IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

OPENING BRIEF ON THE MERITS

JON M. SANDS
Federal Public Defender
District of Arizona

Lindsey Layer (VA Bar No. 79151)
*Stanley Molever (CA Bar No. 298218)
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
lindsey_layer@fd.org
stan_molever@fd.org
602.382.2816 Telephone
602.889.3960 Facsimile

Counsel for Petitioner-Appellant
Jack Wayne Friend

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QUESTIONS PRESENTED

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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