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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**APPENDIX**

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN LEYVA VALDEZ, Jr.,

Petitioner-Appellant,

v.

W. L. MONTGOMERY, Acting Warden,

Respondent-Appellee.

No. 16-56845

D.C. No.
5:16-cv-00567-VAP-DTB
Central District of California,
Riverside

ORDER

Before: GOULD, NGUYEN, and OWENS, Circuit Judges.

Petitioner-Appellant's Petition for Rehearing is **DENIED**.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Petitioner-Appellant's Petition for Rehearing En Banc is also **DENIED**.

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| MARTIN LEYVA VALDEZ, JR., *Petitioner-Appellant*,<br><br>v.<br><br>W. L. MONTGOMERY, Acting Warden, *Respondent-Appellee*. | No. 16-56845<br><br>D.C. No. 5:16-cv-00567-VAP-DTB<br><br>OPINION |

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Submitted February 5, 2019*
Pasadena, California

Filed March 14, 2019

Before: Ronald M. Gould, Jacqueline H. Nguyen, and John B. Owens, Circuit Judges.

Opinion by Judge Gould

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

## SUMMARY**

### Habeas Corpus

The panel affirmed the district court's dismissal of California state prisoner Martin Leyva Valdez, Jr.'s federal habeas petition as untimely under the Antiterrorism and Effective Death Penalty Act.

The parties agreed that the petition was untimely unless the statute of limitations was tolled from May 15, 2014—when the California Superior Court denied Valdez's first state habeas petition—until April 29, 2015—when Valdez filed his second state habeas petition in the California Court of Appeal.

Because the question of whether Valdez's second state habeas petition was timely filed in the Court of Appeal is an entirely distinct issue from whether his habeas petition in the Superior Court was timely filed, the panel held that the "look through" doctrine cannot answer whether the second state habeas petition was timely.

The panel held that Valdez is not entitled to statutory tolling. Because Valdez filed his second state habeas petition before the California Supreme Court decided *People v. Elizalde*, 351 P.3d 1010 (Cal. 2015), the panel rejected his contention that he can establish good cause for the delay by waiting until *Elizalde* was decided. The panel likewise rejected Valdez's contention that the size of the state-court

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

record and complexity of the case renders his delay reasonable and establishes good cause, where Valdez offered no explanation for why he could timely file his first petition but not his second.

The panel concluded that the district court did not err by not ordering the State to respond and lodge the state-court record.

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## COUNSEL

Stephanie M. Adraktas, Berkeley, California, for Petitioner-Appellant.

Xavier Becerra, Attorney General of California; Julie L. Garland, Senior Assistant Attorney General; Robin Urbanski, Supervising Deputy Attorney General; Sharon L. Rhodes, Deputy Attorney General; Vincent P. LaPietra, Deputy Attorney General; Office of the California Attorney General, San Diego, California; for Respondent-Appellee.

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## OPINION

GOULD, Circuit Judge:

We once again consider whether a California-state prisoner is entitled to statutory tolling under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Because we hold that Petitioner-Appellant Martin Valdez is not, we affirm the district court's dismissal of Valdez's federal habeas petition as untimely.

## I

Over the course of two jury trials, Valdez was convicted of murder, attempted murder, assault with a firearm, and robbery. *People v. Valdez*, No. E053309, 2013 WL 1770856, at *1 (Cal. Ct. App., Apr. 25, 2013) (unpublished). The trial court sentenced Valdez to life without the possibility of parole, plus seventy years to life, plus nine years. *Id.* Valdez appealed his conviction to the California Court of Appeal, which affirmed. *Id.* at *2. The California Supreme Court then denied Valdez's petition for review on July 31, 2013.

Valdez filed his first state habeas petition in California Superior Court on April 10, 2014. The court denied that petition on May 15, 2014. Almost one year later, in April 2015, Valdez filed his second state petition in the California Court of Appeal, asserting the same claims.[1] The court denied that petition without explanation. Valdez then filed his third state petition in the California Supreme Court on June 10, 2015, again raising the same claims. The court denied that petition without explanation.[2]

[1] California has a unique postconviction review system. Rather than appealing adverse decisions, prisoners must file a new, original habeas petition at each court level. In practice, however, California's system operates like a normal appellate system, and the Supreme Court and this court treat it as analogous to a normal appellate system. *See Evans v. Chavis*, 546 U.S. 189, 192–93 (2006); *Carey v. Saffold*, 536 U.S. 214, 221–25 (2002); *Curiel v. Miller*, 830 F.3d 864, 870 n.3 (9th Cir. 2016) (en banc).

[2] Valdez also filed a second round of state habeas petitions. Those petitions are irrelevant to this appeal, except as briefly discussed below.

Valdez constructively filed his current federal petition for writ of habeas corpus in the district court on March 1, 2016, raising the same claims he had raised in the state proceedings. After an initial review, the district court ordered Valdez to show cause why his petition should not be dismissed as untimely. Valdez responded that he is entitled to tolling because he was waiting for the California Supreme Court to decide *People v. Elizalde*, 351 P.3d 1010 (Cal. 2015), a case highly relevant to one of Valdez's claims.[3] Valdez also argued that tolling applies because his case is complex: it involved "two trials, over 6,000 pages of transcripts, and . . . the prosecution sought the death penalty."

The Magistrate Judge was not persuaded and recommended that the district court dismiss Valdez's petition as untimely. Valdez objected to the magistrate's findings and recommendations, but the district court adopted them and dismissed Valdez's petition.

Valdez filed a timely notice of appeal. We granted Valdez a Certificate of Appealability and appointed counsel. On appeal, Valdez contends that he is entitled to statutory tolling.[4] In the alternative, he contends that we should

[3] The State concedes *Elizalde* is relevant.

[4] The district court held that Valdez is not entitled to equitable tolling. Valdez does not challenge that holding on appeal. Any challenge is therefore waived. *See, e.g.*, *Bohmker v. Oregon*, 903 F.3d 1029, 1040 n.6 (9th Cir. 2018).

remand the case to the district court for further factual development.[5]

**II**

Because Valdez's conviction became final and he filed his federal habeas petition after the enactment of AEDPA, AEDPA's one-year statute of limitations applies. *See Campbell v. Henry*, 614 F.3d 1056, 1058 (9th Cir. 2010). We review de novo the district court's dismissal of Valdez's federal habeas petition as untimely. *Id.*

**III**

AEDPA "affords a state prisoner one year from the end of the direct review process in state court to apply in federal court for a writ of habeas corpus . . . ." *Campbell*, 614 F.3d at 1058. AEDPA's statute of limitations is tolled, however, while a "properly filed" state habeas petition is pending in state court. 28 U.S.C. § 2244(d)(2). "A state habeas petition is 'pending' as long as the ordinary state collateral review process continues." *Trigueros v. Adams*, 658 F.3d 983, 988 (9th Cir. 2011) (citing *Carey v. Saffold*, 536 U.S. 214, 219–20 (2002)).

We have previously held that if a California prisoner timely files his or her initial state habeas petition, AEDPA's statute of limitations is tolled while the state court considers the petition. *See, e.g.*, *Velasquez v. Kirkland*, 639 F.3d 964, 967 (9th Cir. 2011). In California, a state habeas petition is

[5] Valdez also contends that we should hold this case in abeyance pending the California Supreme Court's response to the question we certified in *Robinson v. Lewis*, 795 F.3d 926 (9th Cir. 2015). We find it unnecessary to do so. We can, and do, resolve this appeal based on current precedent.

"timely if filed within a 'reasonable time.'" *Evans v. Chavis*, 546 U.S. 189, 192 (2006) (quoting *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993)). If the state court denies that petition, then as long as the prisoner timely files another petition in a higher court, AEDPA's statute of limitations is tolled for "the days between (1) the time the lower state court reached an adverse decision, and (2) the day [the prisoner] filed a petition in the higher state court." *Id.* at 193; *see also Saffold*, 536 U.S. at 221–25. This is often referred to as "gap" tolling.

But if a California prisoner does not timely file his or her first state habeas petition, then the prisoner is not entitled to tolling. *See, e.g.*, *Bonner v. Carey*, 425 F.3d 1145, 1148–49 (9th Cir. 2005), *amended by* 439 F.3d 993 (9th Cir. 2006). Similarly, if a prisoner timely files his or her first state habeas petition but does not timely file a second petition, then the prisoner is not entitled to tolling for the period following the denial of the first petition. *See, e.g.*, *Velasquez*, 639 F.3d at 968 (prisoner was not entitled to statutory tolling because he waited 91 days after denial of his first state habeas petition to file his second, without explanation); *Chaffer v. Prosper*, 592 F.3d 1046, 1048 (9th Cir. 2010) (per curiam) (prisoner was not entitled to statutory tolling because he waited 115 days after denial of his first state habeas petition to file his second, without explanation).

The parties agree that unless the statute of limitations was tolled here from May 15, 2014—when the California Superior Court denied Valdez's first state habeas petition—until April 29, 2015—when Valdez filed his second state habeas petition in the California Court of Appeal—Valdez's federal habeas petition was untimely. Valdez "bears the burden of proving that the statute of limitation was tolled." *Banjo v. Ayers*, 614 F.3d 964, 967 (9th Cir. 2010). He makes

two contentions as to why he is entitled to tolling. We address, and reject, both.

**A**

Valdez first contends that, because the California Superior Court held that his first state habeas petition was timely, and the California Court of Appeal denied his second state habeas petition without explanation,[6] under the "look through" doctrine, we should presume that the Court of Appeal adopted the Superior Court's reasoning and held that Valdez's second state habeas petition was timely.

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,' we 'look through' the mute decision and presume the higher court agreed with and adopted the reasons given by the lower court." *Curiel v. Miller*, 830 F.3d 864, 870 (9th Cir. 2016) (en banc) (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 802–06 (1991)). That doctrine has universally been applied in cases where the court rendering a reasoned decision and a later court making a summary determination were facing precisely the same issue. *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."); *Bonner*, 425 F.3d at 1148–49, 1148 n.13 (looking through unexplained decisions of the California Court of Appeal and California Supreme Court to a California Superior Court decision

[6] Its decision states: "The petition for writ of habeas corpus is DENIED."

holding that a petition was untimely to conclude that the petition was untimely and the prisoner was not entitled to statutory tolling); *Casey v. Moore*, 386 F.3d 896, 918 n.23 (2004) ("We cannot 'look through' to see what the state appeals court did on the merits of Casey's case, because the merits of the federal issue were not raised until Casey appealed.").

For that reason, the "look through" doctrine does not provide a basis for holding that Valdez's second state habeas petition was timely. 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. *Cf. Kernan v. Hinojosa*, 136 S. Ct. 1603, 1606 (2016) (per curiam) ("look through" doctrine inapplicable where "[i]mproper venue could not possibly have been a ground for the high court's summary denial of Hinojosa's claim"). Specifically, the question here is whether Valdez timely filed his second state habeas petition in the Court of Appeal "within a 'reasonable time'" following the Superior Court's "adverse determination." *Chavis*, 546 U.S. at 191, 192–93 (quoting *In re Harris*, 855 P.2d at 398 n.7). The question is not whether Valdez's first state habeas petition was timely—a question the "look through" doctrine could answer. *See Bonner*, 425 F.3d at 1148–49, 1148 n.13. Because the "look through" doctrine cannot answer whether Valdez's second state habeas petition was timely, we address that question ourselves.

**B**

If a California court has held that a state habeas petition was timely or untimely, we are bound by that decision. *See Robinson v. Lewis*, 795 F.3d 926, 929 (9th Cir. 2015) ("If a California court states it has dismissed a state habeas petition

because the petition was untimely, 'that would be the end of the matter.'" (quoting *Saffold*, 536 U.S. at 226)); *Trigueros*, 658 F.3d at 990 ("[W]e rely on the California Supreme Court's orders practice explained in *Robbins* and conclude that it considered Trigueros's petition timely because the California Supreme Court had the timeliness question before it, and did not cite to cases involving a timeliness procedural bar."). Here, the California Court of Appeal dismissed Valdez's second state habeas petition without explanation. That decision does not provide a basis for concluding that the petition was timely. *See Chavis*, 546 U.S. at 197 ("If the appearance of the words 'on the merits' does not automatically warrant a holding that the filing was timely, the *absence* of those words could not automatically warrant a holding that the filing was timely." (emphasis in original)); *Curiel*, 830 F.3d at 871 ("The Supreme Court has admonished us in the past not to assume that a California court found a state habeas petition to be timely from the court's silence on the question.").

Instead, we "must . . . examine the delay . . . and determine what the state courts would have held in respect to timeliness." *Chavis*, 546 U.S. at 198. The question is whether Valdez filed his second state habeas petition "within a 'reasonable time.'" *Id.* at 192 (quoting *In re Harris*, 855 P.2d at 398 n.7). To answer that question, the U.S. Supreme Court has instructed that we reference the "'short period[s] of time,' 30 to 60 days, that most States provide for filing an appeal." *Id.* at 201 (alteration in original) (quoting *Saffold*, 536 U.S. at 219). Heeding that instruction, we have "indicated that the Supreme Court's 60-day limit is the 'benchmark' from which we will not depart without a showing of good cause," and we have held that unexplained delays of 81, 101, and 115 days are unreasonable. *Robinson*, 795 F.3d at 930–31.

Here, the California Superior Court denied Valdez's first state habeas petition on May 15, 2014. Valdez then filed his second state habeas petition on April 29, 2015. Because Valdez waited almost one year to file his second state petition (the gap was about two weeks short of a year), it was untimely under our decisions unless Valdez can establish good cause. *See Robinson*, 795 F.3d at 929 ("California courts allow a longer delay if the petitioner demonstrates good cause." (citing *In re Robbins*, 959 P.2d 311, 317 (Cal. 1998)).

Valdez presses two arguments on this point. First, he contends that he waited to file his second state habeas petition until the California Supreme Court decided *Elizalde*, which establishes good cause. We reject that contention. Valdez filed his second state habeas petition before the California Supreme Court decided *Elizalde*, "so waiting until [*Elizalde*] was decided does not explain the delay." *Waldrip v. Hall*, 548 F.3d 729, 737 (9th Cir. 2008).[7] *In re Lucero*, 132 Cal. Rptr. 3d 499, 503–04 (Ct. App. 2011)—on which Valdez relies—is inapposite. Unlike the prisoner there, Valdez did not wait to file his second state habeas petition until after a new decision; he filed it before.

In the alternative, Valdez claims that his delay was reasonable because of the size of the state-court record and complexity of the case. This contention is likewise insufficient to establish good cause. Valdez timely filed his first state habeas petition. That petition raised the same claims he then raised in his second state petition. He has

[7] Valdez makes much of the fact that he filed a second round of habeas petitions based on *Elizalde*, asserting that doing so demonstrates his diligence. But that assertion does not explain why Valdez filed his second state habeas petition before *Elizalde* was decided.

offered no explanation for why he could timely file his first petition but not his second. *See Velasquez*, 639 F.3d at 968 ("[E]ach of Velasquez's habeas petitions is nearly identical to the petition that came before it. It is not reasonable that Velasquez's counsel would need excess time essentially to re-file an already-written brief.").

In summary, the district court correctly held that Valdez is not entitled to statutory tolling.

**IV**

We next address Valdez's contention that the district court should not have dismissed his federal habeas petition without requiring the State to respond and lodge the state-court record. Valdez contends that the district court could not determine whether his state habeas petitions were timely filed absent the state-court record.

A district court may summarily dismiss a federal habeas corpus petition *sua sponte* if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief . . . ." Rule 4 of the Rules Governing Section 2254 Cases. A district court should do so, however, only after "provid[ing] the petitioner with adequate notice and an opportunity to respond." *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001). Moreover, because "federal habeas courts" have a duty to "independently [review] the basis for the state court's decision," a district court must "obtain and review the relevant portions of the state court record," or hold an evidentiary hearing, as necessary to discharge its duty. *Nasby v. McDaniel*, 853 F.3d 1049, 1053 (9th Cir. 2017).

Valdez, in his federal habeas petition, listed the date the California Supreme Court denied his petition for review on

direct appeal, the dates he filed his state habeas petitions, and the dates the state courts denied those petitions. The district court, after ordering Valdez to show cause and thereby providing Valdez "adequate notice and an opportunity to respond," *Herbst*, 260 F.3d at 1043, had Valdez's explanations for why he delayed in filing his second state habeas petition. Finally, the district court had the California Court of Appeal's decision dismissing Valdez's second state petition because Valdez attached that decision as an exhibit to his objections to the magistrate judge's findings and recommendations. As demonstrated in Section III, the foregoing information is all that is necessary to conclude that Valdez's federal habeas petition was untimely. The district court did not err by not ordering the State to respond and lodge the state-court record.[8]

**V**

Because we conclude that Valdez is not entitled to statutory tolling for the period following the California Superior Court's denial of his first state habeas petition, Valdez's federal habeas petition is untimely, and we affirm the district court's dismissal of his petition.

**AFFIRMED.**

[8] Valdez asks us to take judicial notice of various state-court documents because they purportedly show why the district court needed to order the State to lodge the state-court record. Because we can, and do, affirm the district court's decision on the record before it, we **DENY** Valdez's motion for judicial notice as **MOOT**.

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|---|---|
| MARTIN LEYVA VALDEZ, JR.,<br><br>Petitioner,<br><br>vs.<br><br>W.L. MONTGOMERY, Warden,<br><br>Respondent. | Case No. EDCV 16-00567-VAP (DTB)<br><br>**J U D G M E N T** |

Pursuant to the Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the action is dismissed with prejudice.

Dated: September 8, 2016

Virginia A. Phillips
VIRGINIA A. PHILLIPS
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|---|---|
| MARTIN LEYVA VALDEZ, JR.,<br><br>Petitioner,<br><br>vs.<br><br>W.L. MONTGOMERY,<br><br>Respondent. | Case No. EDCV 16-00567-VAP (DTB)<br><br>ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE |

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation ("R&R") of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the R&R to which objections have been made. The Court accepts the findings and recommendations of the Magistrate Judge.

In his Objections, petitioner essentially restates arguments made in his Response to Order to Show Cause that he delayed in filing his second state habeas petition in the California Court of Appeal because he was "wait[ing] for the California Supreme Court to decide [People v. Elizalde, 61 Cal. 4th 523 (2015)]." (Response at 4.) Those arguments lack merit for the reasons stated in the R&R.

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However, petitioner now appears to also argue that because he had "good cause" for the delay and, more importantly, because his state petitions were not denied as untimely, he is entitled to gap tolling. (Objections at 12-13.) Petitioner is mistaken.

As explained by the Court in the R&R (R&R at 6), the Supreme Court has held that when a California court rejects a petition without any indication as to its timeliness, even if the denial is based "on the merits," the federal court must conduct its own inquiry to determine whether it was timely filed in determining whether a petitioner is entitled to gap tolling between the denial of one petition and the filing of another in the next level of review. Evans v. Chavis, 546 U.S. 189, 198, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006). The Ninth Circuit has elaborated that while there is no hard and fast rule for what constitutes unreasonable delay, an upper limit of approximately sixty days is appropriate, unless an *adequate* explanation for additional delay has been provided. See Velasquez v. Kirkland, 639 F.3d 964, 967-68 (9th Cir. 2011); Noble v. Adams, 676 F.3d 1180, 1183 (9th Cir. 2012). Here, the Court determined that petitioner's delay of 349 days, over eleven months, between the denial of his first state habeas petition by the Superior Court and the filing of his second petition in the California Court of Appeal, was not reasonable, especially in light of the fact that petitioner asserted the same claims in all of his state habeas petitions. (R&R at 7-9.) Accordingly, petitioner's arguments have no merit.

IT THEREFORE IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: September 8, 2016

Virginia A. Phillips

VIRGINIA A. PHILLIPS
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|---|---|
| MARTIN LEYVA VALDEZ, JR.,<br><br>Petitioner,<br><br>vs.<br><br>W.L. MONTGOMERY, Warden,<br><br>Respondent. | Case No. EDCV 16-00567-VAP (DTB)<br><br>REPORT AND RECOMMENDATION OF UNITED STATE MAGISTRATE JUDGE |

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, Chief United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

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**PROCEEDINGS**

On March 1, 2016,[1] petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Pet.") herein. The Petition purports to be directed to a 2011 conviction sustained by petitioner in Riverside County Superior Court. (See Pet. at 2-3;California Appellate Court website).[2] Petitioner purports to be raising five grounds for relief. (See Pet. at 5-7.)

The Court's initial review of the Petition revealed that it appeared to be untimely. Accordingly, on April 25, 2016, the Court issued an Order to Show Cause ("OSC") directing petitioner to show cause in writing (if any he had) as to why the Court should not recommend that this action be dismissed with prejudice on the ground of untimeliness.

On June 20, 2016, petitioner filed a Response to the OSC ("Response").

Thus, this matter is now ready for decision. For the reasons discussed hereafter, the Court recommends that the Petition be dismissed with prejudice as untimely.

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[1] March 1, 2016 is the signature date and thus, the earliest date on which petitioner could have turned the Petition over to the prison authorities for mailing. Rules Governing Section 2254 Cases in the United States District Courts, Rule 3(d); see also Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001) (holding that the prison mailbox rule applies to a habeas petitioner's state and federal filings).

[2] http://appellatecases.courtinfo.ca.gov.

## DISCUSSION

**I. The Petition is untimely.**

Since the Petition was filed after the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), it is subject to the AEDPA's one-year limitation period, as set forth at 28 U.S.C. § 2244(d). See Campbell v. Henry, 614 F.3d 1056, 1058 (9th Cir. 2010). 28 U.S.C. § 2244(d) provides:

> (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 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.

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**A. Unless a basis for tolling the statute existed, petitioner's last day to file his federal habeas petition was October 29, 2014.**

Here, the California Supreme Court affirmed petitioner's underlying conviction on direct appeal on July 31, 2013. (Pet. at 3.) Therefore, absent any later trigger date, petitioner's judgment of conviction became final 90 days thereafter, on October 29, 2013, when the period in which to petition the United States Supreme Court for a writ of certiorari expired. See Harris v. Carter, 515 F.3d 1051, 1053 n.1 (9th Cir. 2008); Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999).

From the face of the Petition, it does not appear that petitioner has any basis for contending that he is entitled to a later trigger date under § 2244(d)(1)(B). Nor does it appear that petitioner has a basis for contending that any of his claims are based on a federal constitutional right that was initially recognized by the United States Supreme Court subsequent to the date his conviction became final and that has been made retroactively applicable to cases on collateral review under § 2244(d)(1)(C). Nor does it appear that petitioner has any basis for contending that he is entitled to a later trigger date under § 2244(d)(1)(D), since petitioner was aware of the factual predicate of his claims as of the date his judgment of conviction became final. See Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (statute of limitations begins to run when a prisoner "knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance"). Since petitioner has made no showing that any of the later trigger dates under 28 U.S.C. § 2244(d)(1) are applicable, the one-year limitation period commenced on October 29, 2013. Thus, petitioner had until October 29, 2014 to file the instant Petition. See 28 U.S.C. § 2244(d)(1)(A); Clay v. United States, 537 U.S. 522, 527, 528 n.3, 123 S. Ct. 1071, 155 L. Ed. 2d 88 (2003). Petitioner filed the instant Petition on March 1, 2016, over one year and four months after the expiration of the limitation period. Therefore, absent tolling, the Petition is untimely.

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The burden of demonstrating that the AEDPA's one-year limitation period was sufficiently tolled, whether statutorily or equitably, rests with the petitioner. See, e.g., Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005); Zepeda v. Walker, 581 F.3d 1013, 1019 (9th Cir. 2009); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). For the reasons discussed hereafter, the Court concludes that petitioner has not met his burden.

**B. Petitioner has not met his burden of demonstrating that statutory tolling rendered the Petition timely.**

28 U.S.C. § 2244(d)(2) provides:

> 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.

In Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999), overruled on other grounds by Harris, 515 F.3d at 1053, the Ninth Circuit construed the foregoing statutory tolling provision with reference to California's post-conviction procedures. The Ninth Circuit held that "the AEDPA statute of limitations is tolled for 'all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application.'" Id. at 1006 (citation omitted).

In Carey v. Saffold, the Supreme Court held that, for purposes of statutory tolling, a California petitioner's application for collateral review remains "pending" during the intervals between the time a lower state court denies the petition, and the time the petitioner files a further petition in a higher state court. 536 U.S. 214, 219-21, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002). However, such interval or "gap" tolling is unavailable if the petitioner unreasonably delays in seeking higher court

review after a lower court petition is denied. Id. at 225-26; see also Welch v. Carey, 350 F.3d 1079, 1083 (9th Cir. 2003) (en banc) ("The Supreme Court made it very clear in Carey v. Saffold that an unreasonable delay in seeking review in the California Supreme Court from a lower court on the same claim deprives any application from being regarded as 'pending.'") (emphasis in original). In Evans v. Chavis, 546 U.S. 189, 198, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006), the Supreme Court held that, "[i]n the absence of (1) clear direction or explanation from the California Supreme Court about the meaning of the term 'reasonable time' in the present context, or (2) clear indication that a particular request for appellate review was timely or untimely," a federal habeas court "must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness," *i.e.*, "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.'"

The Court in Evans observed, as it had in Saffold, that most states provide a short period - between 30 and 60 days - for an appeal to a higher court, a fact it considered in determining whether a delay was "reasonable" for purposes of statutory tolling. Evans, 54 U.S. at 201. In Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010) (per curiam), the Ninth Circuit held that, because a petitioner's filing delays of 115 days between the denial of his first Superior Court habeas petition and the filing of his second habeas petition in the California Court of Appeal and 101 days between the denial of his second habeas petition and the filing of his third habeas petition in the California Supreme Court "were substantially longer than the '30 to 60 days' that 'most States' allow for filing petitions," and as the petitions offered no justification for those delays as required under California law, the petitioner was not entitled to statutory tolling for either of those intervals. Subsequent to the Supreme Court's holding in Evans, the Ninth Circuit has found that, while there is no hard and fast rule for what constitutes unreasonable delay, an upper limit of approximately sixty days

is appropriate, unless an adequate explanation for additional delay has been provided. See Velasquez v. Kirkland, 639 F.3d 964, 967-68 (9th Cir. 2011); Noble v. Adams, 676 F.3d 1180, 1183 (9th Cir. 2012).

In the instant action, petitioner filed the following collateral challenges to his convictions:

(1) A habeas petition in the Riverside County Superior Court which was filed on April 10, 2014, and denied on May 15, 2014 (Pet. at 3-4);

(2) a habeas petition in the California Court of Appeal which was filed on April 29, 2015, and which was denied on May 5, 2015 (Pet. at 4; California Appellate Court website); and

(3) a habeas petition in the California Supreme Court which was filed on June 10, 2015, and denied on February 17, 2016. (Pet. at 4-5; California Appellate Court website.)

Petitioner is entitled to statutory tolling for the period in which his first state petition was pending in the Riverside County Superior Court. At the time petitioner filed this petition, on April 10, 2014, 163 days of the one-year AEDPA limitations period had elapsed. Thus, petitioner accrued 35 days of tolling during the pendency of his first petition, extending his limitations period to December 3, 2014. As noted earlier, petitioner did not constructively file the instant Petition until March 1, 2016, more than one year and two months after the deadline.

Petitioner is not entitled to statutory tolling for the period between the superior court's May 15, 2014 denial and the constructive filing of his habeas petition in the California Court of Appeal over eleven months later on April 29, 2015. Petitioner asserts that he delayed in filing his second state petition in the California Court of Appeal because of the large record in his case ("there were two trials, over 6,000 pages of transcripts, and . . . the prosecution sought the death penalty"), and that he chose "to delay or postpone the filing of his second [state] petition" until the California Supreme Court decided People v. Elizalde, 61 Cal. 4th 523 (2015), which

the court ultimately decided on June 25, 2015. (Response at 4-6.) The Court is not persuaded that petitioner's delay entitles him to statutory tolling for this period.

First, although petitioner's trial record may have been large, he asserted the same claims in all three state habeas petitions. See Velasquez, 639 F.3d at 968 (explaining that "each of Velasquez's habeas petitions is nearly identical to the petition that came before it" such that "[i]t is not reasonable that Velasquez's counsel would need excess time essentially to re-file an already written brief"); Marroquin v. Long, 2013 WL 5315500, at *5 (C.D. Cal. June 19, 2013) (finding petitioner not entitled to gap tolling for 70-day interval that was not adequately justified where each petition was identical to the prior petition). Yet, petitioner waited over eleven months before filing his second petition. The Court cannot find such a delay to be reasonable under the circumstances.

Second, the Court finds petitioner's other excuse – that he delayed because he was waiting for the California Supreme Court to decide Elizalde – to be disingenuous. Petitioner filed his second state petition in the California Court of Appeal on April 29, 2015, almost two months prior to the California Supreme Court's decision in Elizalde on June 25, 2015. (See Pet. at 4; California Appellate Court website.) Accordingly, he did not wait until the court decided Elizalde, and instead filed his second state petition prior to the court's ruling.

In any event, the Court notes that petitioner does not cite to, nor could the Court find, any case in which such a delay was found to be reasonable. See, e.g., Lowe v. Tilton, 2008 WL 4078390, at *8 (S. D. Cal. Aug. 28, 2008) (finding that petitioner's "wait and see" approach because he wanted to "see how Cunningham[ v. California, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007)] would be applied under California law" was not reasonable basis for delay); see also Evans, 546 U.S. at 201 (holding that delay of six months was unreasonable under California law); Banjo v. Ayers, 614 F.3d 964, 970 (9th Cir. 2010) (finding 146-day gap unreasonable

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and inconsistent with "short periods of time permitted by most states"); Chaffer, 592 F.3d at 1048 (holding a 115-day gap would not qualify for tolling).

Moreover, petitioner is not entitled to any further statutory tolling for his second and third habeas petitions, as state habeas petitions filed *after* the one-year statute of limitation period have expired do not revive the statute of limitation and have no tolling effect. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed."). Petitioner's second state petition was not filed until April 29, 2015, over four months after the limitation period had already expired on December 3, 2014.

**C. Petitioner has not met his burden of demonstrating that equitable tolling rendered the Petition timely.**

In Holland v. Florida, 560 U.S. 631, 634, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010), the Supreme Court squarely held "that the timeliness provision in the federal habeas corpus statute is subject to equitable tolling." See also Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (as amended) (limitations period may be equitably tolled if "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time") (citation omitted). As set forth by the Supreme Court in Pace, the two requirements for equitable tolling are: "(1) [T]hat [the petitioner] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." 544 U.S. at 418; see also Holland, 560 U.S. at 649 (applying Pace standard). Additionally, "the prisoner must show that the 'extraordinary circumstances' were the cause of his untimeliness." Spitsyn, 345 F.3d at 799 (citation omitted); see also Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009). Claims of equitable tolling are construed narrowly by the courts, and the "threshold necessary to trigger equitable tolling under [the] AEDPA is very high, lest the exceptions

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swallow the rule." Mendoza v. Carey, 449 F.3d 1065, 1068 (9th Cir. 2006) (citation omitted and alteration in original).

Here, petitioner fails to satisfy this exacting standard for equitable tolling. Petitioner has not alleged any wrongful conduct, nor has he claimed the existence of any extraordinary circumstances beyond his control which made it impossible for him to file a timely habeas petition. (See generally Pet. at 1-8; Response at 1-6.) However, to the extent petitioner contends he is entitled to equitable tolling due to his large trial record and his delay while waiting for the California Supreme Court's decision in Elizalde, petitioner's allegations have no merit. Petitioner cannot show that his large trial record prevented him from filing a timely petition. In order to demonstrate that his trial record constituted extraordinary circumstances justifying equitable tolling, petitioner must demonstrate a causal link between the delay in filing and the extraordinary circumstance. See Bryant v. Arizona Atty. Gen., 499 F.3d 1056, 1061 (9th Cir. 2007). The petitioner must additionally show that "'the extraordinary circumstances were the cause of his untimeliness,'" id. (quoting Spitsyn, 345 F.3d at 799), and that the "'extraordinary circumstances ma[de] it impossible to file a petition on time.'" Roy v. Lampert, 465 F.3d 964, 969 (9th Cir. 2006) (as amended) (citation omitted). Since petitioner was able to file a timely petition in the Riverside County Superior Court despite the size of the record, petitioner cannot show that his trial record was the cause of his untimeliness. Under the circumstances here, petitioner's conduct does not demonstrate any diligence on his own behalf. See Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (equitable tolling is only appropriate where "external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim").

Further, although petitioner asserts he delayed in filing his state (California Court of Appeal and California Supreme Court) and federal petitions because he was waiting for the California Supreme Court to decide Elizalde, as mentioned above, petitioner's contention is belied by the fact that he filed his second state petition prior

to the issuance of that decision. More importantly, petitioner cannot show that external forces made it impossible for him to file a timely petition. Accordingly, petitioner has failed to demonstrate any basis for equitable tolling.

## CONCLUSION AND RECOMMENDATION

The Court therefore finds and concludes that, when the Petition herein was filed, it was untimely by over one year and two months.

IT ACCORDINGLY IS RECOMMENDED that the District Court issue an Order: (1) Approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: July 14, 2016

DAVID T. BRISTOW
UNITED STATES MAGISTRATE JUDGE

## NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

SUPREME COURT OF THE UNITED STATES

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|---|---|---|
| MARTIN VALDEZ | ) | |
| | ) | NO._____ |
| Petitioner, | ) | |
| | ) | CERTIFICATE OF SERVICE |
| v. | ) | |
| | ) | |
| W.L. MONTGOMERY, | ) | |
| Warden | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

I hereby certify that I was appointed to represent the petitioner under the Criminal Justice Act, 18 U.S.C. 3006A and that I have on this date served copies of the petitioner's Petition for Writ of Certiorari by depositing them in the U.S. Mail, first class postage prepaid, at Berkeley, California and addressed to:

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California State Prison, Calipatria
P.O. Box 9004
Calipatria, CA
92233-5004
PETITIONER

Attn: Ms. Sharon Rhodes
Deputy Attorney General
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RESPONDENT

Dated: _____, 2019.

_____
Stephanie M. Adraktas
Attorney for Petitioner