

No.

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**IN THE SUPREME COURT OF THE UNITED STATES**

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MARTIN VALDEZ,

Petitioner

v.

W.L. MONTGOMERY, 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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### **QUESTIONS PRESENTED**

Martin Valdez appeals from the Ninth Circuit Court of Appeals published decision affirming the dismissal of his petition for a writ of habeas corpus as untimely.

The questions presented are: (1) Is the Ninth Circuit's decision contrary to this Court's decision in *Ylst v Nunnemaker* because it failed to presume that the silent denial of his second state court petition was based on the same grounds as the first?; (2) Is the Ninth Circuit's decision contrary to Rule 4 of the Rules Governing Section 2254 cases because it did not require the district court to review the relevant state court records before deciding to dismiss the petition as untimely?

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner, Martin Valdez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, which affirmed the district court order dismissing as untimely his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

## **OPINIONS BELOW**

The Ninth Circuit Court of Appeals issued a published decision affirming the district court's order dismissing the petition for a writ of habeas corpus as untimely.

*Valdez v. Montgomery*, 918 F.3d 687 (9<sup>th</sup> Cir. 2019). App. 2.<sup>1</sup> The district court order dismissing the petition as untimely is unreported. App. 15, 16, 18.

## **JURISDICTION**

The final judgment of the Ninth Circuit Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc and affirming dismissal of the petition was entered on April 22, 2019. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law."

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<sup>1</sup> "App" refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit. "RT" refers to the reporter's transcript of the state Court of Appeal proceedings and "CT" refers to the Clerk's Transcript.

## STATEMENT OF THE CASE AND FACTS

### A. State Court Proceedings<sup>2</sup>

The district court summarily dismissed the petition without obtaining copies of the relevant state court records. ER 4, 5. Accordingly, this summary of the state court proceedings is based on Valdez's *pro se* petition filed in the district court and the district court records. Valdez was convicted by a jury in Riverside County Superior Court of one count of first degree murder with special circumstances, three counts of attempted first degree murder, one count of assault with a deadly weapon and one count of robbery. The petition does not include the date of Valdez's conviction. CR 1, p. 2.

The petition states that Valdez appealed his conviction to the California Court of Appeal, but does not include a statement of the grounds raised. CR 1, p. 2. Valdez's conviction was affirmed by the Court of Appeal on April 25, 2013. His petition for review to the California Supreme Court was denied on July 31, 2013. CR 1, p. 3.

Valdez filed a petition for a writ of habeas corpus in the Riverside County Superior Court on April 10, 2014. The petition asserted three claims of ineffective assistance of trial counsel and a claim that the evidence was insufficient to support the gang allegations. The petition was denied on May 15, 2014. CR 1, pp. 3-4.

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<sup>2</sup> Because the district court record does not include a copy of the reporter's transcripts for Valdez's trial or the Court of Appeal Opinion, a summary of the facts underlying Valdez's convictions is not included in this petition.



Valdez filed his next petition for a writ of habeas corpus in the California Court of Appeal on an unspecified date in April, 2015. Valdez stated that the claims raised in that petition were the same as the ones he had included in his Superior Court petition. The petition was denied on May 5, 2015. CR 1, p. 4.

Valdez then filed a petition for a writ of habeas corpus in the California Supreme Court on June 10, 2015, raising the same claims as those he included in his previous petitions. The petition was denied on February 17, 2016. CR 1, p. 5.

Because the orders denying Valdez's state court petitions are not part of the district court record, they are not included in the excerpts of record. Valdez has filed a motion concurrently with this brief, requesting judicial notice of the orders denying the above described state habeas corpus petitions as well as a second full round of state habeas corpus petitions that concluded on November 9, 2016.

#### **B. Federal Court Proceedings**

On March 31, 2016, Valdez filed a petition for a writ of habeas corpus in the district court. CR 1. On April 25, 2016, the district court issued an order to show cause why the petition should not be dismissed as untimely. CR 5. On June 20, 2016, Valdez filed his response. CR 8. On July 14, 2016, the magistrate judge issued findings and recommendations that the petition be dismissed as untimely. ER 7.

On August 29, 2016, Valdez filed objections to the magistrate's report. CR 13. On September 8, 2016, the district court issued an order adopting the magistrate's findings

and recommendations and on the same date, it issued an order and judgment dismissing the petition as untimely. ER 4, 6. On October 7, 2016, Valdez filed a notice of appeal. ER 1. On June 30, 2017, this Court issued a certificate of appealability and appointed counsel. Docket No. 4-1.

On January 8, 2018, Valdez made a motion for summary reversal, arguing that remand was necessary because the district court had failed to order respondent to lodge the state court record. Valdez argued that this Court should not adjudicate the timeliness of his petition without the relevant state court records. On February 28, 2018, this Court denied the motion without prejudice to renewal in the opening brief. Docket No. 17.

**C. The District Court's Analysis of The Timeliness of Valdez's Petition**

The district court found that, because the California Supreme Court denied Valdez's petition for review on direct appeal on July 31, 2013, the judgment became final 90 days later, on October 29, 2013. ER 10. The district court held that the AEDPA limitations period commenced on October 29, 2013, and Valdez had until October 29, 2014, to file his federal petition. *Id.* Because the petition was filed on March 1, 2016, it was untimely absent statutory or equitable tolling. *Id.*

The district court acknowledged that the AEDPA limitations period is tolled for all of the time that the petitioner is attempting, through proper use of state court procedures, to exhaust state court remedies. ER 11. However, under *Evans v. Chavis*, 546 U.S. 189 (2006), the periods between the denial of a state petition and the filing of a

petition seeking higher court review (“gaps”) are tolled only if the period that elapses is reasonable. *Id.*

The district court held that “an unreasonable delay in seeking review from a higher court on the same claim cannot be regarded as “pending” and therefore does not qualify for statutory tolling.” (emphasis in original.) ER 12. The district court found that an upper limit of approximately 60 days is appropriate, unless an adequate explanation for delay is provided. ER 12-13.

The district court found that Valdez was entitled to statutory tolling for the period before his first state petition was filed in the Riverside County Superior Court, extending the AEDPA limitations period 35 days to December 3, 2014. The district court next considered whether Valdez should be allowed gap tolling for the approximately eleven month period between the denial of the Superior Court petition and the filing of his next petition in the Court of Appeal. ER 13. If Valdez was allowed “gap” tolling for that period, his petition would be timely. ER 13.

In his response to the Order to Show Cause, Valdez explained that his Court of Appeal petition was delayed for two reasons: (1) there was a very large trial record in his case (“two trials, over 6,000 pages of transcript and . . . the prosecution sought the death penalty”) and (2) he had delayed filing his Court of Appeal petition because he wanted to wait until the California Supreme Court decided *People v. Elizalde*, 61 Cal.4th 523 (2015), which was ultimately decided on June 25, 2015. ER 13-14.

Valdez explained that the California Supreme Court had granted review in *Elizalde* to settle the split of opinion in the California Courts of Appeal concerning the booking inquiry exception to *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Elizalde* decision would control the state court's resolution of Valdez's constitutional claim that admission of his responses to booking inquiries concerning gang affiliation violated *Miranda*. CR 8, pp. 3-4.

Valdez also explained that he had delayed filing his second state court petition in anticipation of *Elizalde* because (1) California requires only that a petition be filed within a reasonable time after the petitioner knew or should have known of the grounds for relief, and so there was no statutory deadline (2) Valdez had a reasonable expectation that he would benefit from a favorable decision in *Elizalde*; and (3) California generally bars successive petitions. CR 8, p. 5.

The district court held that Valdez's reasons were inadequate, because "he asserted the same claims in all three state habeas petitions." ER 14. The district court also found that Valdez's claim that he delayed filing his second petition in anticipation of the California Supreme Court decision in *Elizalde* was "belied" by the fact that Valdez filed his Court of Appeal petition prior to the issuance of that decision. ER pp. 16-17.

The district judge accepted the magistrate's findings and recommendations, concluding that because Valdez had "asserted the same claims in all of his state habeas petitions" his argument that his delay was reasonable was without merit. ER 6.

Accordingly, without examining Valdez’s state petitions or the other relevant state court records, the district court dismissed the petition on grounds that it was untimely. ER 4, 5.

## **REASONS FOR GRANTING THE PETITION**

### **I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT’S PUBLISHED DECISION CONFLICTS WITH RULE 4 OF THE RULES GOVERNING SECTION 2254 CASES AND THIS COURT’S DECISION IN *YLST V. NUNNEMAKER***

#### **A. The Ninth Circuit’s Published Decision Erroneously Holds That The District Court Could Summarily Dismiss the Petition Without Considering the Relevant State Court Records**

Under Rule 4 of the Rules Governing Section 2254 Cases, a district court may summarily dismiss a petition if it “plainly appears” from the petition and attachments that the petitioner is not entitled to relief. However, the court must “obtain and review” the relevant portions of the state court record as necessary to determine whether the petition should be dismissed. *Nasby v. McDaniel*, 853 F.3d 1049, 1053 (9<sup>th</sup> Cir. 2017).

Certiorari should be granted to provide guidance to the district courts regarding their duty to examine the relevant portions of the state court record before summarily dismissing a Section 2254 petition under Rule 4. The Ninth Circuit’s published decision in this case holds that the district court properly dismissed the petition without requiring the respondent to lodge any

portions of the relevant state court record. It reasoned that because the petitioner had listed the dates of his state court petitions and because the district court gave him an opportunity to respond to a notice to show cause why the petition should not be dismissed as untimely, it was not required to examine the state court records related to the petitioner's murder conviction and sentence of life in prison.

*Valdez v. Montgomery*, 918 F.3d at pp. 693-695; App. pp. 13-14.

The Ninth Circuit's published decision in this case also conflicts with its decision in *Nasby v. McDaniel*, 853 F.3d 1049 (2017), which holds:

“Regardless of what documents the parties originally submit, it is the district court's independent obligation to obtain the relevant portions of the record.” *Id* at p. 1054.

Although *Nasby* concerns the district court's adjudication of the merit of the claims and not their timeliness, the same principals should control when the timeliness of a petition turns on the reasonableness of a petitioner's delay or other issues of fact that could not be resolved based on the face of the petition alone. Accordingly, this Court should grant certiorari, reverse the decision of the Ninth Circuit Court of Appeals and remand this case to the district court for further proceedings.

**B. Certiorari Should Be Granted Because The Ninth Circuit’s Published Decision Misapprehends The *Ylst* “Look Through” Doctrine**

The “look through” doctrine provides that “[w]hen at least one state court has rendered a reasoned decision, but the last state court to reject a prisoner’s claim issues an order ‘whose text or accompanying opinion does not disclose the reason for the judgment,’ the federal court must ‘look through’ the mute decision and presume the higher court agreed with and adopted the reasons given by the lower court.” *Ylst v. Nunnemaker*, 501 U.S. 797, 802–06 (1991).

That doctrine applies where the court rendering a reasoned decision and a later court making a summary determination were deciding the same claim. *See e.g., Ylst*, 501 U.S. at 803 (“Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.”)

In this case, In this case, the published decision holds that the “look through” doctrine of *Ylst v. Nunnemaker* cannot provide a basis for holding that Valdez’s second state habeas petition was timely. The decision reasons that the *Ylst* doctrine does not apply because “Whether Valdez’s second state habeas petition was timely filed in the Court of Appeal is a different and entirely distinct issue from whether his habeas petition in the Superior Court was timely filed.” App. p. 10.

Certiorari should be granted because the decision conflicts with *Ylst* and with prior published decisions on the applicability of the *Ylst* doctrine and the timeliness of habeas corpus petitions filed under the California “original writ” system.

This Court has explained that the California “original writ” system provides the functional equivalent of appellate review of a habeas petition filed in the Superior Court. *Evans v. Chavis*, 546 U.S. 189, 192–93 (2006); *Carey v. Saffold*, 536 U.S. 202, 222–23 (2002). Accordingly, orders on petitions filed in the California Court of Appeal and the California Supreme Court are treated as the equivalent of appellate review of the original petition filed in the Superior Court. *Trigueros*, at p. 991. If the California Supreme Court finds the petitioner’s last petition to be timely, that holding overrules any lower court rulings that the same claim was not timely filed. *Curiel*, at p. 871.

As a result, the Ninth Circuit has consistently rejected the proposition that each petition filed in the California Court of Appeal and the California Supreme Court “is judged on its own timeliness.” *Trigueros v. Adams*, 658 F.3d 983, 991 (9<sup>th</sup> Cir. 2011); *Campbell v. Henry*, 614 F.3d 1056, 1060 (9<sup>th</sup> Cir. 2010).



The published decision in this case holds that the *Ylst* “look through” doctrine cannot answer whether the Court of Appeal petition was timely filed. App. p. 10. The decision reasons that because the Court of Appeal petition had not been filed when the Superior Court issued its ruling, it was impossible for the Superior Court to have ruled that the later filed petition was timely. *Id.*

While that is true, the decision overlooks an important point. Because the California Supreme Court had before it the entire procedural history of petitioner’s case as well as copies of the decisions of the Superior Court and the Court of Appeal, it had all of the information necessary to decide whether to find the Court of Appeal petition was timely and to adopt the Superior Court’s reasoned decision. *See Curiel*, at p. 871.

*Ylst* requires a federal court to examine the reasoning of the Superior Court not because that Court could have ruled on the timeliness of later filed petitions, but because later filed petitions that are denied without comment are presumptively denied on the same grounds given by the Superior Court. *Ylst* at pp. 804-806 (explaining that reviewing courts are not required to explain their reasoning if they are affirming a lower court decision based on the same grounds).

Here, the district court erroneously failed to conduct the mandatory *Ylst* inquiry. It denied Valdez’s petition without requiring the respondent to answer or to lodge the state court record. ER 4-17. If the district court had done so and properly applied the *Ylst* presumption, the respondent would have been required to show strong evidence that the

California Supreme Court in fact intended to find that the petition before it was untimely.

The Ninth Circuit's decision in this case cites to *Kernan v. Hinojosa*, 136 S.Ct. 1603, 1606 (2016)(per curiam) which is inapposite, because the Superior Court petition in that case was denied on grounds of improper venue, which was a doctrine that could not have applied to petitions later filed in the proper forum. In this case, the California Supreme Court clearly could have denied Valdez's last state court petition based on the same grounds articulated by the Superior Court. Accordingly, the *Ylst* "look through" presumption should have been applied.

Finally, the *Ylst* decision explicitly considered a situation like the one presented in this case, where a later filed state court petition was alleged to be untimely and held that the *Ylst* "look through" presumption applies. *Ylst* states that after the "look through" presumption is applied, the opponent must produce "strong evidence" to demonstrate that the later unexplained order was a finding that the petition was untimely:

[I]t might be shown that, even though the last reasoned state-court opinion had relied upon a federal ground, the later appeal to the court that issued the unexplained order was plainly out of time, and that the latter court did not ordinarily waive such a procedural default without saying so.

While we acknowledge that making the presumption rebuttable will make it less efficient than the categorical approach taken by the Courts of Appeals that have adopted the “look-through” methodology (citations omitted) we think it will still simplify the vast majority of cases. The details of state law need not be inquired into unless, if they should be as the habeas petitioner asserts, they would constitute strong evidence that the presumption, as applied, is wrong.

*Ylst*, at pp. 804-805.

For all of these reasons, the *Ylst* look through doctrine should have been applied in this case, as the presumption applies whether or not a later filed petition was allegedly untimely. The burden should have been placed on the respondent to show “strong evidence” that the California Supreme Court’s silent denial was not based on the same grounds as those articulated by the Superior Court.

In summary, certiorari should be granted in this case because the Ninth Circuit’s published decision suggests that the California Superior Court decision is not relevant to the timeliness of the later filed petitions. App. at p. 10. However, because the *Ylst* “look through” inquiry requires a federal court to presume that a later decision rests on the same grounds, the Superior Court decision is relevant to the timeliness of the later filed petitions.

The district court should have examined the Superior Court decision while presuming that the California Supreme Court and the Court of Appeal did so as well, and that those Courts applied the Superior Court's reasoning to the later filed petitions raising the same claims. *Ylst*, at pp. 803-806. For all of these reasons, certiorari should be granted.

## ARGUMENT

### **I. The Order Dismissing the Petition Should Be Reversed Because The District Court Summarily Ruled on The Timeliness of Valdez’s Petition Without First Obtaining and Reviewing The Relevant Portions of the State Court Record**

A district court may summarily dismiss a habeas corpus petition only if it “plainly appears from the face of the petition ... that the petitioner is not entitled to relief.” Rule 4 of the Rules Governing Section 2254 Proceedings. Rule 4 provides that when summary dismissal is inappropriate, the “judge shall order the respondent to file an answer or other pleading . . . or to take such other action as the judge deems appropriate.” *White v. Lewis*, 874 F.2d 599, 602 (9<sup>th</sup> Cir.1989). Under Rule 5, the respondent must also lodge with the court copies of the relevant state court records.

Moreover, a district court has an independent duty to review the relevant portions of the state court record before disposing of a habeas petition. *See Nasby v. McDaniel*, 853 F.3d 1049 (2017). In *Nasby*, the Ninth Circuit held that because the district court’s failed to review the relevant state court record there was “no alternative” but to remand the case to the district court with instructions to order the State to submit the relevant state court records and to readjudicate the petition. *Id* at p. 1053.

The *Nasby* opinion begins “We face a threshold obstacle to reviewing Nasby’s petition. The district court failed to examine important parts of the record of the state court proceedings in its adjudication of Nasby’s claims.” *Nasby*, at p. 1052. The Ninth Circuit ultimately concluded that “Regardless of what documents the parties originally

submit, it is the district court's independent obligation to obtain the relevant portions of the record." *Id* at p. 1054. Although *Nasby* concerns the district court's adjudication of the merits of claims and not their timeliness, the same principals should control when the timeliness of a petition turns on the reasonableness of a petitioner's delay or other issues of fact.

This Court has also recognized that information essential to the calculation of the AEDPA limitations period may be absent—as it was in this case—unless the State has filed, along with its motion or answer, copies of documents from the state-court proceedings. *Pliler v. Ford*, 542 U. S. 225, 232 (2004) cited in *Day v. McDonough*, 547 U.S. 198, 207, fn 6 (2006). Here, the district court clearly erred in dismissing the petition as untimely and rejecting petitioner's justifications for his delay without obtaining and reviewing the pertinent state court records.

Moreover, because the timeliness of the petition was a mixed question of law and fact, the district court was required to obtain the state court record and review it sua sponte before dismissing the petition. *Rhinehart v. Gunn*, 598 F.2d 557, 559 (9<sup>th</sup> Cir. 1979)(per curiam)(reversing dismissal of petition where district court failed to independently obtain and review relevant state court records); *Chaney v. Lewis*, 801 F.2d 1191, 1194-1195 (9<sup>th</sup> Cir. 1986); *Griffin v. Rogers*, 308 F.3d 647, 653-655 (6<sup>th</sup> Cir. 2002)(reversing dismissal of petition as time barred and remanding with instructions to obtain the state court record because there was insufficient evidence in the record to

determine whether petitioner should have been allowed equitable tolling).

As set forth in more detail below, petitioner's federal habeas corpus petition was not plainly untimely. Accordingly, the district court should have ordered the warden to respond to the petition and to lodge the state court records. In the alternative, the district court should have obtained and reviewed the relevant state court records sua sponte.

**A. The Petition Was Not “Plainly” Untimely**

**1. The AEDPA Limitations Period**

Section 2244(d)(1) of Title 28 U.S.C., imposes a one-year statute of limitations on habeas corpus petitions filed in federal court by state prisoners. *Smith v. Duncan*, 297 F.3d 809, 812 (9th Cir. 2002). The one-year period is tolled during “the time... a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending ...” 28 U.S.C. § 2244(d)(2); *Artuz v. Bennett*, 531 U.S. 4, 5 (2000).

California's original writ procedure does not allow an “appeal” of a state habeas denial but rather allows a petitioner to file separate petitions at each level of the state courts. This Court has addressed the application of the § 2244(d)(2) “pending” language in the context of California's original writ procedure in two cases: *Carey v. Saffold*, 536 U.S. 214 (2002), and *Evans v. Chavis*, 546 U.S. 189 (2006).

*Carey* held that a petition is “pending” during the intervals “between a lower court

decision and a filing of a new petition in a higher court. *Carey*, 536 U.S. at 223.

Therefore, the intervals between the state court's disposition of a state habeas petition and the filing of a petition at the next state appellate level are generally tolled, so long as the state petitions were timely under state law. If the petitioner “delayed ‘unreasonably’ ... the petition was not ‘pending’ during this [the interval] period.” *Carey*, 536 U.S. at 225.

This Court remanded the petition to the Ninth Circuit to evaluate whether the four and one-half month interval in his case made the state petition untimely. *Carey*, 536 U.S. at 226-227. On remand, the Ninth Circuit held that the interval was reasonable and the petition timely:

The Supreme Court held that Saffold's petition was pending until the California Supreme Court denied it -- provided he did not unreasonably delay in filing his petition. This holding, when viewed in light of the California Supreme Court's orders denying on the merits petitions that were far more tardy than Saffold's, compels the conclusion that Saffold's petition was not denied as untimely by the California Supreme Court, that he is entitled to tolling for the four and one-half month period in question, and that his federal habeas petition should be reviewed on the merits by the district court.

*Saffold v. Carey*, 312 F.3d 1031, 1035-1036 (9th Cir. 2003).

In *Evans v. Chavis*, this Court held that, when the state has not clearly indicated whether a petition is timely, federal courts must conduct their own inquiry into state law and the facts surrounding the filing of the state postconviction proceedings and then make a determination whether the state petitions were timely filed:

In the absence of ... [a] clear indication that a particular request for appellate review was timely or untimely, the Circuit must itself examine the



delay in each case and determine what the state courts would have held in respect to timeliness. That is to say, without using a merits determination as an “absolute bellwether” (as to timeliness), the federal court must decide whether the filing of the request for state-court appellate review (in state collateral review proceedings) was made within what California would consider a “reasonable time.”

*Evans*, 546 U.S. at 198.

**2. Whether Statutory Tolling Should Have Been Allowed Under *Evans v. Chavis* Is a Mixed Question of Fact and Law That Could Not Be Fairly Decided Without Reviewing The Relevant State Court Records**

The first step in the analysis of petitioner’s eleven month filing delay is to determine whether the state courts had clearly indicated whether his Court of Appeal petition was timely. *Evans*, 546 U.S. at 198. Here, the district court could not have fairly made that determination because it failed to examine the orders denying the state court petitions. Instead, the district court examined the online dockets for Valdez’s petitions filed in the Court of Appeal and the California Supreme Court, from which it was able to discern the relevant dates and the disposition of the petitions. ER 2, 13. The district court decision does not indicate that it obtained the orders issued by the Riverside County Superior Court. ER 6,7.

The second step of the *Evans/Saffold* analysis requires the district court, if there is no clear indication of timeliness, to determine whether the petition was timely under California law. *Evans*, 546 U.S. at 299. Here, the district court found that Valdez’s petition was plainly untimely because there was an approximately eleven month “gap”

between the denial of his petition filed in the Riverside County Superior Court and the filing of his petition in the California Court of Appeal. ER 13-14.

Summary dismissal was inappropriate, because the reasonableness of Valdez's delay could not be fairly evaluated without reviewing the relevant state court records. The district court found that Valdez was "disingenuous" when he said that he delayed filing his second state petition because he was waiting for the *Elizalde* decision. The district court reasoned that Valdez was lying because he filed his petition in the Court of Appeal about two months prior to the decision in *Elizalde*. I ER 16.

The district court was apparently unaware that, after waiting about a year for the decision in *Elizalde*, Valdez decided to pursue his *Miranda/Elizalde* claim in a second full round of state habeas corpus petitions. After the *Elizalde* decision was issued on June 25, 2015, Valdez promptly filed a new petition in the Riverside County Superior Court and he promptly exhausted the claim by filing petitions in the Court of Appeal and the California Supreme Court. *In re Valdez*, Riverside County Superior Court Case No. RIC 1607784 (July 6, 2016); *In re Valdez*, California Court of Appeal, Fourth District, Division Two, Case No. E066541 (August 8, 2016); *In re Valdez*, California Supreme Court Case No. S237294 (November 9, 2016).

The orders in Valdez's second round of state habeas corpus petitions demonstrate that Valdez's assertion that he delayed filing his second petition in anticipation of the *Elizalde* decision was not disingenuous. Valdez reasonably delayed filing his Court of

Appeal petition in an effort to fully exhaust his claims in state court and to try to avoid the bar on successive petitions. Valdez ultimately decided to file a round of successive petitions rather than continue to wait for the *Elizalde* opinion.

While state court exhaustion can usually proceed up the appellate “ladder” in California without successive litigation, that was not the case here because Valdez was attempting to both comply with the AEDPA limitations period and avoid a successive petition bar. Even experienced counsel would have struggled with the decision as to how to proceed with state court exhaustion under those circumstances.

In summary, Valdez’s delay was reasonable because he had to choose between continuing to wait for *Elizalde* or filing a round of successive petitions in the state courts. Either way, he faced the possibility of a unfair procedural default.

Because the record below was inadequate to fairly determine the reasonableness of the delay and therefore the timeliness of Valdez’s petition, this Court should grant certiorari and reverse the district court order dismissing the petition as untimely. *Nasby v. McDaniel*, 853 F.3d 1049, 1054 (2017). Because the district court denied “gap” tolling and found that Valdez’s petition was untimely without examining the pertinent state court records, the case should be remanded with instructions to the district court to obtain and review the relevant state court records before readjudicating the timeliness of Valdez’s petition.

## **II. The Petition Was Timely Under This Court's Decisions in *Ylst* and *Wilson***

The last reasoned decisions concerning Valdez's claims were issued by the Riverside County Superior Court. Under this Court's decisions in *Ylst v. Nunnemaker*, *supra*, and *Wilson v. Sellers*, \_\_\_ U.S. \_\_\_ 138 S.Ct. 1188 (2018), this Court should "look through" the subsequent silent denials and presume they were based on the same grounds. *Wilson*, 138 S.Ct. at pp. 1195-1197.

The Riverside County Superior Court denied Valdez's first round of petitions for (1) "failure to state a prima facie factual case," (2) because some of the issues were raised and decided on appeal and (3) because some of the issues could have been but were not decided on appeal. As to Valdez's ineffective assistance of counsel claim, the Superior Court also denied that claim because Valdez had not established prejudice. *In re Valdez*, Riverside County Superior Court Case No. RIC1403504 (May 15, 2014.)

The Court of Appeal and the California Supreme Court both issued silent denials, (*In re Valdez*, Court of Appeal for the Fourth Appellate District, Division 2, Case No. E063417 (May 5, 2015); *In re Valdez*, California Supreme Court Case No. S227015 (February 17, 2016), which are presumed to be based on the same grounds as those articulated by the Riverside County Superior Court. *Wilson*, 138 S.Ct. at pp. 1195-1197.

Here, the silent denials by the Court of Appeal and the California Supreme Court are presumed to rest on the same grounds as the Riverside County Superior Court decision denying the petition on the merits and on procedural grounds other than

timeliness. Because that is a clear indication that Valdez's second and third petitions were timely, he should be allowed statutory tolling for the period that his first round of habeas corpus petitions were pending in the state courts. *Curiel*, 830 F.3d at 871. Accordingly, his petition was timely under *Wilson* and *Ylst*. This Court should grant certiorari to address the conflict between the Ninth Circuit's published decision and this Court's precedents.

### **CONCLUSION**

For the reasons stated above, this Court should grant certiorari and reverse the judgment of the Ninth Circuit Court of Appeals affirming the district court order that the petition was untimely.

Dated: July 15, 2019.

Respectfully submitted,

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