

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

ROBERT JOE GONZALES,

*Petitioner,*

v.

KELLY SANTORO, WARDEN,

*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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### Question Presented

This Court explained in *Evans v. Chavis*, 546 U.S. 189 (2006), that a habeas corpus petition filed in a California appellate court within 30 to 60 days after the denial of habeas relief in a lower court is filed within a reasonable time and tolls the federal habeas statute of limitations. *Chavis* held that in the absence of a “clear indication” that a state petition was untimely filed, a federal habeas court “must itself examine the delay” “and determine what the state courts would have held in respect to timeliness.” *Id.* at 198. Did the Ninth Circuit abdicate its responsibility under *Chavis* when it treated a pincite in a summary denial to a page of a state opinion that addresses three distinct procedural bars as establishing that a California petition was untimely, when that petition was filed less than three weeks after habeas relief was denied in the lower court, the lower court did not deny the petition before it as untimely, and the State admitted that the lower court petition tolled the statute of limitations under 28 U.S.C. § 2244(d)(2)?

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**Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit**

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**I. OPINIONS BELOW**

Gonzales petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals. The Ninth Circuit’s order denying Gonzales’s petition for rehearing is unreported. Petitioner’s Appendix (“Pet. App.”) 1. The Ninth Circuit’s opinion affirming the denial of habeas corpus relief is unreported. Pet. App. 2-4. The district court’s order dismissing the habeas action with prejudice and its judgment against Petitioner are unreported. Pet. App. 7-15.

The orders by the Los Angeles County Superior Court, California Court of Appeal and California Supreme Court denying habeas relief are unreported. Pet. App. 23-25. The California Court of Appeal’s opinion affirming the state court judgment on appeal is unreported. Pet. App. 28-53. The California Supreme Court’s order denying Gonzales’s petition for review of the Court of Appeal’s appellate decision is unreported. Pet. App. 26.

**II. JURISDICTION**

The Ninth Circuit’s opinion affirming the denial of habeas relief was filed on August 27, 2018. Pet. App. 2. Gonzales timely filed a petition for rehearing on September 10, 2018 (Ninth Circuit docket no. 48), which the Ninth Circuit denied on September 24, 2018. Pet. App. 1. The district court had jurisdiction under 28

U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed under Supreme Court Rule 13.

### **III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

#### **U.S. Const., amend. XIV, § 1**

“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”

#### **Title 28 U.S.C. § 2244(d)**

**(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

**(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

**(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

**(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

#### IV. STATEMENT OF THE CASE

Gonzales was charged in the Los Angeles County Superior Court with the first degree murder of Christopher Ash and with three special circumstance allegations, an allegation of personal use of a deadly weapon (a knife), and a gang enhancement. The jury acquitted him of first degree murder but convicted him of second degree murder. The jury found the gang enhancement true but the personal use of a knife enhancement not true. The court sentenced Gonzales to a term of 15 years to life. Pet. App. 25.

Gonzales raised two issues on direct appeal: (1) that the evidence was insufficient to sustain a conviction for second degree murder; and (2) that the trial court erred and violated his federal constitutional rights when it denied his motion for a new trial based on jury misconduct. *Id.* On August 13, 2013, the California Court of Appeal affirmed the judgment in a written opinion. Pet. App. 24. On September 13, 2013, Gonzales filed a petition for review in the California Supreme Court raising the same two issues.<sup>1</sup> The court summarily denied the petition on

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<sup>1</sup> District court docket no. 22, lodgment no. 2 at 3-5;  
<http://appellatecases.courtinfo.ca.gov>, last visited on October 26, 2017.

October 16, 2013. Pet. App. 22. Gonzales had 90 days from that date, until January 14, 2014, to timely file a petition for a writ of certiorari. *Jimenez v. Quartermann*, 555 U.S. 113, 120 (2009). He did not file a cert. petition. Consequently, Gonzales's judgment became final, and the one-year statute of limitations to file a federal habeas corpus petition began to run, on January 14, 2014. *Id.* at 118-19; *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999); 28 U.S.C. § 2244(d)(1)(A); *see also* Pet. App. 17 (Respondent reaches same conclusion in her motion to dismiss).

About four and a half months later, on May 31, 2014, Gonzales constructively filed a *pro se* habeas corpus petition in the Los Angeles County Superior Court by signing the petition and delivering it to prison officials for mailing to the court (he also served Respondent by mail). Pet. App. 17. The Superior Court described the petition as being filed on June 6, 2014. Respondent argued in her motion to dismiss in district court that this petition was constructively filed on June 2 but assumed arguendo that it, and Gonzales's other petitions, were filed on the date noted in the proofs of service or on the date they were delivered to prison officials for mailing, May 31 in this instance. *Id.*

Gonzales raised eight claims in his Superior Court petition and he realleged the same claims in his later habeas petitions filed in the California Court of Appeal and the California Supreme Court. Gonzales claimed that:

1. The trial court abused its discretion and violated Gonzales's constitutional rights by denying a motion to sever.

2. The trial court abused its discretion and violated his constitutional rights by denying a motion to exclude evidence.
3. The trial court erred and violated his constitutional rights in failing to caution the jury regarding uncharged evidence.
4. The trial court's voir dire procedures were inadequate to protect his rights to an impartial jury and due process.
5. The trial court erred and violated his constitutional rights by failing to inquire if jurors had been exposed to media coverage.
6. His constitutional rights were violated by the cumulative impact of state court errors.
7. Trial counsel was prejudicially ineffective.
8. Appellate counsel was prejudicially ineffective. *See* Ninth Circuit docket no. 21 (Excerpts of Record ("ER") 111-160, 176-271).

The Los Angeles County Superior Court denied the petition on June 25, 2014 without ordering a response from the State. Pet. App. 24. The denial order states:

Defendant is not present in court, and not represented by counsel. Defendant's petition for writ of habeas corpus read and considered. Defendant was convicted of second degree murder.

The conviction was affirmed on appeal on August 13, 2013. Defendant's first six grounds for relief dealt with alleged error by the trial court during defendant's trial.

These are matters that could have been raised in Defendant's direct appeal. A writ of habeas corpus will not lie where the claimed errors could have been, but were not, raised via timely appeal. (In re Reno (2012) 55 C4th 428).

Defendant's last ground for appeal is inadequacy of trial and appellate counsel. Defendant failed to present sufficient facts warranting relief.

Petition is denied.

*Id.*

Less than three weeks later, on July 15, 2014, Gonzales constructively filed a habeas petition in the California Court of Appeal alleging the same claims by signing the petition and delivering it to prison officials for filing. Pet. App. 18. The court gave the petition a filing date of July 18, 2014. Gonzales included with his petition a copy of the Superior Court's order denying his prior petition. Ninth Circuit docket no. 21 (ER 205).

Without ordering a response from the State, the court denied the petition on September 30, 2014 in an order stating:

The petition for writ of habeas corpus has been read and considered, along with the file in the related appeal, B237860.

The petition is denied for failure to state sufficient facts demonstrating entitlement to the relief requested. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475; see also *In re Clark* (1993) 5 Cal.4th 750, 765; *In re Lindley* (1947) 29 Cal.2d 709, 723.)

Pet. App. 23.

On October 5, 2014, apparently not having received notice of the Court of Appeal's order, Gonzales constructively filed in federal district court a *pro se* document titled "Request And Notice To File A 28 U.S.C.A. [sic] § 2254" petition. Pet. App. 18. Gonzales asked the court to toll the time to file a federal petition and that if did not grant tolling, to advise him of the date to timely file a federal petition. *Id.* Gonzales included copies of the Superior Court order denying his petition and the request for a ruling he filed in the Court of Appeal on October 2, 2014. Ninth Circuit docket no. 21 (ER 161-75). Gonzales noted the tension between the mandate to exhaust state remedies on the one hand, and to file a federal petition within the one-year statute of limitations on the other. *Id.* (ER 162).

District Judge Otis D. Wright, II denied the request without prejudice. *Id.* (ER 102, 105). The court explained that Gonzales did not file an "actual petition. Instead, the entire document is a brief arguing that Petitioner should enjoy statutory tolling of the limitations period applicable to § 2254 petitions." *Id.* (ER 102). The court ruled that "[b]ecause he has not properly initiated a 'case' or 'controversy,' the Court lacks subject matter jurisdiction." *Id.* The court added that

it “passes no judgment at this time on whether the would-be petitioner will face a statute of limitations barrier at all, or, if he does face one, whether he will be able to surmount that obstacle through tolling or other means.” *Id.* (ER 105).

On October 23, 2014, less than one month after the California Court of Appeal denied his petition, Gonzales constructively filed a petition in the California Supreme Court by signing it and giving it to prison officials for mailing. Pet. App. 19. The court gave the petition a filing date of October 30, 2014. Gonzales included with the petition the orders by the Court of Appeal and Superior Court denying his prior petitions. Ninth Circuit docket no. 21. (ER 146, 168).

On January 21, 2015, the California Supreme Court summarily denied the petition in an order stating: “The petition for writ of habeas corpus is denied.” Pet. App. 23.

Having exhausted state remedies, Gonzales constructively filed a *pro se* habeas petition in district court about one and a half months later, on March 5, 2015, by signing the petition and delivering it to prison officials for mailing. Pet. App. 19. The petition was stamped by the clerk as filed on March 16, 2015 and that is the file date that appears in the district court docket. The federal petition raised the jury misconduct and insufficient evidence claims Gonzales asserted in his state appeal and the eight claims he asserted in state habeas. District court docket no. 1 at ECF pages 14-49.

Respondent moved to dismiss the petition with prejudice on the ground that it was filed 27 days late. Pet. App. 19. Respondent stated that Gonzales was

entitled to statutory tolling for the time he had a habeas petition pending in Superior Court because that court denied his ineffective assistance of trial and appellate counsel claims on the merits (in addition to denying six claims on the ground that they could have been but were not raised on appeal). Pet. App. 20-21.

However, Respondent argued that the California Court of Appeal's "see also" citation to page 765 of *Clark* "signified that the state habeas petition was untimely." Pet. App. 21-22 (footnote omitted). Respondent acknowledged that page 765 of *Clark* also discusses two other independent rules: "that issues resolved on appeal with [sic] not be reconsidered on habeas corpus' and that a writ will not lie for claims that should have been, but were not, raised on appeal." Pet. App. 21. Respondent nevertheless argued that "it appears that the court cited *Clark* for the explain-and-justify delay rule" that appears in footnote 5 of page 765 of that opinion, *id.*, even though the court did not cite footnote 5 in its order. According to Respondent, "[b]ecause the California Court of Appeal rejected the petition as untimely, it was not 'properly filed'" under federal habeas law, and consequently Gonzales was not entitled to statutory tolling of the limitations period for any of the time he spent exhausting claims after the denial of his Superior Court petition on June 25, 2014. Pet. App. 22.

To summarize: According to Respondent, the one-year federal statute of limitations began to run on January 14, 2014, when Gonzales's judgment became final on the conclusion of direct review; the statute was tolled for the 23 days Gonzales's Superior Court petition was pending, giving him until February 6, 2015

to timely file a federal petition; and when he filed his federal petition on March 5, 2015, it was 27 days late. Pet. App. 6, 17-22.

In his *pro se* opposition to Respondent's motion to dismiss, Gonzales argued that he was entitled to statutory tolling during the entire time his habeas petitions were pending in state court and therefore his federal petition was timely. Ninth Circuit docket no. 21 (ER 49). He argued that the California Court of Appeal found at least one claim timely and therefore the statute was tolled; that the Court of Appeal's order was too ambiguous to be read as holding that all his claims were untimely; that he explained in his Court of Appeal petition that any delay in filing was caused by lack of access to his trial transcripts; that his Superior Court and Court of Appeal petitions were not substantially delayed because the former was filed approximately five months after his judgment became final<sup>2</sup> and the latter was filed shortly after the Superior Court denied his petition;<sup>3</sup> that the citation to *Clark* referred to the rule that "a writ will not lie for claims that should have been, but were not raised on appeal," a ground cited by the Superior Court in denying relief; and that the federal statute did not begin to run until he learned the factual predicate of his claims upon receiving his trial transcripts. *Id.* (ER 47-52).

The parties consented to have Magistrate Judge Michael R. Wilner conduct all proceedings, including deciding dispositive matters and ordering the entry of

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<sup>2</sup> It was actually filed about four and a half months after judgment became final.

<sup>3</sup> Gonzales filed a petition in the Court of Appeal less than three weeks after the Superior Court denied his petition.

final judgment. District court docket nos. 2, 20. On May 3, 2016, Magistrate Judge Wilner filed an order granting Respondent's motion and dismissing the petition with prejudice as time-barred. Pet. App. 7-15.

The magistrate judge explained that “[t]he Attorney General concedes that the trial court reached the merits of [Gonzales's] first petition in the state superior court,” and “[o]n that basis, Petitioner should receive a nominal three weeks of statutory tolling attributable to the superior court action.” Pet. App. 12. “Beyond that, though, he is not entitled to more tolling” because “the state appellate and supreme courts denied Petitioner's subsequent habeas actions on timeliness grounds . . . .” *Id.*

The magistrate judge explained that “[t]he state appellate court expressly rejected Petitioner's petition for a variety of reasons. One was his failure to assert sufficient facts to state a claim for relief (the *Duvall* denial).” *Id.* The court continued: “Additionally, as signified by the state court's use of the legal term 'see also,' the court referred to *Clark* (page 765 -- untimely petition) and *Lindley* (claim regarding sufficiency of evidence not brought on direct appeal) as additional bases to deny relief.” *Id.*

The court reasoned that a “fair reading of the specific citation to page 765 of the *Clark* decision is that the state appellate court intended to signify that the petition was not filed within a reasonable amount of time.” Pet. App. 13. According to the magistrate judge, “[t]he overarching messages of this section of the decision is that a prisoner bears the burden of demonstrating the timeliness of his

postconviction filing. For this reason, the bulk of the main text and the key footnote on that page of the decision focus on whether a ‘significant delay’ is fatal to a claim.”

*Id.*

The magistrate judge acknowledged that “[t]o be sure, the *Clark* Court additionally noted that it is ‘*also* the general rule’ that a habeas petitioner may not raise issues for a second time on habeas review (citing *Waltreus*)<sup>4</sup> and cannot plead habeas claims that could have been reviewed on direct appeal (*Dixon*).<sup>5</sup> *Clark*, 5 Cal. 4th at 765 (emphasis added).” *Id.* The court nevertheless concluded that “the reference to *Clark* in the appellate order (a) issued nearly a year after the supreme court denied review and (b) three years after conviction at trial is an unmistakable signal that the court denied the petition as untimely.” *Id.* “Given that the appellate court found Petitioner’s action to be untimely, it was not ‘properly filed’ for statutory tolling purposes.” *Id.* Under *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the court “presume[d] that the state supreme court silently denied relief in Petitioner’s subsequent action for the same timeliness ground.” *Id.* “The bottom line: Petitioner filed his federal action about a month after his AEDPA deadline expired.” Pet. App. 14.

The magistrate judge explained that the responsibility for missing the deadline “falls squarely on the prisoner’s shoulders. Petitioner opted to pursue additional state relief rather than, say, file a protective petition in federal court and

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<sup>4</sup> *In re Waltreus*, 62 Cal. 2d 218 (1965).

<sup>5</sup> *Ex parte Dixon*, 41 Cal.2d 756 (1953).

seek a stay of the action to properly exhaust his claims.” *Id.* The magistrate judge said that “Petitioner’s half-hearted attempt to do so in October 2014 fell far short of that bar.” *Id.*

## V. REASONS FOR GRANTING THE WRIT

### A. Introduction

Robert Gonzales is serving 15 years-to-life in state prison for second degree murder. Pet. App. 29. A magistrate judge ruled that Gonzales’s *pro se* habeas corpus petition was filed 27 days late and dismissed it as untimely. Pet. App. 8-15. In granting a certificate of appealability on the issue of whether the district court correctly dismissed Gonzales’s petition as untimely, the Ninth Circuit ruled that the petition stated “at least one federal constitutional claim debatable among jurists of reason, namely that jurors violated the Sixth and Fourteenth Amendments by consulting extrinsic evidence during deliberations.” Ninth Circuit docket no. 5.

On August 27, 2018, a Ninth Circuit panel, per the Honorable A. Wallace Tashima, Morgan Christen, and Cynthia M. Rufe,<sup>6</sup> affirmed the judgment in an unpublished memorandum opinion. Pet. App. 2-4. The panel held that Gonzales “is not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2) because the California Court of Appeal deemed his petition untimely under state law by citing *In re Clark*, 5 Cal. 4th 750, 765 (1993), as an alternative to its ruling on the merits.” Pet. App. 3. The opinion concludes that “[t]he citation to *Clark* establishes that the California

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<sup>6</sup> United States District Judge for the Eastern District of Pennsylvania, sitting by designation. Pet. App. 2.

Court of Appeal deemed Gonzales's petition untimely, and this court must defer to that determination." *Id.* Gonzales timely petitioned for rehearing on September 10, 2018 (Ninth Circuit docket no. 48), and the panel denied rehearing on September 24, 2018. Pet. App. 1.

Certiorari is required for this Court to enforce its mandate that federal habeas courts determine what state courts would have held with respect to timeliness when state court rulings do not clearly indicate that a state habeas petition was untimely filed. Here, the magistrate judge and Ninth Circuit abdicated that responsibility and essentially applied a "strict liability" standard against Gonzales, i.e., that a "see also" citation to *Clark* means a state petition is untimely, and federal habeas review foreclosed, no matter how nonsensical and unforeseeable that conclusion is in light of procedural posture of the case, the language used by the state courts, and controlling state and federal law. Under the facts of this case and controlling Supreme Court law, the citation to *Clark* is not a "clear indication" that the state court found Gonzales's petition untimely, and therefore the Ninth Circuit should have "determine[d] what the state courts would have held in respect to timeliness" and concluded the petition is timely. *Evans v. Chavis*, 546 U.S. 189, 198 (2006). Page 765 of *Clark*, the pincite given in the summary denial, discusses three procedural bars, including the timeliness rule and the rule of *Ex Parte Dixon*, 41 Cal. 2d 756 (1953), which bars claims that could have been, but were not, raised on appeal. The most reasonable interpretation of the pincite is that it shows the Court of Appeal agreed with the Superior Court -- whose

ruling it had before it -- that Gonzales's six record-based claims were barred by *Dixon*, not that it disagreed with the Superior Court and believed that Gonzales's petition and all the claims in it were untimely.

In any event, under the facts present here, the pincite does not "clearly rule[]" that the Court of Appeal found Gonzales's petition untimely. *Carey v. Saffold*, 536 U.S. 214, 226 (2002). Indeed, it is hard to imagine how a state court could find that Gonzales unreasonably delayed presenting his claims when he filed his initial petition in Superior Court just four and a half months after his judgment became final on conclusion of direct review (with seven and a half months left in one-year federal limitations period); he filed his next petition in the Court of Appeal less than three weeks after the Superior Court denied relief; and he filed a petition in the Supreme Court less than one month after the Court of Appeal denied relief.

Because the Court of Appeal did not clearly rule that Gonzales's petition was untimely, the Ninth Circuit should have proceeded to the next step of the *Saffold/Chavis* analysis and evaluated the "relevant considerations" to decide whether a state court would find Gonzales's petition unreasonably delayed. *Chavis*, 546 U.S. at 852; *Saffold*, 536 U.S. at 226. Under this analysis, Gonzales's state petitions were timely. The panel opinion never reached this step because, by failing to consider or misapprehending material facts and law necessary to assess the state court's order in context, it concluded that the cite to *Clark* "establishes that the California Court of Appeal deemed Gonzales's petition untimely," and therefore "this court must defer to that determination."

This Court explained in *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), that “[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review.” The panel opinion essentially adopts Respondent’s position that any citation to *Clark* means a California state petition is untimely, even when the pincited page refers to another procedural bar found by the lower court to apply to the case, and even when under controlling state and federal law, the petitioner timely presented his claims. Respondent has never persuasively explained how any of Gonzales’s petitions were untimely under state law. Under the facts here, if the Court of Appeal expressly held that Gonzales’s petition was untimely, it would be applying a state procedural rule in an erroneous, novel and arbitrary manner that would violate Gonzales’s due process rights and which would not preclude federal merits review. *NAACP v. Alabama ex. rel. Flowers*, 377 U.S. 288, 301 (1964); *Sivak v. Hardison*, 658 F.3d 898, 907 (9th Cir. 2011). Yet the opinion ascribes this meaning to the Court of Appeal’s summary ruling based on an unexplained “see also” cite to a page of *Clark* describing three different procedural bars, and then concludes it “must defer” to the deciphered ruling. The Court should grant Gonzales’s petition to enforce the Court’s mandate under *Carey* and *Chavis* so that Gonzales can have his habeas corpus claims considered on the merits in federal court.

**B. The California Court of Appeal Did Not Clearly Rule that Gonzales’s Petition and All Claims In It Were Untimely**

A “properly filed application for State post-conviction or other collateral review” tolls the federal statute of limitations for the pendency of state habeas

proceedings. 28 U.S.C. § 2244(d)(2); *Curiel v. Miller*, 830 F.3d 864, 868 (9th Cir. 2016) (en banc). A habeas petition that is untimely under state law is not “properly filed” and does not toll the federal limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408, 412-14 (2005). If a state court “clearly rule[s]” that a delay in filing a habeas petition is “unreasonable,’ that would be the end of the matter.” *Saffold*, 536 U.S. at 226; *see also Curiel*, 830 F.3d at 871 (“so long as the state court’s timeliness ruling is clear, that is ‘the end of the matter’”). However, in the absence of a “clear indication” that a petition was timely or untimely filed, federal habeas courts must “examine the delay in each case and determine what the state courts would have held in respect to timeliness,” i.e., whether the petition was filed within a “reasonable time.” *Chavis*, 546 U.S. at 198.

The panel opinion holds that “Gonzales is not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2) because the California Court of Appeal deemed his petition untimely under state law by citing *In re Clark*, 5 Cal. 4th 750, 765 (1993), as an alternative ruling on the merits.” Pet. App. 3. This holding is erroneous because the summary order does not “clearly rule” or “clearly indicate” that it found Gonzales’s petition and all the claims in it untimely.<sup>7</sup> This is clear from reviewing the circumstances surrounding the state filings, as this Court did in *Saffold* and *Chavis* to assess whether the California state courts clearly ruled that the state

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<sup>7</sup> As long as one claim in a state habeas petition is timely, the federal limitations period is tolled as to the entire petition and all claims in it, even if the remaining claims are untimely. *Campbell v. Henry*, 614 F.3d 1056, 1061-62 (9th Cir. 2010).

petitions were untimely. *Saffold*, 536 U.S. at 217-18, 226 (noting date when Saffold's conviction became final on direct review, the dates when Saffold filed petitions in the Superior Court, Court of Appeal, Supreme Court and federal court, and the language of the Supreme Court order denying relief); *Chavis*, 546 U.S. at 195-96 (similar).

Gonzales filed one full round of state habeas petitions, beginning in Superior Court and ending in the California Supreme Court, and then filed a federal petition about six weeks after the Supreme Court denial. At issue here is the ruling in between by the Court of Appeal, the last reasoned decision on Gonzales's claims.

Gonzales raised the same eight claims in each state petition. His first six were record-based claims challenging, for example, the denial of motions to sever and to exclude evidence. His other two claims alleged ineffective assistance of trial counsel and appellate counsel.

He constructively filed his first state petition in the Los Angeles County Superior Court on May 31, 2014, about four and a half months after his judgment became final on the conclusion of direct review. The Superior Court denied the petition on June 25, 2014 without ordering a response from the State. The denial order states:

Defendant is not present in court, and not represented by counsel. Defendant's petition for writ of habeas corpus read and considered. Defendant was convicted of second degree murder.

The conviction was affirmed on appeal on August 13, 2013. Defendant's first six grounds for relief dealt with alleged error by the trial court during defendant's trial. These are matters that could have been raised in Defendant's direct appeal. A writ of habeas corpus will not lie where the claimed errors could have been, but were not, raised via timely appeal. (In re Reno (2012) 55 Cal 4th 428).

Defendant's last ground for appeal is inadequacy of trial and appellate counsel. Defendant failed to present sufficient facts warranting relief.

Petition is denied.

Pet. App. 25.

Less than three weeks later, on July 15, 2014, Gonzales constructively filed a habeas petition in the California Court of Appeal alleging the same claims by signing the petition and delivering it to prison officials for filing. Gonzales included with his petition a copy of the Superior Court's order denying his prior petition, as instructed by the form petition he was required to use under California Rule of Court 8.380(a).

Without ordering a response from the State, the Court of Appeal denied the petition on September 30, 2014 in an order stating:

The petition for writ of habeas corpus has been read and considered, along with the file in the related appeal, B237860.

The petition is denied for failure to state sufficient facts demonstrating entitlement to the relief requested. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475; see also *In re Clark* (1993) 5 Cal.4th 750, 765; *In re Lindley* (1947) 29 Cal.2d 709, 723.)

Pet. App. 24.

The only sentence of text explaining the Court of Appeal's ruling states that the petition was "denied for failure to state sufficient facts demonstrating entitlement to the relief requested." This is the same language used by the Superior Court to deny the two ineffective assistance of counsel claims. *Supra* at 23 ("Defendant's last ground for appeal is inadequacy of trial and appellate counsel. Defendant failed to present sufficient facts warranting relief."). The Court of Appeal cites pages 474-75 of *Duvall* in support of its proposition. Those pages state the rules that California state courts will deny a petition (1) on the merits when it fails to state a *prima facie* case for relief or (2) on procedural grounds when it fails to plead facts with sufficient particularity. Thus, the most reasonable interpretation is that the Court of Appeal denied the two ineffective assistance claims on the merits, as the Superior Court did,<sup>8</sup> or for failure to plead sufficient

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<sup>8</sup> This is Respondent's position. Pet. App. 20-21.

facts. Either ruling tolls the federal statute. *Gaston v. Palmer*, 417 F.3d 1030, 1038-39 (9th Cir. 2005); *Curiel*, 830 F.3d at 869.

Page 765 of *Clark* cites three procedural bars: (1) the timeliness rule that a petitioner must “explain and justify any significant delay in seeking habeas corpus relief”; (2) the *Dixon* bar for raising claims that could have been but were not raised on appeal, the bar applied to Gonzales’s remaining six claims by the Superior Court; and (3) the *Waltreus*<sup>9</sup> bar, which states that issues resolved on appeal will not be reconsidered in habeas. Gonzales did not reassert in state habeas any claims resolved on appeal, so *Waltreus* doesn’t apply.

The most reasonable interpretation of the *Clark* pincite is that it refers to the *Dixon* rule barring the six remaining record-based claims, as the Superior Court ruled. Gonzales raised the same eight claims in both courts and the Court of Appeal had the Superior Court order before it, since Gonzales had submitted it with his petition.

It makes no sense, much less is clearly indicated, that the “see also” cite to page 765 of *Clark* signals that the petition, and all the claims in it, were untimely. First, the Superior Court did not find Gonzales’s petition untimely, and Respondent admitted in his briefs here and in district court that the Superior Court petition provides statutory tolling, i.e., was timely filed. Pet. App. 6 (“Petitioner is entitled to the twenty-three days this petition [filed in Superior Court] was pending, which extended the statute of limitations to February 6, 2015”); Pet. App. 17, 18, 21

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<sup>9</sup> *In re Waltreus*, 62 Cal. 2d 218 (1965).

(Respondent's motion to dismiss states that the Superior Court "denied Petitioner's ineffective assistance of trial and appellate counsel claims on the merits" and "Petitioner is entitled to statutory tolling for the pendency of his superior court habeas petition").<sup>10</sup>

Second, Gonzales raised the same claims in both courts.

Third, Gonzales explained in his petitions that any delay in the discovery or presentation of claims was because he had no access to his trial transcripts during his appeal and his appellate attorney failed to raise all of Petitioner's claims. Ninth Circuit docket no. 21 (ER 140, 221, 257). Gonzales cited his transcripts in his petitions, including in his claim of ineffective assistance of trial counsel. *Id.* (ER 115-37, 180-202, 227-46, 249-54).

Fourth, Gonzales filed his petition in the Court of Appeal less than three weeks after he lost in Superior Court, an interval held by this Court to be reasonable and timely. *Chavez*, 546 U.S. at 201 (California state habeas petitions filed in higher court 30-60 days after denial in lower court are timely and toll federal limitations period); *Saffold*, 536 U.S. at 222 (petitions filed in higher court within 30-to-45 days of lower court denials are timely and toll federal statute). Because Gonzales met the Supreme Court's 30-60 day deadline to file a petition in a

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<sup>10</sup> Respondent tried to renounce this position at oral argument in the Ninth Circuit but the Court should hold that Respondent has waived any argument that the Superior Court petition was untimely or does not provide statutory tolling. *Reyes v. Lewis*, 833 F.3d 1001, 1033 (9th Cir. 2016).

higher court upon a lower court's denial, that cannot be a basis to hold Gonzales's Court of Appeal petition untimely.

The only possible basis to find Gonzales's habeas claims unreasonably delayed is for the time he took to file his initial state petition in Superior Court. But Gonzales filed his Superior Court petition just four and a half months after his judgment became final, when the time to file a certiorari petition lapsed without one being filed. At that point, there were still seven and one half months left on the federal clock. Further, this was Gonzales's first state habeas petition, not a successive petition. *Clark*, 5 Cal. 4th at 767 n.7. The State was not ordered to respond to any of Gonzales's state petitions, and therefore no argument that his petitions were untimely was presented to the state courts. The State has not cited a single case holding that the filing of a first state habeas petition in Superior Court four and one-half months after the judgment is final on conclusion of direct review is untimely. Indeed, the State's position in its briefs in the Ninth Circuit and in district court is that Gonzales is entitled to statutory tolling during the time his Superior Court petition was pending; in other words, that the Superior Court petition was timely filed.

Gonzales cited in his briefs numerous authorities showing that California courts have found timely petitions filed with much more delay than present here. *See, e.g.*, Ninth Circuit docket no. 20 at 33; Ninth Circuit docket no. 35 at 7. Numerous other authorities make this point as well. *See, e.g.*, *In re Spears*, 157 Cal. App. 3d 1203, 1207-08 (1984) (habeas petition raising claim of ineffective

assistance of appellate counsel filed in Court of Appeal 18 months after Court of Appeal issued opinion affirming judgment on appeal is timely)<sup>11</sup>; *In re Burdan*, 169 Cal. App. 4th 18, 30-31 (2008) (habeas petition filed in Court of Appeal 10 months after denial of petition by Superior Court timely, where Superior Court petition was filed one year after ruling challenged by petitioner); *In re Lucero*, 200 Cal. App. 4th 38, 44-45 (2011) (Court of Appeal petition timely when filed 11 days after Superior Court denial, where Superior Court petition was filed 10 months after finality of court decision forming basis of petitioner’s claims); *In re Crockett*, 159 Cal. App. 4th 751, 757-58 (2008) (Court of Appeal petition by prisoner’s counsel timely when filed five months after Superior Court denied petition, where Superior Court petition was filed four months after publication of opinion giving rise to claims).

The magistrate judge emphasized that Gonzales did not file his first petition until three years after he was convicted at trial on May 3, 2011. But Gonzales wasn’t sentenced for another seven months – until December 12, 2011<sup>12</sup> – and he couldn’t initiate his appeal or a habeas action until he was sentenced. Gonzales filed his Superior Court petition on May 31, 2014, about seven and a half months after the California Supreme Court denied his petition for review on appeal. As shown in letters submitted in district court, and consistent with Gonzales’s state

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<sup>11</sup> Gonzales filed his habeas petition in the Court of Appeal on July 15, 2014, 11 months after that court affirmed his judgment on direct appeal.

<sup>12</sup> Ninth Circuit docket no. 21 (ER 177); district court docket no. 22-4 at ECF page 25.

allegations, his appellate counsel refused to send him the trial transcripts until after the supreme court denied review. Ninth Circuit docket no. 21 (ER 58-59, 61).

Moreover, Gonzales could not possibly file his claim of ineffective assistance of appellate counsel until his appeal concluded. Before then, he could not show prejudice on the claim. He alleged that “[a]ppellate counsel failed to raise all Petitioner’s merited [sic] claims violating Petitioner’s 6th and 14th Amendment rights of the U.S. Constitution.” Ninth Circuit docket no. 21 (ER 197). The State hasn’t explained why a claim of ineffective assistance of appellate counsel filed four and a half months after the appeal becomes final is untimely, and *Spears* and other authorities show it is not.

The opinion states that “*Clark* is understood primarily to represent California’s timeliness rule” and “[t]o the extent *Clark* signifies a different California rule, that rule is the one against second or successive petitions . . . which Gonzales concedes is not relevant here.” Pet. App. 3. While *Clark* is known mainly for the timeliness and successiveness bars, just because the latter does not apply here does not mean the former does. *Clark* discusses many different procedural rules and can be cited for a number of propositions. Significantly, while the timeliness and successive bars are discussed throughout the opinion, the *Dixon* bar on claims that could have been but were not raised on appeal is discussed only on page 765 -- the pincited page -- and in a footnote on page 768. That the Court of Appeal would cite *Clark* to signal a *Dixon* bar is borne out by what the Superior Court did when denying Gonzales’s petition -- it cited *Reno* for the *Dixon* rule: “A

writ of habeas corpus will not lie where the claimed errors could have been, but were not, raised via timely appeal. (In re Reno (2012) 55 Cal. 4th 428.)” Pet. App. 25. *Reno* addressed the specific question of exhaustion petitions filed by capital habeas petitioners, 55 Cal. 4th at 442-43, but like *Clark*, it addresses many different procedural bars, including the *Dixon* rule. *Id.* at 490-96. The panel opinion oversimplifies *Clark* and misapprehends state court citation practice in reaching its erroneous conclusion.

Even if the Court rejects Gonzales’s reading that the Court of Appeal, like the Superior Court, denied the six record-based claims under the *Dixon* rule, denied the two ineffectiveness claims on the merits, and found no claims untimely, it still cannot conclude that the court’s summary denial clearly ruled that the petition and every claim in it were untimely. *Saffold* held that a denial “on the merits and for lack of diligence” did not clearly rule that the petition was untimely. 536 U.S. at 225-26. If the order in *Saffold* did not clearly indicate the petition was untimely, neither does the Court of Appeal’s order here.

#### **C. The Court Should Hold that Gonzales’s State Habeas Petitions Were Timely Filed**

Evaluating the relevant considerations, this Court should conclude that Gonzales “made the relevant filing[s] within a reasonable time.” *Chavis*, 546 U.S. at 199. As shown in the preceding section, under state and federal law Gonzales did not significantly or unreasonably delay in filing any of his three petitions. The Superior Court found his petition timely; Respondent admits that the Superior Court petition tolls the federal limitations period; Gonzales filed his petition in the

Court of Appeal less than three weeks after losing in Superior Court; and he filed a petition in the Supreme Court less than one month after the Court of Appeal ruled against him. Further, he alleged two claims of ineffective assistance of counsel, which are more appropriately litigated in habeas than on appeal, *People v. Mendoza Tello*, 15 Cal. 4th 264, 266-67 (1997), and he could not bring his claim of appellate counsel's ineffectiveness until his appeal had ended. Gonzales filed at least one timely claim, all that is required to toll the federal statute. He is entitled to statutory tolling for the entire pendency of his three state petitions and to have his federal habeas corpus claims reviewed on the merits. *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

## VI. CONCLUSION

For the foregoing reasons, the court should grant Gonzales's petition.

Respectfully submitted,

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DATED: December 19, 2018

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