reform the law of habeas corpus to prevent its misuse in obstructing rather than achieving justice. This is an area of law where the rights and interests of victims of crime and the law-abiding public have been violated most egregiously. CJLF has suggested the rules adopted in landmark opinions of the United States Supreme Court. (See *Teague v. Lane* (1989) 489 U.S. 288, 300 (plur. opn. of O'Connor, J.); *McCleskey v. Zant* (1991) 499 U.S. 467, 523 fn. * (dis. opn. of Marshall, J.); see also *White v. Woodall* (2014) 572 U.S. 415, 426 (citing law review article by CJLF's Legal Director for interpretation of key habeas reform statute).)

CJLF has also been heavily involved in habeas corpus reform efforts in California. CJLF's Legal Director (and counsel in this case) is the principal drafter of the two sections of Proposition 66 at issue here, Penal Code sections 1509 and 1509.1. During the campaign he wrote the op-ed making the case to the voters for Proposition 66 in the largest newspaper in the state. (See Scheidegger, *A Better Death Penalty for California*, L.A. Times (Sept. 29, 2016), https://www.latimes.com/opinion/op-ed/la-oe-scheidegger-pro-prop-66-20160929-snap-story.html.) He represented the initiative committee in argument before this court in *Briggs v. Brown* (2017) 3 Cal.5th 808 on the validity of the initiative.

The return of the present case to California courts is exactly what the successive petition reform of Proposition 66 was intended to prevent. The petitioner committed murder and robbery 36 years ago. (See *People v. Friend* (2009) 47 Cal.4th 1.) He has no credible claim that he is innocent of the crime or ineligible for the penalty (see Order Denying Petition for Writ of Habeas Corpus, Alameda Sup. Ct. No. 81254A, pp. 5-6) and therefore there is no miscarriage of justice within Proposition 66's exception. The petitioner's initial habeas corpus petition was denied in 2015, and that should have been the end of the case in state courts. As explained in the attached brief, any claim that had not been presented to a California court by that time should have been found defaulted by the federal court, which should then have proceeded with its "cause and prejudice" analysis, not kick the case back to state court. Instead, this case is still in state court five years after it should have been finished. The federal courts could have and should have decided it in that time, and the case should now be completed entirely.

Yet petitioner urges on this court a misinterpretation of Proposition 66 that would retain jurisdictional ping-pong as the norm rather than the exception that the U.S. Supreme Court said it should be. (*Rhines v. Weber* (2005) 544 U.S. 269, 277.) Surprisingly, the Attorney General supports this position rather than vigorously opposing it as one would expect.

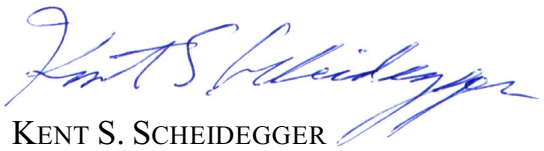
Need for Further Argument

CJLF is familiar with the arguments presented on both sides of this issue and believes that further argument is necessary.

The brief is submitted with this application and ready for immediate filing. The attached brief brings to the attention of the court additional authorities and argument relevant to the question presented.

August 31, 2020

Respectfully Submitted,



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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

SUMMARY OF ARGUMENT

Prior to Proposition 66, this court frequently used the term "successive petition" in the ordinary sense of the words, i.e., a second, third, etc. petition after an initial petition attacking the same judgment had been decided. That is also how the term is used in federal law. The artificial meaning the parties propose was neither well-established nor regularly used before Proposition 66.

The parties' proffered definition would defeat the clear purpose of the successive petition reform to "tackle the same problems" as *In re Reno*, but do it more effectively with stronger medicine. The Legislative Analyst unmistakably told the voters that the reform would apply to all petitions after the first, and nothing else in the text or ballot materials is contrary.

There is no serious doubt of the constitutionality of the reform as written. The U.S. Supreme Court upheld a more severe restriction of successive petitions in *Felker v. Turpin*. The courts of every state but one to decide the

constitutionality of such limitations on suspension clause or due process grounds have come to the same conclusion.

ARGUMENT

I. Before Proposition 66, the term "successive" did not have the established, technical, and artificial meaning that petitioner claims.

Both petitioner and, surprisingly, the Attorney General contend that the term "successive petition" had a certain " 'clearly established definition' " prior to Proposition 66. (See Appellant's Opening Brief ("AOB") 22, quoting Answer to Request for Cert. of Appealability 2-3.) The definition that they claim was clearly established is that the question of whether the petitioner had adequately explained his failure to include his new claims in the prior petition was incorporated in the question of whether the petition was "successive" rather than whether the court should proceed to the merits despite the petition being successive. (See AOB 23.)

Amicus does not dispute that a clearly expressed and consistently employed specialized definition of a term would have considerable weight in interpreting the same term in later legislation, although it would not necessarily be controlling if other indications pointed a different way. (See Parts II and III, *infra*.) The primary problem with the parties' argument is that there simply is no such clear or consistent usage. The passages the parties cite are, for the most part, equally consistent with the view that "successive" in pre-Proposition 66 California habeas law meant what it means in ordinary usage and federal habeas law, and that the adequacy of petitioner's explanation went to the question of whether particular claims within a petition should be considered on the merits despite the petition's "successive" status. Even more important, there are other passages in the same cases that unambiguously use the word "successive" in the latter sense.

We will return to the California habeas usage in Part I.B., *infra*, but first some background is needed on the usage of the term generally and its usage

in federal habeas corpus law, a more thoroughly litigated and developed body of law than California's.

A. Ordinary and Federal Usage of "Successive."

The starting point for interpretation is the ordinary meaning of the language used. (See *People v. Valencia* (2017) 3 Cal.5th 347, 357.) The Attorney General wisely concedes that "[t]he ordinary and usual meaning of the word 'successive' is 'following in uninterrupted order; consecutive.'... Commonly understood, successive means anything after the first." (Answer Brief ("AB") 22, quoting American Heritage Dict. (4th ed. 2007) p. 1378.)

Just a few months ago, this court considered a truancy statute with subdivisions that expressly addressed the consequences of first, second, third, and fourth truancies. The court repeatedly referred to them as "successive truancies." (See *In re A.N.* (2020) 9 Cal.5th 343, 362.) Similarly, *In re Halko* (1966) 246 Cal.App.2d 553, 554, a quarantine case, refers to "successive orders of isolation" meaning simply one after another issued to a patient who remained contagious upon the expiration of the previous order. The straightforward meaning of "successive petition," then, is a second, third, fourth, etc. petition.

We could add further examples, but these are sufficient. The ordinary meaning is clear, and the parties arguing for a different meaning must make a strong showing for their alternative definition. They cannot.

In 1948, Congress wrote a discretionary rule into 28 U.S.C. § 2255 for federal prisoners, using the term "second or successive." (See *Sanders v. United States* (1963) 373 U.S. 1, 4.) A similar rule for state prisoners, though not using the term, was written into the habeas corpus statute. (See *id*. at p. 11 & fn. 5.) It is evident from the discussion of *Sanders* that "successive" simply means another petition attacking the same judgment after a first has been decided. The question of whether the successive petition should be considered on the merits or dismissed was separate from the question of whether it is

successive. The term applied to both state prisoners' habeas corpus petitions and federal prisoners' motions to vacate, and it applied to both repeated claims and new claims, though the criteria for whether to proceed to the merits differed between repeated and new claims. (See *id*. at pp. 15-19.)

The term "successive" appeared again in the Rules Governing Section 2254 Cases in the United States District Courts ("Federal Habeas Rules"). As originally promulgated in 1976 and amended by Congress before taking effect, Rule 9(b) read:

> "(b) SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." (See former Habeas Rule 9(b), 28 U.S.C. (2000 ed.) foll. § 2254; see also *In re Clark* (1993) 5 Cal.4th 750, 788, fn. 23, quoting Rule 9 as it existed at the time.) [2]

Three points are noteworthy here. First, the caption says "Successive Petitions" while the text says "[a] second or successive petition ...." The "second or" language was not significant, and we see the same interchangeability in the opinions of this court. (See Part I.B. *infra*.) Second, it was not deemed necessary to define "successive petition." Third, the criteria for when the petition may be dismissed as successive, rather than decided on the merits despite successiveness, are stated separately, not incorporated into any definition of "successive petition."

For a time, there was a dichotomy in terminology in the federal system. Federal Habeas Rule 9(b) unambiguously used the term "successive petition" to refer to both petitions seeking to relitigate previously rejected claims and petitions raising new claims. However, some Supreme Court decisions used

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2. Rule 9 was amended in 2004, removing language supplanted by the Antiterrorism and Effective Death Penalty Act of 1996, discussed below.

"successive petition" to mean only the former, while the latter were considered under the term "abuse of the writ." (See *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 444, fn. 6 (plur. opn. of Powell, J.).) This usage is obsolete in the federal system. *Slack v. McDaniel* (2000) 529 U.S. 473, 486 recognizes that "second or successive" under Rule 9(b) incorporates both types. (See also *Felker v. Turpin* (1996) 518 U.S. 651, 664 [AEDPA "successive" includes "abuse of the writ"].)

In 1996, Congress rewrote § 2244 as part of a sweeping reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The new section 2244, subdivision (b) applied the term "second or successive" to state prisoner cases for the first time in statute (see *Magwood v. Patterson* (2010) 561 U.S. 320, 337-338), following the pattern of Federal Habeas Rule 9(b) but dramatically tightening the criteria for when a successive petition may be considered on the merits. The criteria are discussed in Part IV, *infra*.

The Attorney General notes that not every second-in-time petition is considered "successive" in federal usage. (AB 30-31.) That is correct as far as it goes, but any implication that the federal usage is even remotely as loose as the parties' proposal in this case is not correct.

From the beginning, the "successive petition" problem has been one of prisoners seeking to collaterally attack the judgment by which they are detained "for second and third bites at the same piece of fruit." (See *In re Reno* (2012) 55 Cal.4th 428, 497.) The federal cases finding a second-in-time petition not successive (as opposed to eligible for consideration despite being successive) are cases not presenting that problem. A second petition is not "successive" if the first was not an actual bite or if the petitioner was biting a different apple.

Claims of mental incompetence for execution (see *Ford v. Wainwright* (1986) 477 U.S. 399) were addressed in *Stewart v. Martinez-Villareal* (1998) 523 U.S. 637 and *Panetti v. Quarterman* (2007) 551 U.S. 930. *Ford* claims are

unique in that they are not collateral attacks on the judgment of conviction and sentence. The judgment may be completely proper, but it cannot be executed while the prisoner is insane. (See *Ford*, *supra*, at pp. 409-410.) Mental competence varies with time, however, so *Ford* claims are not ripe when the initial habeas petition is filed. (See *Panetti*, *supra*, at p. 943.)

Therefore, in the "unusual posture presented" by *Ford* claims, a habeas corpus petition presenting such a claim as soon as it becomes ripe is not deemed successive, whether it is made for the first time as in *Panetti* (see 551 U.S. at p. 945) or reasserted after previously having been dismissed as premature as in *Martinez-Villareal*. (See 523 U.S. at pp. 644-645.) In the latter situation, the Supreme Court noted that the successive petition rule " 'constitute[s] a modified res judicata rule,' " and a claim previously dismissed as legally premature is not "barred under any form of res judicata." (*Ibid*., quoting *Felker v. Turpin*, *supra*, 518 U.S. at p. 664.)

The problem of state prisoners arriving in federal court with claims they did not exhaust in state court is unique to federal habeas corpus. However, the U.S. Supreme Court's different treatment of two modes of proceeding sheds important light on the issue in this case.

It often happens in federal habeas corpus cases, particularly capital ones, that a petitioner has both claims that he did present to the state court and claims that he did not. (See *Reno*, *supra*, 55 Cal.4th at pp. 442-443.) The claims not presented are considered "unexhausted" if a state-court remedy is still available and "defaulted" if not. (See *Gray* v. *Netherland* (1996) 518 U.S. 152, 161-162.) Before *Rhines v. Weber* (2005) 544 U.S. 269, the rule of *Rose v. Lundy* (1982) 455 U.S. 509 gave a petitioner with unexhausted claims two choices. He could take dismissal of the entire petition due to the unexhausted

claims, or he could dismiss the unexhausted claims and proceed with only the exhausted ones. (See *Lundy*, *supra*, at p. 520.)[3]

Whichever path the petitioner chose, though, he would likely receive only one federal review of his case. If he chose to proceed with only the exhausted claims, he would find himself barred by the successive petition rule if he returned with a new petition after exhausting the other claims in state court. (See *id*. at pp. 520-521 (plur. opn. of O'Connor, J.).)

Slack and *Martinez-Villareal* held what *Rose* implied. The petitioner who takes dismissal of his entire petition under the "total exhaustion" rule can return to federal court after exhaustion. His second-in-time petition is not "successive" because he did not receive a decision on his claims the first time. (See *Slack v. McDaniel*, *supra*, 529 U.S. at p. 487.) Yet *Slack* also reaffirmed what the plurality in *Rose* said about the petitioner who chooses to proceed with only the exhausted claims. He *is* subject to the successive petition rule if he files a second petition with the previously unexhausted claims. (See *ibid*., quoting *Lundy*, *supra*.)

The thread that ties these together is whether the petitioner has received a decision on the "bottom line" of the usual habeas corpus petition—whether the petitioner is in custody pursuant to an invalid judgment. If the entire petition is dismissed because it contains unexhausted claim he has not received such a decision, and the second-in-time petition is not successive. If he dismisses the unexhausted claims and proceeds with the rest, he has litigated to decision on the merits the question of whether the criminal judgment is valid, and a second petition on that question is successive.

The final variation on the "not successive" theme comes in *Magwood v. Patterson* (2010) 561 U.S. 320. Magwood successfully attacked the first

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3. In the peculiar classification of federal habeas corpus, "exhausted" claims include both the ones presented to the state courts and the ones defaulted and no longer available there. See *infra* at p. 32.

judgment against him as to penalty, but the state trial court resentenced him and entered a new judgment. (See *id*. at p. 326.) His habeas corpus petition challenging the new judgment was not successive, even though it included a claim that could have been raised in his attack on the first judgment. (See *id*. at 332-333.) It was his first bite at a new apple.

Magwood rejected the state's argument that a single habeas corpus petition can be parsed, with some claims being declared successive and some not. The statute refers to "a second or successive habeas corpus application," and this "applies to an *application* as a whole ...." (*Id*. at p. 335, fn. 10, italics in original.) "Application" is interchangeable with "petition." (See *id*. at p. 324, fn. 1.) A statute that establishes a rule for successive petitions or applications cannot reasonably be construed to establish a rule for some claims within a petition and not others. The federal statute establishes rules for when various claims presented in successive applications may be considered on the merits (see 28 U.S.C. § 2244(b)), but whether the application is successive at all is determined at the application level, not the claim level. (See *Magwood*, *supra*, 561 U.S. at pp. 334-335.)

Magwood rejects the argument that whether the "second or successive" designation applies depends on whether the petitioner had the opportunity to raise the claim earlier. The exceptions to the dismissal requirement include some claims that could not have been raised earlier and not others. A definition of "successive" that excluded all claims that could not have been raised earlier "would considerably undermine–if not render superfluous" this language in the statute. (See *id*. at p. 335.)

The Attorney General's argument in the present case that his approach draws support from federal precedent (AB 30) is not correct. The U.S. Supreme Court has expressly rejected the notions that "successive petition" is determined by claim rather than by petition and that it includes a broad evaluation of whether a claim was available earlier.

B. California Usage.

The threshold question in this case is whether, before Proposition 66, the term "successive petition" had an idiosyncratic definition in California different from ordinary meaning and different from federal usage, i.e., that the lack of justification is included in the definition of "successive petition" rather being a separate question of whether the court should address the merits despite the petition's successive status. Neither party has cited a statement from any pre-Proposition 66 successive petition case that unambiguously establishes such an odd and unnatural use of the word. The best they can muster is a bit of unsupported dictum in a footnote from a case that was decided on other grounds. (See *infra* at p. 27.) On the other hand, there are many uses of the term in the cases that cannot be reconciled with this proposed definition.

1. Reno.

Just four years before Proposition 66, this court rendered a major decision on successive petitions in *In re Reno* (2012) 55 Cal.4th 428. *Reno* should therefore be the first place to look for an understanding of what the term "successive petition" was understood to mean at the time of enactment. Petitioner claims that the usage in *Reno* supports his position. (AOB 24.) In fact, the section of *Reno* he cites refutes it.

Reno attempted to deal with the crushing burden on California courts, and particularly this court, imposed by the abusive writ practices of the capital defense bar. That abuse is a problem nationwide, and it "threatens the court's ability to function." (See *Reno*, *supra*, 55 Cal.4th at p. 515.) One measure taken was the adoption of a page limit.

Reno refers to the page limit it imposes as applying to "second and subsequent petitions in capital cases." (*Id*. at p. 521.) Petitioner claims that the *Reno* court chose this language to mean something broader than "successive," and conversely that the drafters of Proposition 66 used a narrower term in

choosing the word "successive." (AOB 24.) However, on page 517, the *Reno* court referred to the same limit as "our proposed limit of 50 pages for *successive petitions*." (Italics added.) Two pages later, the court again refers to " '[a] page or word limit on *successive petitions*' " while quoting petitioner's argument, with no indication that term is incorrect. (*Id*. at p. 519, italics added.)

What the page limit discussion in *Reno* actually establishes is that the court used the terms "successive" and "second and subsequent" interchangeably. Nor is this the only place in the opinion to do so. On page 457, the court refers to "second and subsequent petitions" in one sentence and refers to the same petitions in the next sentence as "such successive petitions."

The *Reno* opinion uses the terms "successive petition" or "successive habeas corpus petition" 19 times, by our count. (See *Reno*, *supra*, 55 Cal.4th at pp. 443, 453 [twice], 457, 458, fn. 14 [twice], 459, fn. 15, 464 [twice], 466, 472, 486, 497, 503, 511, 517 [thrice], 519.) Not a single one of these unambiguously uses the term to refer to an unjustified petition after the first, as opposed to any petition after the first. Some of them are unambiguously the latter usage. For example, the court says that under the law at that time, "[a] change in the law will also excuse a successive or repetitive habeas corpus petition." (*Id*. at p. 466.) If "successive" by definition meant unexcused, that would make no sense. The court would have said "a second petition justified by a change in the law is not successive." But it did not, because that is not what "successive" meant.

In another passage on the same point, *Reno* draws the distinction at issue here with crystal clarity. The court notes the change wrought by *Atkins v. Virginia* (2002) 536 U.S. 304, changing intellectual disability (then called mental retardation) from a mitigating factor to a categorical exclusion. "This court issued orders to show cause in some of those cases *despite the successive nature of the petitions* involved, recognizing *Atkins* represented a change in the law *excusing* both the delay and *successive nature of the petitions*." (*Reno*,

supra, 55 Cal.4th at p. 457, fn. 14.)[4] It is scarcely possible to say it any more clearly. Before Proposition 66, a circumstance that prevented making the claim in the initial petition did not change the nature of the later petition as successive. It provided an excuse or justification that warranted reaching the merits "despite the successive nature."

The *Reno* court also addressed the very common claims that successive petitions are justified by ineffective assistance of counsel when the alleged ineffectiveness is merely that prior counsel omitted an arguable claim. "We reiterate that the 'mere omission of a claim "developed" by new counsel does not ... *warrant consideration of the merits of a successive petition*.' " (*Id*. at p. 503, quoting *In re Clark*, *supra*, 5 Cal.4th at p. 780.) Again, that would make no sense if "successive petitions" were limited by definition to those without justification, since ineffective assistance of prior counsel is a justification. (See *ibid*.) Justification permits "consideration of the merits of a successive petition"; it does not save a second or subsequent petition from "successive" status.

The Attorney General urges this court to "construe the term [successive petition] to incorporate well-established judicial exceptions to the procedural bar on subsequent petitions." (AB 21.) The Attorney General cites *Reno* at page 452 for a description of the pre-Proposition 66 exceptions but does not appear to be claiming that this passage incorporates the exceptions in the definition of "successive." (AB 27.) No such argument could credibly be made, as the word "successive" does not appear on this page at all.

The Attorney General concedes that the passage of *Reno* at page 466 is inconsistent with his proposed definition and uses the term to refer to all petitions after the adjudication of the first, as amicus argues above. (AB 22.) However, the Attorney General also claims that a passage on page 453, in

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4. Proposition 66 continues to accommodate the *Atkins* situation, as discussed *infra* at p. 39.

which *Reno* quotes *In re Clark*, uses the term to incorporate the exception into the definition, contradicting the usage in multiple places elsewhere in the same opinion. (AB 28-29.) That would be very odd, if true. This court is not normally so sloppy with its language. Not surprisingly, it is not true. The passage merely notes the waste of scarce judicial resources imposed by successive petitions. Nothing in this observation speaks to the question of whether the exception for justified petitions is inside or outside the definition of "successive."

The Attorney General follows this inapposite citation with the assertion that "[t]hese 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." (AB 29, italics added.) To cite *Reno* for *that* proposition is ludicrous. Even Reno's petition would not be "successive" by that definition, as it included some claims that could not have been raised earlier. (See 55 Cal.4th at p. 462, fn. 17 [claims 125 and 127].) Yet the court denounced the petition as one which "exemplifies abusive writ practice." (*Id*. at p. 523.) The Attorney General's proposed "entirely" rule appears to be an effort to cope with the problem of defining a "successive petition" versus a "successive claim," as noted in the discussion of *Magwood*, *supra*, at p. 19. But as the *Magwood* court realized, the correct answer is to separate the question of whether a petition is successive from the question of whether claims within it may be considered on the merits anyway.

2. Clark.

Before *Reno*, this court's primary opinion on successive petitions was *In re Clark*. Reading this opinion carefully, we see the same pattern of usage as in *Reno*. At multiple points, the usage is inconsistent with the notion that lack of justification is incorporated in the definition of "successive petition." At no time does the court use that term in a way that unambiguously indicates the contrary. The passages cited by the parties are at best ambiguous in that regard.

Again, it is essential to distinguish the designation of a petition as "successive" from the operation of the successive petition rule. Application of the rule may lead to the result that the court proceeds to the merits "despite the successive nature of the petition[]" (see *Reno*, *supra*, 55 Cal.4th at p. 457, fn. 14), without altering the nature of the petition as successive. Statements that particular repeated petitions will be considered on the merits and giving reasons for such consideration therefore do not, without more, support the claim that the justification question is included in the definition of "successive."

Clark traces the history of the development of both judge-made and statutory limitations on successive petitions on pages 767 to 774, but at no point in this discussion does the court say that a second or subsequent petition with justification for not making the claim earlier is not successive as opposed to decided on the merits despite being successive. At the conclusion of the discussion, *Clark* uses the term in a way that is definitively to the contrary. "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." (5 Cal.4th at p. 774.)

Beyond serious dispute, this statement of the rule separates the status of the petition as successive from the question of whether it will nonetheless be entertained on the merits. It contemplates three distinct steps. The petition is recognized to be successive, the petitioner must justify the failure to present the claims earlier, and only if the court accepts that justification does it proceed to the merits.

This statement is immediately followed by the caption for Part III.B.2 of the opinion, "Justification for Delayed and/or Successive Petitions." (*Ibid*.) That caption would make no sense if justified subsequent petitions were not "successive." The caption is followed by a sentence that contemplates the same three-step process as the sentence before the caption, but with the focus on the court's decision rather than the petitioner's pleading requirement.

> "Before considering the merits of a second or successive petition, a California court will first ask whether the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether that explanation justifies the piecemeal presentation of the petitioner's claims." (*Ibid*.)

Again, this wording is inconsistent with the notion that lack of justification is subsumed within the definition of "successive." If the court decides "that explanation justifies the piecemeal presentation" then the court "consider[s] the merits," but the petition remains "a second or successive petition." On the next page, the *Clark* court refers to "unjustified successive petitions." (*Id*. at p. 775.) If successive petitions were unjustified by definition, the word "unjustified" here would be redundant. This passage would instead read "unjustified subsequent petitions" or "successive petitions." It reads the way it does because "unjustified" and "successive" are distinct concepts.

Clark noted that California law allowed a valid claim of ineffective assistance of prior habeas corpus counsel to serve as justification, contrary to federal law at the time. (*Id*. at p. 780.) However, cautioning that mere omission of a claim is not alone sufficient to establish ineffective assistance, the court said it would not "warrant consideration of the merits of a successive petition." Again, if successive petitions were by definition unjustified, it would say something like "mere omission of a claim ... will not prevent a petition from being considered successive."

Petitioner contends that *Clark* "used the term to refer to petitions presenting claims that were previously rejected or 'known to the petitioner at the time of a prior collateral attack on the judgment.' " (AOB 23, citing *Clark*, *supra*, 5 Cal.4th at p. 768.) The sentence quoted does not use the term at all, much less define it. It says, "The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of the prior collateral attack on the judgment." This is followed by a quote from *In re Connor* (1940) 16 Cal.2d 701, 705: "In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings

attacking the validity of the judgment against him." This usage is fully consistent with the idea that "successive" is defined according to its ordinary meaning, but the rule allowed a successive petition to go forward if based on previously unknown grounds. On the same page, petitioner notes the citation to *Clark* in *In re Robbins* (1998) 18 Cal.4th 770, 787, fn. 9, which is discussed below.

Finally, petitioner cites *Clark*, with a "see also" cite in addition to *Robbins*, for the proposition that a " 'subsequent' petition is not considered 'successive' " if the claims could not have been raised earlier or the omission is adequately explained, citing pages 767-770, 774, and 780 of *Clark.* (AOB 24.) Nothing on these pages supports the "not considered successive" assertion. Pages 767-770, as noted above, trace the development of the rule regarding when a successive petition will or will not be considered on the merits. Page 774, as discussed above, contains two statements and a heading that flatly contradict the "not considered successive" notion. Page 780, also discussed above, similarly contains one statement that contradicts that notion and nothing that supports it.

The Attorney General recognizes that *Clark* "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." (AB 22, citing *Clark*, *supra*, 5 Cal.4th at pp. 768, 774.) However, the Attorney General also quotes two statements from *Clark* that he says support incorporating the lack of justification into the definition of whether a petition is successive. (See AB 28.) Neither does.

On page 769, *Clark* says, "This court has never condoned abusive writ practice or repetitious collateral attacks on a final judgment. Entertaining the merits of successive petitions is inconsistent with our recognition that delayed and repetitious presentation of claims is an abuse of the writ." This is much too thin a reed to support the notion that only the abusive petitions are "successive." Given the context and the reality that most successive petitions are

unjustified, this statement should be understood to indicate that entertaining the merits of successive petitions would generally amount to condoning abuse of the writ, but there are exceptions. Indeed, just two paragraphs later the *Clark* court expressly limits its discussion to those successive petitions that "present[] additional claims that could have been presented in an earlier attack." (5 Cal.4th at p. 770.)

The Attorney General quotes that same paragraph for *Clark*'s denunciation of the waste of resources caused by successive petitions, also citing *Reno*'s quotation of this sentence (55 Cal.4th at p. 453) for the same. (AB 28-29.) Well, successive petitions as a group do cause a huge waste of resources. Habeas corpus petitions generally have long been notorious for being mostly meritless. Justice Jackson famously compared the search for a meritorious habeas corpus petition to searching a haystack for a needle. (See *Reno*, *supra*, 55 Cal.4th at p. 453, quoting *Brown v. Allen* (1953) 344 U.S. 443, 536-537 (conc. opn.).) Justice Jackson's haystack was habeas corpus petitions generally, but as *Reno* recognized, the chance of a successive petition containing a valid claim is even less. (See *id*. at pp. 457-458.)

The *Clark* court's decrying of the waste caused by successive petitions generally does not come close to supporting an idiosyncratic definition of the term "successive petition." That is particularly true when the term is unambiguously used to refer to second and subsequent attacks on the same judgment after decision of the first elsewhere in the same opinion.

3. Robbins.

Petitioner cites only one pre-Proposition 66 statement of this court that can plausibly be read to indicate that the term "successive" is narrower than "subsequent." (See AOB 23, 24.) However, this statement need not be read this way, and it is dictum in a case that was decided on other grounds.

In re Robbins considered a habeas corpus petition filed in 1995 after this court had affirmed on direct appeal in 1988 and denied a habeas corpus

petition on the merits in 1989. (See 18 Cal.4th at p. 783.) This petition raised both timeliness and successiveness issues. The court chose to decide it on timeliness, and the footnote cited by the parties explains why the court did not decide the successiveness issue. It begins, "We have stated that claims presented in a 'subsequent' petition that *should have been* presented in an earlier filed petition will be barred as 'successive' unless the petitioner 'adequately explains' his or her failure to present *all* claims in the earlier filed petition." (*Id*. at p. 788, fn. 9, citing *In re Horowitz* (1949) 33 Cal.2d 534, 546-547; Clark, *supra*, 5 Cal.4th at pp. 768, 782.) On its face, this sentence could be read to mean that "subsequent" and "successive" mean different things. However, *Robbins* does not purport to be deciding this. It expressly says that it is merely noting what the court has previously stated. Reference to the authorities cited is therefore necessary to see if either of them say that. They do not.

The word "subsequent" does not appear in the passage from *Horowitz* at all. (*In re Horowitz* (1949) 33 Cal.2d 534, 546-547.) The word "successive" appears only in a quote from *In re Drew* (1922) 188 Cal. 717, 722. It is used there in its ordinary sense, not as any specialized term. The *Horowitz* passage states the policy regarding when successive petitions may be denied without reaching the merits, but it does not say or imply that the petitions that are decided on the merits are somehow not "successive."

The footnote cites page 768 of *Clark*. That page also does not use the word "subsequent." It discussed *Horowitz*, *Drew*, and other cases. As discussed *supra* at page 25, nothing on this page is inconsistent with the use of "successive" in its ordinary sense.

Finally, the footnote cites page 782 of *Clark*. This citation has no bearing on the present question. At the top of the page, the *Clark* court wraps up a discussion about denying a petition before the petitioner can add new claims. Then it concludes that Clark had not justified his omission of the claims from the prior petition, but the court will base its decision on delay instead.

The *Robbins* footnote can alternately be read to use the phrase "barred as 'successive' " as shorthand for "barred under the successive petition rule," a rule that includes the distinct concepts of successiveness and justification. The authorities cited in the footnote all support the proposition that a successive petition may be denied under the successive petition rule if the omission of the claims is not justified. None of them support the proposition that the word "successive" has a specialized meaning in California habeas corpus law different from its ordinary meaning. Given the frequent and unambiguous use of "successive" in its ordinary sense in cases that discuss the successive petition rule in depth, this bit of awkwardly phrased dictum in a footnote in a case decided on other grounds should not be given significant weight.

4. Conclusion.

Petitioner relies on the presumption that words that have been construed by the courts have the same meaning in a subsequently enacted statute. (AOB 23.) That is true with the important qualification that this presumption is for "a *well-settled* judicial construction." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046, italics added.) The usage of the term "successive petition" as excluding those for which the petitioner has provided justification is not remotely well-settled in California habeas corpus law.

This court's two primary successive petition decisions prior to Proposition 66 repeatedly use the term "successive petition" to refer to all repeated attacks on the same judgment, with the justification being a separate consideration on whether to proceed to the merits nonetheless. The presumption petitioner cites does not apply.

The argument for a technical rather than ordinary meaning is further weakened by the fact that this is an initiative rather than a legislative statute. The parties' artificial meaning of "successive" is not "a meaning defined by statute or commonly understood by the electorate." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 902.) The court can be confident, as it was in

Robert L., that the average voter would have understood the term in its ordinary meaning. (See *ibid.*)

We will show in the succeeding parts that the ordinary meaning of the term is consistent with the purpose, the structure, and the explanation provided to the voters in the voter guide. All the factors considered in interpretation of initiatives point in the same direction and against the parties' contention. Further, the constitutional issues that the Attorney General raises are not substantial and in any event are overwhelmed by the combined weight of all the other factors.

II. Giving "successive" an artificial meaning that nullifies the reform would be contrary to the clear purpose of the initiative.

Briggs v. Brown (2017) 3 Cal.5th 808, 844 noted that the successive petition reform in Proposition 66 "tackles the same problems" addressed in *In re Reno*. The problem is the massive delay, burden, and expense created by "the prevalence of meritless successive writ petitions" (*id*. at p. 843) filed by petitioners returning from federal court with "exhaustion petitions." The purpose of the successive petition reform was to fix that problem. Understanding why the parties' proffered misinterpretation of section 1509 would defeat that purpose requires an explanation of the root causes of the problem.

A. The Problem.

1. Successive petitions.

In re Clark (1993) 5 Cal.4th 750 was this court's effort to bring some kind of order to the chaos that habeas corpus had become, placing some restraints on the rampant abuse of the process that was choking the courts and blockading justice. Similar efforts were undertaken in other jurisdictions by both courts and legislatures. The U.S. Supreme Court adopted a new successive petition rule in *McCleskey v. Zant* (1991) 499 U.S. 467, 493 after the lax standard of *Sanders v. United States*, *supra*, had failed to adequately

restrain abuse. Five years later, Congress determined that *McCleskey* had not gone far enough and prescribed stronger medicine. (See 28 U.S.C. §§ 2244(b), 2255(h).) In sister states as well, restraints were placed on successive petitions and sometimes had to be tightened further when the first attempt "proved itself inadequate to stem the tide of successive petitions and was abandoned." (*Clark*, *supra*, at p. 792 [discussing Pennsylvania's experience].)

Regrettably, *Clark* also "proved itself inadequate." The sorry story of abuse, waste, and delay related by this court in *Reno* demonstrates that strong medicine was needed, and the mild changes in *Reno* itself were not much above a placebo.

Part of the problem identified in *Reno* was intentional abuse by the capital defense bar, burying the courts with massive petitions making over a hundred claims, many of which are patently without merit. (See *Reno*, *supra*, 55 Cal.4th at p. 515; see also Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 6 (1989), reprinted in 135 Cong.Rec. 24694, 24695, col. 1 ("Powell Com. Report").) But another part lies with the way this court crafted its successive petition rule in *Clark*. The court apparently did not consider the interaction between state and federal habeas corpus review, and the exceptions were not designed to make the gears mesh.

The process of review of capital cases *should*, in most cases, take a relatively smooth path through direct review, one state habeas corpus proceeding, one federal corpus proceeding, consideration of executive clemency, and, if none of those reviews results in a change in the judgment, execution of the sentence. (See Powell Com. Report, *supra*, at p. 6, 135 Cong.Rec. at p. 24695, col. 2 ["one complete and fair course of collateral review in the state and federal system"].) This path would be long, but not nearly as long as capital cases take at present.

2. Exhaustion.

Reno made this observation regarding the interaction of the two systems:

> "In the event this court denies the habeas corpus petition, all (or nearly all) capital defendants proceed to file a petition for a writ of habeas corpus in federal district court. But because the federal courts require claims presented there to have first been exhausted in state court [citations], capital defendants quite typically file a second habeas corpus petition in this court to raise unexhausted claims. Third and fourth petitions are not unknown. The potential for delay, as litigants bounce back and forth between this court and the federal courts, is obvious." (*Reno*, *supra*, 55 Cal.4th at pp. 442-443; see also Powell Com. Report, *supra*, at p. 2, 135 Cong.Rec. at p. 24694, col. 3.)

But there is more to the exhaustion story than that. "Exhausted" in federal habeas parlance does not necessarily mean presented to the state courts. Not all cases need to come back in a game of jurisdictional ping pong. Quite the contrary, the U.S. Supreme Court has said the procedure employed for this back-and-forth "should be available only in limited circumstances." (*Rhines v. Weber* (2005) 544 U.S. 269, 277.) Yet in California, this happens in nearly all capital cases.

Generally, a requirement that a claimant exhaust remedies in the primary forum before turning to another one means that he must present it in the primary forum in accordance with its rules. If one must present a claim to an administrative agency before filing a court suit, for example, and he fails to do so by the administrative deadline, the claim remains unexhausted and he also loses the right to sue in court. (See *Woodford v. Ngo* (2006) 548 U.S. 81, 89-91 (administrative law generally); *id*. at pp. 93-96 (Prison Litigation Reform Act).)

Federal habeas corpus for state prisoners, however, has a peculiar approach. (See *id*. at pp. 92-93 [contrasting habeas with administrative law].) "In habeas, state-court remedies are described as having been *'exhausted' when they are no longer available*, regardless of the reason for their unavail-

ability. [Citation.] Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted ...." (*Ibid*., italics added.)

That does not mean that the petitioner gets a federal hearing on the merits, though. "[T]he procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." (See *Gray* v. *Netherland* (1996) 518 U.S. 152, 161.) Nor does it mean that the case must return to state court for a decision on whether it is defaulted. In *Gray*, Virginia had a *Clark*-type rule on successive petitions. The Federal District Court determined that the factual basis of the claim was known to the petitioner, and therefore his claim was defaulted under state law. (See *id*. at pp. 161-162.) Claims which are clearly defaulted under state law are not supposed to come back to state court for confirmation of the obvious. The federal court is supposed to find them defaulted and then proceed to the question of whether the petitioner can meet the cause and prejudice or miscarriage of justice exceptions.

"Of course, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred." (*Harris v. Reed* (1989) 489 U.S. 255, 263, fn. 9.) The frequency with which state prisoners' claims may be considered unexhausted rather than defaulted upon their presentation to the federal court therefore *depends to a large degree on the clarity of the state's procedural default rules*.

3. Stay and abeyance.

In all states, though, there may be times when a state prisoner arrives in federal habeas corpus with claims never presented to state court which the federal court either finds are not defaulted (i.e., there is still an available state remedy) or where the default question is unclear. As discussed *supra* at page

17, the pre-AEDPA rule was that a petitioner could elect to have his entire petition dismissed, return to state court to exhaust, and then return to file a new federal petition with all his claims. AEDPA added a wrinkle to this procedure by enacting a one-year statute of limitations (see 28 U.S.C. § 2244(d)(1)) with a tolling provision for the time spent on collateral review in state court but not for the time spent in federal court on the first, dismissed petition. (See *id*., subd. (d)(2); *Rhines*, *supra*, 544 U.S. at pp. 274-275.) Because the federal court might take a year to resolve the exhaustion question, even a petitioner who files promptly might lose any chance for a federal review by following the *Lundy* procedure. (See *Rhines*, *supra*, at p. 275.)

This problem required the Supreme Court to accept the device that some district courts had devised of issuing a stay of execution in capital cases and holding the federal case in abeyance while the petitioner returned to state court to exhaust state remedies. (See *id*. at pp. 275-276.) However, the high court was keenly aware of the potential of this device to defeat the purposes of AEDPA and cautioned that "[a]ny solution to this problem must therefore be compatible with AEDPA's purposes." (*Id*. at p. 276.)

"One of the statute's purposes is to '*reduce delays* in the execution of state and federal criminal sentences, particularly in capital cases.' " (*Ibid*., quoting *Woodford v. Garceau* (2003) 538 U. S. 202, 206, italics added.) Another was to "reinforce[] the importance of *Lundy*'s "simple and clear instruction to potential litigants: *before* you bring any claims to federal court, be sure that you first have taken each one to state court.' " (*Id*. at pp. 276-277, quoting *Lundy*, *supra*, 455 U.S. at p. 520, italics added.)

The high court was very well aware that these statutory purposes could be undermined by the frequent use of stay and abeyance, and it admonished the lower federal courts to take steps to preclude overuse. (See *id*. at p. 277.) "For these reasons, stay and abeyance should be available only in limited circumstances." (*Ibid*.) Before being granted a stay, the petitioner is, according to *Rhines*, required to show "good cause for [his] failure to exhaust his claims

first in state court." As "good cause" is essentially the same thing as *Clark* justification (see *Clark*, *supra*, 5 Cal.4th at pp. 774-775), the only claims that *should* be coming back in California exhaustion petitions are those that meet the standard of *Clark* and *Reno* to be considered on the merits "despite the successive nature of the petition[]." (See *Reno*, *supra*, 55 Cal. 4th at p. 458, fn. 14.) Further, the Supreme Court admonished the federal district courts not to grant stay-and-abeyance for claims that are obviously without merit. For such claims, the district courts should exercise the authority granted in AEDPA to simply deny them on the merits notwithstanding their unexhausted status. (See *Rhines*, *supra*, at p. 277, quoting 28 U.S.C. § 2254(b)(2).)

The massive abuse of successive petitions so thoroughly documented in *Reno* demonstrates that the implementation of *Rhines* in California has been a total failure. Far from being used in only limited circumstances, the federal courts have paved the way for capital defendants to return to state court with a successive petition "quite typically." (See *Reno*, *supra*, 55 Cal.4th at p. 442.) As of 2007, three-quarters of capital habeas petitioners were being granted stay and abeyance, adding nearly three years to the review process. (Arthur Alarcón, Remedies for California's Death Row Deadlock (2007) 80 So.Cal. L.Rev. 697, 749.) Far from being limited to petitioners who have shown good cause for not presenting the claims to a state court on their first petition, petitions "with no serious attempt to justify" not raising the claims the first time "have become all too common in successive habeas corpus petitions ...." (*Reno*, *supra*, at p. 443.) Far from being limited to arguably meritorious claims, successive exhaustion petitions routinely contain claims that are "frivolous on the merits." (See *id*. at p. 516.)

Part of the problem is the failure of the federal district courts and federal court of appeals to obey the Supreme Court's directions in *Rhines*. Review of these practices by the Supreme Court and appropriate further direction to the lower federal courts is certainly in order.

Even so, the federal courts are not entirely to blame. The complexity and open-ended nature of *Clark*'s criteria for when a successive petition will be considered on the merits and when it will not are also a major contributing cause. As noted previously, the federal court can declare that a claim that has never been presented to a state court is "defaulted" and therefore "exhausted" "if it is clear that the state court would hold the claim procedurally barred." (*Harris v. Reed*, *supra*, 489 U.S. at p. 263, fn. 9.) That is simple enough if the state has a bright-line rule, but it becomes much more difficult in many cases if the state rule has subjective standards. Under *Clark*, the primary question a California court must ask is "whether the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether that explanation justifies the piecemeal presentation of the petitioner's claims." (5 Cal.4th at p. 774.) There are many claims for which the answer is clearly no. (See *Reno*, *supra*, 55 Cal.4th at p. 505.) There are a few for which it is clearly yes. (See *id*. at pp. 457-458, fn. 14 [new U.S. Supreme Court decision, overruling prior decision, establishing new categorical exclusion from capital punishment].) Yet there remains a broad swath of cases where a judge might say that he or she would not find the justification adequate yet cannot say that another judge would necessarily come to the same conclusion.

Even more subjective is *Clark*'s inclusion under the "fundamental miscarriage of justice" banner of a case where newly discovered penalty-phase evidence that "would have so radically altered the profile of the petitioner that no reasonable judge or jury would have sentenced the petitioner to death." (5 Cal.4th at p. 797.) The weighing of aggravating versus mitigating evidence and the assignment of weight to those factors is an inherently subjective exercise, and people can and do disagree strongly. It is doubtful whether any cases meeting this standard exist in the real world (see *id*. at p. 807 (conc. and dis. opn. of Kennard, J.)), but the subjective nature of the inquiry can make it difficult for a federal judge to say that a claim meets the *Harris* standard of *clearly* defaulted.

B. The Solution.

The *Rhines* stay-and-abeyance procedure was supposed to be the exception, not the rule. Most capital cases should have one state habeas corpus petition, one federal habeas corpus petition, and then be over. (See *supra* at p. 31.) To make the *Rhines* court's vision a reality in this state, California first had to clean up its own act on its fuzzy exceptions to both the untimeliness and successive petition bars. And *that* is exactly what the proponents of Proposition 66 set out to do.

In a companion case to *Robbins*, Justice Brown noted that "a Byzantine system of procedural hurdles, each riddled with exceptions and fact-intensive qualifications, only undermines their intended purpose." (*In re Gallego* (1998) 18 Cal.4th 825, 842 (conc. and dis. opn.).) She cautioned the Legislature, in its consideration of habeas corpus reform, "to avoid the pitfalls this court struggles with, such as vague measures of timeliness and 'good cause.' " (*Id*. at p. 853.)

> "Whatever changes are implemented must articulate definitive standards such as a statute of limitations, limits on review of contentions that were or could have been raised on appeal, and *restrictions on successive petitions. Any exceptions should be narrow and well defined.* Only in such circumstances will procedural rules have the necessary foundation for adequate and independent state grounds and clear guidance for habeas corpus counsel." (*Ibid*., italics added.)

For capital cases, Proposition 66 sweeps away the fuzzy, subjective criteria of *Clark*.[5] Following the taxonomy in *Reno*, petitions are either "initial" (see 55 Cal.4th at p. 516) or "successive," a term interchangeable with "second and subsequent." (See *ibid*.; *id*. at p. 517.) Initial petitions are

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5. Noncapital cases, where defendants are often unrepresented on both state and federal habeas corpus, present different considerations. (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 843-844.)

untimely if not filed within one year of the habeas counsel appointment order. (See Pen. Code, § 1509, subd. (c).)

Untimely initial petitions and all successive petitions are generally defaulted, although Proposition 66 does retain a modified version of *Clark*'s "fundamental miscarriage of justice exception." *Clark* defined the exception as having four categories:

> "(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; (4) that the petitioner was convicted or sentenced under an invalid statute." (5 Cal.4th at pp. 797-798, footnotes omitted.)

Proposition 66's corresponding provision widens the gateway by a considerable margin for the most compelling case, the petitioner who is actually innocent, category (2). While *Clark* referred to "irrefutable evidence" (5 Cal.4th at p. 798, fn. 33), Proposition 66 requires a mere preponderance of the evidence. (See Pen. Code, § 1509, subd. (d).)

This exception largely includes *Clark*'s category (1). Cases where "no reasonable judge or jury would have convicted the petitioner" in a fair trial will nearly always be cases where the petitioner is actually innocent. The most obvious exception is where the petitioner would have "beaten the rap" despite being clearly guilty when his guilt is proved by evidence that is inadmissible despite being reliable and probative, such as evidence excluded under the Fourth Amendment's exclusionary rule. Proposition 66 does not count this circumstance as a "fundamental miscarriage of justice," congruent with the people of California's decision 34 years earlier to reject the exclusionary rule as a matter of state law. (See *In re Lance W.* (1985) 37 Cal.3d 873, 885-886.)

The exception would also include the most compelling cases from *Clark*'s category (4), invalid statutes. In noncapital cases, this exception would provide relief for a defendant who has been convicted for an act that is "beyond the power of the criminal law-making authority to proscribe." (See *Mackey v. United States* (1971) 401 U.S. 667, 692 (conc. and dis. opn. of Harlan, J.).)[6] Of course, Proposition 66 is only for capital cases, and in practice capital punishment in California is only for murder, the ultimate proscribable act. However, the death-eligibility circumstances are sometimes challenged as unconstitutional (see, e.g., *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-364), and a defendant whose only special circumstance was struck down would qualify. In that event, "circumstances exist placing the sentence outside the range of the sentencer's discretion." (§ 1509, subd. (d).)

Proposition 66 also accommodates the two most prevalent forms of justification under the earlier *Clark* rule. *Reno* noted that the new, retroactive, constitutional rule of *Atkins v. Virginia* (2002) 536 U.S. 304 furnished justification for successive petitions under *Clark*. (See *Reno*, *supra*, 55 Cal.4th at p. 457, fn. 14.) In AEDPA, Congress provided an exception for "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." (28 U.S.C. § 2244(b)(2)(A).) But the new constitutional rules in capital cases that are retroactive are the rules of categorical exclusion such as *Atkins* that render a defendant ineligible for the death penalty, and Proposition 66's miscarriage of justice exception covers those cases. Although a second exception exists in theory for fundamental procedural rules of the magnitude of *Gideon v. Wainwright* (1963) 372 U.S. 335, none has been found in the modern retroactivity era, and it is highly unlikely that any remain to be discovered. (See *Tyler v. Cain* (2001) 533 U.S. 656, 667, fn. 7.)

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6. Justice Harlan was advancing a proposal for a different finality-enhancing rule on retroactivity, eventually adopted in *Teague v. Lane* (1989) 489 U.S. 288, but the principle is the same.

The other justification which is claimed in nearly every successive petition, but only rarely found, is the claim of ineffective assistance of trial counsel which is not made by allegedly ineffective habeas counsel. Despite the frequent and egregious abuse of such claims (see, e.g., *Reno*, *supra*, 55 Cal.4th at p. 503), Proposition 66 does provide a safety valve for this particular needle in the haystack. In the new section allowing an appeal from denial of the initial petition, the court of appeal is permitted to consider an ineffectiveness claim if the failure to present it to the superior court was ineffective. (See Pen. Code, § 1509.1, subd. (b).) This particular second bite at the apple is permitted on appeal from denial of the first petition rather than on a second petition, but it is permitted.

Proposition 66 rejects *Clark*'s category (3), following instead the decision of the United States Supreme Court in *Sawyer v. Whitley* (1992) 505 U.S. 333, 341-347. Reasonable people can differ, but Proposition 66 makes the value judgment that reconsidering the sentence of a guilty murderer very late in the process is not worth the major impact on finality that results. (See *id*. at pp. 345-346.)

Under Proposition 66, correctly interpreted, few capital cases will need to return to state court for even a second habeas corpus proceeding, much less a third or fourth. (Cf. *Reno*, 55 Cal. 4th at p. 458.) The case arrives in federal court after the direct appeal and state habeas proceeding, at which point nearly all claims have either been presented to and rejected by state court or else are clearly defaulted. The successive petition rule would apply to any exhaustion petition that follows the denial of an initial petition, and the only exceptions are actual innocence or actual ineligibility. Few capital defendants have even colorable claims of actual innocence, and with the pool of pre-*Atkins* cases dried up, few will have colorable claims of ineligibility.

With the state procedural default question marked by clear lines, the federal court can and should proceed to the cause-and-prejudice inquiry. (See *supra* at p. 33.) The federal cause standard is similar to the *Clark* justification

requirement (see *supra* at p. 35), and the federal prejudice standard is similar to the California Constitution's requirement for reversible error. (Compare *Banks v. Dretke* (2004) 540 U.S. 668, 698-699, with *People v. Watson* (1956) 46 Cal.2d 818, 836.) Absent unusual circumstances, successive petitions in California capital cases "rarely raise an issue even remotely plausible, let alone state a prima facie case for actual relief." (*Reno*, *supra*, 55 Cal.4th at pp. 457-458.) Almost all claims in successive petitions are procedurally barred, often for more than one reason. (*Id*. at p. 458.) Thus claims that both qualify as justified under the pre-Proposition 66 regime and have substantive merit are quite rare. That is not to say the number is zero, but it is quite small. If the consequence of Proposition 66 is that those very, very few claims are redressed in federal court rather than state court,[7] that is an acceptable result.

The gain that will result from federal courts proceeding directly to the cause-and-prejudice analysis is enormous. The massive waste documented in *Reno* will not merely be reduced, as the *Reno* court attempted, but eliminated altogether. A needless step that adds years to the already excessive delay in capital cases will be eliminated.

C. Meaning and Purpose.

The rules of statutory interpretation are summarized in *People v. Valencia* (2017) 3 Cal.5th 347, 357-358. The first step is to examine the language and give it its ordinary meaning, with the caveat that " '[t]he words of the statute must be construed in context, keeping in mind the statutory purpose ....' " (*Id*. at p. 357, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) In this case, the ordinary meaning is clear, and while a well-established technical meaning might make a difference in an appropriate case, there is none here, as explained in Part I, *supra*.

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7. Most substantial questions of criminal procedure can be "federalized." (See May, How to Get Ahead in Federalizing (2010), http://capcentral.org/procedures/federalize/docs/federalization_100421.pdf.)

Consideration of the purpose of the initiative clinches the case. Beyond any question, the primary purpose of Proposition 66 was to "expedite review in capital cases," although the initiative included other germane provisions as well. (*Briggs v. Brown* (2017) 3 Cal.5th 808, 831.) In broader terms, "it was intended as an extensive reform of the entire system of capital punishment to make it more efficient, less expensive, and more responsive to the rights of victims." (*Ibid*.) It is this court's "solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501.) That precious power can be defeated just as much by misconstruing clear language in a cramped manner, contrary to the initiative's evident purpose, as by striking the initiative outright. Given the purpose of Proposition 66, interpreting the successive petition provision to be little more than a codification of the status quo ante would be contrary to that solemn duty.

Whether the members of a court agree or disagree with a bold policy change voted by the people, negating it by deliberate misinterpretation is not a legitimate option. (See *In re Lance W.* (1985) 37 Cal.3d 873, 889.) The purpose of the successive petition reform of Proposition 66 can be effectuated only by giving the term "successive petition" its ordinary meaning.

Given the strength of the conclusion from the ordinary meaning and clear purpose, an examination of the structure of Proposition 66 and the Voter Information Guide are not strictly necessary, but in the interest of completeness amicus will briefly make that examination.

III. The structure of Proposition 66 and the ballot materials presented to the voters preclude the parties' interpretation.

A. Structure.

Statutes must be read as a whole, not by plucking out individual words and scrutinizing them in isolation. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903.) Reading the initiative as a whole reinforces the conclusion

that "successive petitions" include all those that are not "initial petitions." The parties' proffered definition would require the recognition of a third category of petitions which are "subsequent" but not "successive." This third category does not fit in the structure.

In re Reno (2012) 55 Cal.4th 428 established a page limit rule for habeas corpus petitions in capital cases, dividing such petitions into two classes. For an "initial petition" there is "no limit as to length." (*Id*. at p. 516.) For the other class of petitions there is a limit of 50 pages or 14,000 words. This other class is described by the interchangeable terms "second and subsequent petitions" (*ibid*.) and "successive petitions." (*Id*. at p. 517.)

Proposition 66 uses the terms "initial" and "successive" in the same way. Penal Code section 1509, subdivision (d) provides a dismissal requirement with an actual innocence exception for untimely initial petitions and all successive petitions. If there is a third category of "subsequent but non-successive petitions," that category would not be subject to the timeliness requirement imposed on initial petitions. That would make no sense at all. Whatever may be said for "subsequent" petitions, surely they should not be treated more favorably than initial petitions. (See *Reno*, *supra*, 55 Cal.4th at p. 515 [noting frequency of frivolous claims in exhaustion petitions].)

Penal Code section 1509.1, regarding appeals, similarly classifies all petitions into two classes, initial and successive. Subdivision (a) creates a full right of appeal for both parties on the initial petition, a much more generous provision than federal law. (See 28 U.S.C. § 2253(c) [certificate of appeal-ability required for petitioner's appeal in all cases: initial and successive, state and federal].) Subdivision (c) is similar to the federal law but limited to successive petitions only. What would the rule be for appeals of "subsequent but non-successive petitions" under the parties' interpretation? Would there be any right of appeal at all? The statute does not say because no such third category exists. "Initial" and "successive" are intended to encompass all petitions.

The final sentence of subdivision (a) of section 1509.1 eliminates any doubt, if any remains, that the word "successive" in Proposition 66 has its ordinary meaning and not a technical, artificial meaning. This sentence bans for capital cases the prior practice of seeking review of a lower court's denial of habeas relief by filing an original habeas corpus petition in a higher court, referring to these appeal-substitute petitions as "successive."[8] Whether this usage "is inconsistent with this court's terminology" (see *Briggs v. Brown* (2017) 3 Cal.5th 808, 836, fn. 14) or not, it is certainly inconsistent with the parties' proposed definition. Surely "successive" has the same meaning throughout these two sections. (See *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 161.)

B. Ballot Materials.

To the extent any ambiguity remains after other sources have been examined, this court has regularly looked to the Voter Information Guide to see what the voters were told. (See, e.g., *People v. Lopez* (2020) 9 Cal.5th 254, 269.) There is no ambiguity here.

The analysis by the Legislative Analyst nails it. "[T]he 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, Gen. Elec. (Nov. 8, 2016), analysis of Prop. 66 by the Legis. Analyst, p. 106.) It could not be said any more clearly. The successive petition limitation applies to all petitions after the first.The supporters of Proposition 66 also told the voters the same thing in public debates. (See, e.g., Scheidegger, *A Better Death Penalty for California*, L.A. Times (Sept. 29, 2016), https://www.latimes.com/opinion/op-ed/la-oe-scheidegger-pro-prop-66-

8. That practice and the indeterminacy of its time limits causes such headaches in the federal courts that the U.S. Supreme Court called on the California courts and Legislature to reform it. (See *Evans v. Chavis* (2006) 546 U.S. 189, 199.)

20160929-snap-story.html.) This conclusion is reinforced by the Legislative Analyst's discussion of the fiscal effects, indicating that "the limits on the number of habeas corpus petitions that can be filed, could result in the filing of fewer, shorter legal documents." (Voter Information Guide, *supra*, at p. 107.)

The Attorney General concedes that these points undercut his position (see AB 17-18, 24) but tries to create ambiguity where there is none. Among the stated purposes of the initiative is number 7: "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, *supra*, text of Proposition 66, § 2, at p. 213.) The Attorney General provides a truncated quote of this paragraph and claims it supports an interpretation that merely codifies the status quo ante. Quite the contrary, the last sentence unambiguously states an intent to make a major change in the law. Given the delay, waste, and abuse in successive petitions so thoroughly documented in *Reno*, a strong crackdown is fully consistent with a purpose of restricting frivolous and unnecessary claims.

The Attorney General's claim that "[o]n the whole, the voter materials are ambiguous," is not an accurate characterization of the materials. Tellingly, petitioner does not cite the Voter Information Guide at all in the interpretation section of his brief, even while relying on it extensively for other points.

The voters were clearly and unambiguously told that the successive petition limitation applies to all petitions after the first. " '[W]e may not properly interpret [an initiative] measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.' " (*People v. Morales* (2016) 63 Cal.4th 399, 407, quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

IV. Proposition 66's successive petition reform is clearly constitutional in its ordinary meaning.

"[A] court, when faced with an *ambiguous* statute that raises *serious* constitutional questions, should endeavor to construe the statute in a manner which *avoids* any doubt concerning its validity." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373, italics added in part, internal quotation marks omitted.) "But the canon ... will not be pressed to the point of disingenuous evasion." (*Ibid*., internal quotation marks omitted.) The parties seek to invoke this doctrine to support their position (AOB 25; AB 25), but neither prong of the test is met. The statute is not ambiguous, as explained in the previous parts of this brief, and the doubts are not serious. The United States Supreme Court rejected the same attack against a more restrictive statute in *Felker v. Turpin* (1996) 518 U.S. 651, and no substantial argument has been made that the California Constitution gives the people of this state less authority than Congress has to determine which haystacks must be searched for which needles.

A. Federal Law.

Even though *Felker* is the central precedent on point, petitioner does not mention it at all, and the Attorney General only mentions it in passing in a footnote. (See AB 26, fn. 7.) The group of law professors who dub themselves "Constitutional Law Amici" also mention it only in passing with a "see also" cite to the page that flatly rejects their position. (Brief of Constitutional Law Amici 28 ("Academic Brief"), citing *Felker*, *supra*, 518 U.S. at p. 664 ["The added restrictions which [AEDPA] places on second habeas corpus petitions ... do not amount to a 'suspension' of the writ contrary to Article I, § 9."]) This odd avoidance of the central precedent has a simple, obvious explanation; *Felker* demolishes their case.

The Suspension Clause was included in California's first Constitution at the founding of the state. (See Academic Brief 25-26.) The professors fail to mention, though, that the writ of habeas corpus at that time was simply not

available to collaterally attack the judgment in a criminal case of a court of unquestioned jurisdiction. That was true at common law. (See *Bushell's Case* (1670) 124 Eng. Rep. 1006, 1009-1010 [distinguishing criminal case tried to a jury from contempt citation in the case before the court].) It was true in early America. (See *Ex parte Watkins* (1830) 28 U.S. 193, 202, 207; *Felker*, *supra*, 518 U.S. at p. 663 [discussing common law and *Watkins*]; Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power (1998) 98 Colum. L. Rev. 888, 928-932 [discussing early habeas cases, particularly *Watkins*].)

Early California decisions followed *Watkins*. " 'An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the Court has general, jurisdiction of the subject.' " (*Ex parte Gibson* (1867) 31 Cal. 619, 627-628, quoting *Watkins*, *supra*, 28 U.S. at p. 203.) *Ex parte Kearny* (1880) 55 Cal. 212 granted a habeas corpus petition collaterally attacking a judgment of the police court, but the court in that case went to some lengths to establish that the police court was a court of limited, not general jurisdiction, distinguishing *Watkins* while continuing to recognize the validity of its rule for courts of general jurisdiction. (See *id*. at p. 215-221.)

Neither the United States Constitution nor the California Constitution, as originally understood, includes a constitutional right to collaterally attack the judgment of a court of general jurisdiction *at all*. Any argument that limitations of such usage are unconstitutional must rest on a premise that the Suspension Clause has somehow expanded since then, a possibility the U.S. Supreme Court has neither embraced nor ruled out. (See *Felker*, *supra*, 518 U.S. at pp. 664-665; *Department of Homeland Security v. Thuraissigiam* (2020) 140 S.Ct. 1959, 1968-1969, 207 L.Ed.2d 427, 441.)

Habeas corpus expanded in the late nineteenth and early to middle twentieth centuries to cover a great variety of claims beyond the jurisdiction of the convicting court. (See Scheidegger, 98 Colum. L.Rev. at pp. 932-933.) Beginning in the 1970s, the U.S. Supreme Court began limiting the writ through procedural default, successive petition limits, and nonretroactivity.

(See *id*. at pp. 933-940.) This court did the same in the decisions discussed in Part I, *supra*. Legislative restrictions followed when the case law limits proved inadequate.

The problem of habeas corpus reform comes down to solving the problem posed by Justice Jackson in his concurring opinion in *Brown v. Allen* (1953) 344 U.S. 443. The expansion of habeas corpus produced

> "progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own.... [T]hey have, as a class, become peculiarly undeserving.... *He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search*." (*Id*. at pp. 536-537, italics added.)

Habeas corpus reform, both judicial and legislative, has been an effort to determine in a systematic way which haystacks are worth searching for which needles. (See *McCleskey v. Zant* (1991) 499 U.S. 467, 489 ["complex and evolving body"].) Both AEDPA and Proposition 66 are legislative determinations that the case law reforms had not gone far enough and had not been effective, and stronger medicine was needed.

AEDPA's medicine was very strong indeed. For repeated claims by state prisoners, Congress imposed an absolute ban with no exceptions, not even for actual innocence. (See 28 U.S.C. § 2244(b)(1).) For new claims by state prisoners and all claims by federal prisoners, the medicine was not that extreme, but it was still very strong. A claim in a successive petition may be considered on the merits only "if it relies on a new and retroactive rule of constitutional law or if it alleges previously undiscoverable facts that would establish his innocence." (*Banister v. Davis* (2020) 140 S.Ct. 1698, 1704, 207 L.Ed.2d 58, 66, citing 28 U.S.C. § 2244(b)(2).)[9]

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9. The successive petition rule for federal prisoners is not worded identically, but it is substantially the same. (See 28 U.S.C. § 2255(h).)

The federal rule has two exceptions, each with two conjunctive prongs. The first exception requires a rule that is both new and retroactive on collateral review. Very few rules applicable to capital cases are both new and retroactive. In the post-*Teague* era, only the categorical exclusions for juveniles and persons with intellectual disability have met both criteria. (See *supra* at 39.)

The second exception requires both previously unavailable facts *and* actual innocence of the underlying offense, proved to a high standard. (See 28 U.S.C. § 2244(b)(2)(B).) Previously unavailable facts alone are not enough. (See *United States v. Buenrostro* (9th Cir. 2011) 638 F.3d 720, 725-726 (federal prisoner, § 2255(h)); *Brown v. Muniz* (9th Cir. 2018) 889 F.3d 661, 671, 676 (state prisoner, § 2244(b), constitutional under *Felker*).) Actual innocence alone is not enough, even if proved to a certainty. Actual innocence proved by only a preponderance of evidence is not enough even in conjunction with previously unavailable facts. Ineligibility for the punishment is not in the exception at all.

Yet the constitutionality question was not even close. *Felker* was the unanimous decision of a court that was often sharply divided on habeas corpus questions. (Cf., e.g., *Williams v. Taylor* (2000) 529 U.S. 362 [fragmented opinion on the "deference" standard of AEDPA].) AEDPA's "modified rule of res judicata" was "well within the compass of [the] evolutionary process" that had shaped successive petition law to that point. (*Felker*, *supra*, 518 U.S. at p. 664.)

Proposition 66's successive petition reform is more generous to petitioners than AEDPA's. The "ineligibility" exception catches the same cases as AEDPA's "new and retroactive rule" exception, plus more. A petitioner with a claim like Thomas Thompson's, who claimed innocence of the rape count and associated special circumstance while having no appreciable claim of innocence of the murder (see *Calderon v. Thompson* (1998) 523 U.S. 538, 560), would qualify under Proposition 66 if, unlike Thompson, he could actually prove his claim by a preponderance of the evidence.

More importantly, Proposition 66 throws the doors wide open for the most compelling claims, those of actual innocence of the crime. With only a preponderance standard to meet and no conjunctive requirement of previously unavailable facts, the new standard is far more generous than AEDPA, and for innocence claims it is more generous than the previous case-law standard of *Clark*. That standard required "evidence of innocence [that] could not have been, and presently cannot be, refuted." (5 Cal.4th at p. 798, fn. 33.) That is indeed "a heavy burden," far heavier than the one Proposition 66 imposes.

Section 1509 of the Penal Code is not a "suspension" of the writ of habeas corpus under *Felker*. Nor is there any need to spend much time asking if it is alternately a denial of due process of law. When a provision of the Constitution specifically governs a subject, it makes little sense to turn to the very general Due Process Clause for a different result. (Cf. *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 843 (substantive due process).) In the federal courts, resort to the Due Process Clause as an alternative to the Suspension Clause for attacking AEDPA is rarely even attempted, and when it is the attacks are easily rejected. (See, e.g., *Hirning v. Dooley* (8th Cir. 2006) 209 Fed.Appx. 614, 615 (*per curiam*).) A person who has received the process required by the constitutional provision on point and statutes enacted in conformity with it has received the process due.

B. Sister States.

Prisoners attacking state habeas reforms under provisions similar to those in the federal Constitution have sought to convince their state courts not to follow the federal precedent and decide that their constitutions call for a different result. These efforts have almost always failed, even in states with habeas reforms considerably more restrictive than Proposition 66. The parties can cite only one outlier decision in their favor.

First, this court can put to one side the case of *Allen v. Butterworth* (Fla. 2000) 756 So.2d 52, which the professors rely on (Academic Brief 22) despite this court's rejection of a similar argument in *Briggs v. Brown* (2017) 3 Cal.5th

808. The Florida Supreme Court has subsequently clarified that *Allen*'s holding is only on separation of powers and declined to give precedential effect to its comment that the statute also violated equal protection and due process. "The comment was dictum." (*Id*. at p. 844, citing *Abdool v. Bondi* (Fla. 2014) 141 So.3d 529, 546; see also Intervenor's Return in *Briggs v. Brown*, No. S238309, p. 50.)

Elsewhere, almost all states have followed the federal lead. In *Hertz v. State* (Alaska App. 2000) 8 P.3d 1144, the court considered a successive petition limit that, like AEDPA, had an exception that required both newly discovered evidence *and* proof of innocence by clear and convincing evidence. (See *id*. at p. 1146; Alaska Stat. 12.72.020, subd. (b)(2).) The court rejected the argument that the state suspension clause required consideration of the merits, following *Felker* and noting sister state decisions. (*Hertz*, *supra*, at pp. 1147-1148.) *Arthur v. State* (Ala. Crim. App. 2001) 820 So.2d 886, 889-890 was a capital case involving a two-year limitation on collateral review petitions with no exceptions. The court upheld the limit as within the rule-making authority of the Alabama Supreme Court, citing *Felker*.

In *Brown v. Booker* (Va. 2019) 826 S.E.2d 304, 305, the Virginia Supreme Court considered a claim that the state's time limit effectively barred a petition based on evidence which could not have been obtained within that limit. The court held that the limit was valid even if the evidence showed actual innocence (making the limit more severe than Proposition 66), citing *Felker* and multiple sister state decisions.

That leaves only *Lott v. State* (Mont. 2006) 150 P.3d 337, 339, alone among the state courts in declining to follow *Felker*. That court read the Montana Constitution to embrace a sweeping "right to challenge the cause of one's imprisonment." If followed literally, that would make all habeas corpus reform impossible. If interpreted to mean that the state courts get to pick and choose which statutory habeas corpus reforms they will enforce, that would involve the judicial branch in second-guessing the legislative branch on value

judgments regarding how far habeas corpus should be expanded beyond its common law reach. Not surprisingly, no other state court has followed *Lott*. A Shepard's search indicates that the only cite by any court of any other state is this court's passing reference in a "cf." cite in *Briggs*. (3 Cal.5th at p. 848.)

C. Haystacks, Needles, and Value Judgments.

Setting limits on relitigation via habeas corpus involves balancing the competing interests of correcting errors in criminal cases versus achieving finality in those same cases. (See *Clark*, *supra*, 5 Cal.4th at p. 764.) Reasonable people can and do disagree on where the balance tips, when the interest in finality outweighs the need for a corrective mechanism. In Justice Jackson's metaphor, we can reasonably disagree on which haystacks need to be searched for which needles.

On a few principles nearly everyone can agree. Claims of actual innocence of the crime are particularly deserving of correction, warranting a search where other claims would not. Also, the need to search a haystack depends in part on whether it has been searched before and whether it will be searched after. Proposition 66 implements these principles. It gives innocence claims greater leeway than most habeas reform statutes and more than the preexisting *Clark* rule. It eliminates searching successive petitions of clearly guilty murderers with their mountains of claims having no justification or inadequate justification just to find the rare claim that does have justification. The reality that even those justified claims rarely have substantive merit (see *supra* at p. 27) combined with the fact that the federal courts will apply their exception for "cause and prejudice" anyway means that the chance of a justified, meritorious claim going uncorrected is vanishingly small.

Even if a truly compelling claim actually is blocked from all judicial remedy, there remains executive clemency. In capital cases in the modern era, every clemency petition for an inmate approaching execution has received careful attention from the Governor, and there is no reason to think this will end in the foreseeable future.

Disagreement with where the initiative draws the lines on this debatable issue is not a valid reason to engage in "disingenuous evasion" or strike down a valid statute enacted by the people. The limitations on habeas corpus in Proposition 66 are of the same type that have been established by case law, rules of court, and statutes throughout the country. The placement of the lines differs as opinions on the balance between correction and finality differ. As with AEDPA and *Felker*, though, the constitutional question is not even close. These decisions are well within the people's reserved power of legislation to make.

CONCLUSION

Penal Code section 1509 should be given its ordinary meaning and affirmed as constitutional.

August 31, 2020

Respectfully Submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kent S. Scheidegger, hereby certify that the attached **APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY** contains 13,816 words, as indicated by the computer program used to prepare the brief, WordPerfect.

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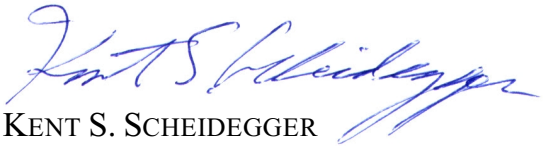

KENT S. SCHEIDEGGER

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The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

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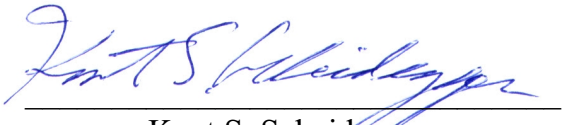

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