No. 04-721

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

MIKE EVANS, Warden, *Petitioner,*

**v.**

REGINALD CHAVIS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITIONER'S REPLY BRIEF ON THE MERITS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

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Respondent Chavis acknowledges that *Carey v. Saffold* allows tolling of the AEDPA limitations period for the interval after denial of state collateral relief by a lower court and a filing in a higher court only "*as long as* the latter petition was timely filed" under state law. Resp. Br. 20; *see Carey v. Saffold*, 536 U.S. 214, 223, 225 (2002). He also agrees that the Ninth Circuit resolved the issue of statutory tolling for the three-year period of delay in this case by simply applying a conclusive presumption that enabled it to find that, contrary to all appearances, his November 1997 petition was timely. And he does not dispute the fact that in California the state usually will not have had the opportunity to raise, and the state courts often will not have reached, the question of timeliness before a summary denial like the one in this case issues.

Chavis nevertheless maintains that the solution for the many cases in which there is no indication from the state court whether the petition was timely filed is, as the Ninth Circuit says, for federal courts considering statutory tolling to presume that a state court petition for habeas corpus was timely and pending during the entire interval before its filing. Resp. Br. 14. Chavis does not argue that this presumption would be accurate most of the time — or even in his own case — but nevertheless

urges that it would just be too difficult for federal courts to apply California law and determine the timeliness of state habeas petitions. Chavis also claims that the Ninth Circuit's presumption would better serve the principles of comity and federalism. Resp. Br. 26-33. These arguments do not withstand scrutiny.

## I.

## THE NINTH CIRCUIT'S PRESUMPTION DOES NOT REFLECT ACTUAL PRACTICE OR ACHIEVE THE CORRECT RESULT IN MOST CASES AND HAS NO SUPPORT IN STATE OR FEDERAL LAW

Judicially-created *per se* rules and conclusive presumptions have a place in our jurisprudence. Conclusive presumptions are crafted "to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). In federal habeas corpus, as in other contexts, "[*p*]*er se* rules . . . require the Court to make broad generalizations. . . . Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Id.* (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977)); *see also Rakas v. Illinois*, 439 U.S. 128, 147 (1978).

What Chavis fails to understand is that "[*p*]*er se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman*, 501 U.S. at 737. Thus, this Court has declined to extend or create presumptions where, as here, the predicate fact or circumstance does not usually compel the particular conclusion. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 12 (1998); *Coleman*, 501 U.S. at 740; *Rakas*, 439 U.S. at 140, 147-48.

Before instituting a presumption or *per se* rule, courts must determine that presuming a particular conclusion from a certain predicate fact without a case-by-case analysis "comport[s] with reality." *Spencer*, 523 U.S. at 12. Chavis posits several arguments in favor of the Ninth Circuit's broad presumption of timeliness, but notably absent is any suggestion that the presumption he embraces "will achieve the correct result in almost all cases." *Coleman*, 501 U.S. at 737. As discussed in the Warden's opening brief, it will not. Pet. Br. 32-36. The Ninth Circuit's presumption therefore possesses only a "superficial clarity." *Rakas*, 439 U.S. at 147.

### A. The Warden's Proposed Sixty-Day Presumption Would Achieve The Correct Result In Most Cases

The Warden, on the other hand, proposes a more tailored presumption that will eliminate a case-by-case inquiry in those cases with the appropriate factual predicate. Where the state petition has been filed within sixty days of denial by the lower court, it may be presumed timely. Pet. Br. 47. Unlike the Ninth Circuit's overbroad presumption, this reflects the reality of California practice.

The issue of interval tolling necessarily arises only in the context of a second or third petition filed in an appellate court after denial in a lower court. There is never statutory tolling for the period of time preceding the filing of the first state petition; that first petition initiates the "one complete round" of state collateral review. *See Saffold*, 536 U.S. at 220 (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). Generally, the federal courts must only decide whether the prisoner is entitled to statutory tolling for the interval following the denial of an initial petition and preceding the filing of a petition in an appellate court. The appellate court petition should usually raise the same claims as the previous petition, *see Saffold*, 536 U.S. at 221-22; *In re Ramirez*, 108 Cal. Rptr. 2d 229, 232 (Cal. Ct. App. 2001); *People v. Djekich*, 280 Cal. Rptr. 824, 827 (Cal. Ct. App. 1991), a matter that requires only filling out a new

form petition with the same grounds for relief and the same supporting facts.[1/] This Court views this as "basic appellate review." *Saffold*, 536 U.S. at 222.

In California, defendants have sixty days to file a notice of direct appeal from a superior court judgment. Cal. Rules of Court, rule 30.1(a). The purpose of vesting original habeas jurisdiction in all levels of California courts is to permit one who is wrongfully imprisoned to obtain release as quickly as possible without the delays inherent in the normal appellate process. *Ex parte Zany*, 130 P. 710, 711 (Cal. 1913); *In re Mazoros*, 142 Cal. Rptr. 609, 612 (Cal. Ct. App. 1977); *Ex parte White*, 84 P. 242, 244 (Cal. Ct. App. 1906). Therefore, it is best to presume that a petition that was summarily denied without explanation was timely filed if it was filed within sixty days of denial by the court below. This presumption will ease the federal courts' burden, respect California law, and lead to the correct result in most cases.

### B. The Ninth Circuit's Presumption Is Not Supported By This Court's Decisions

a. *Carey v. Saffold.* To be sure, *Saffold* did not specifically hold that a federal habeas court must independently determine, for purposes of applying the AEDPA statute of limitations, whether a state habeas petition denied by a state appellate court with an unexplained summary order was timely. The logic and reasoning of the decision, however, make it crystal clear that the Court intended that result. *See* Pet. Br. 15-19. The Court in *Saffold* specifically expressed the concern that the Ninth Circuit's approach "risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." 536

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1. This Court has recognized that it should not take long to re-file claims in a different court. *Rhines v. Weber*, 125 S. Ct. 1528, 1535 (2005) (approving of a requirement that petitioners present unexhausted claims to their state court within thirty days of the federal court granting a stay).

U.S. at 226. As an example, the Court cited to *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001) (finding limitations period tolled during four-year gap). *Welch*, like the present case, involved an unexplained summary denial. It would be passing strange for the Court, having used *Welch* as the prototypical example of a state habeas petition that was not "pending" during the entire interval prior to its filing, to have intended to adopt a rule that all summarily-denied state habeas applications will be deemed timely for AEDPA purposes. To the contrary, doing so would, in *Saffold*'s words, "threaten[] to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226.

For this reason, it is not surprising that the four dissenters in *Saffold* read the opinion as the Warden does. The dissent recognized that "the California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay" and expressed the understanding that, under the Court's holding, federal courts would be deciding whether the petitioners in those cases acted with due diligence. 536 U.S. at 235 (Kennedy, J., dissenting) (internal citation omitted). Nothing in the Court's opinion suggested that the dissent construed the opinion incorrectly in that regard.

b. *Harris v. Reed.* Both Chavis and amicus curiae, the National Association of Criminal Defense Lawyers (NACDL), place great emphasis on this Court's decision in *Harris v. Reed*, 489 U.S. 255 (1989). In that decision, the Court held that the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), applies to cases on federal habeas review. Accordingly, "if it fairly appears that the state court rested its decision primarily on federal law," "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 261, 263 (internal quotation marks and citations omitted). According to Chavis

and amicus, an analogous rule should apply here, *i.e.*, a state habeas petition should be deemed timely unless the state court expressly indicates it was untimely. *See* Resp. Br. 29-30, 34-35; NACDL Br. 7-12. That argument fundamentally misconstrues the underpinnings of *Long* and *Harris* and the role of federal courts when applying the AEDPA limitations period.

The Court explained in *Long* that the "adequate and independent state ground" doctrine "is based, in part, on the limitations of our own jurisdiction" and the concern that the Court "not render an advisory opinion." 463 U.S. at 1042 (internal quotation marks and citations omitted). The Court applies the doctrine in habeas cases because,

> [w]ithout the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its own laws.

*Coleman*, 501 U.S. at 730-31. The concern about this Court's jurisdiction and its rendering of advisory opinions (and of end runs around those limits) does not arise if the state court did not decide the case on state-law grounds, even if the state court *could have* done so. Thus, the *Long* plain statement rule helps answer the question whether the state court, in fact, relied on an adequate and independent state ground for its decision. The very purpose of the *Long* rule is to determine whether a state court issued a ruling under state (as opposed to federal) law. Its entire focus is necessarily on what the state court did. The rule is not intended to affect — and has no effect on — a federal court's analysis of federal legal issues or a federal court's application of federal statutes.

Here, by contrast, the application of a federal provision is at issue. This federal provision, 28 U.S.C. § 2244(d)(2),

provides that a state application for post-conviction relief tolls the AEDPA limitations period only when it is "pending" in state court. The Court held in *Saffold* that whether an application is "pending" depends on whether it was timely filed with a state appellate court. Accordingly, the issue here, in contrast to the issue addressed in *Long* and *Harris*, is not what the state court did; it is what the habeas petitioner did: Did he file his state application to the appellate court in a timely fashion and therefore have a "pending" application?

Of course, a state court can definitively answer that question by ruling on an application's timeliness. The NACDL is simply wrong in asserting that the Warden's position is that federal courts can reassess the timeliness of a state application even after a state court has issued a holding on its timeliness. NACDL Br. 12-13, 21. To the contrary, the Warden has never disputed the obvious proposition that a state court's ruling on that issue of state law is dispositive. A state court's *silence*, however, does not indicate whether the application was "pending" within the meaning of 28 U.S.C. § 2244(d)(2). Section 2244(d)(2) does not provide that a state application tolls the limitations period when it is "pending *as expressly determined by the state court*"; it merely looks to whether the application was "pending." If the state court has not addressed the timeliness issue, the federal court must (where resolution of this issue would determine whether the federal petition was filed within the federal one-year limitations period).

The oddity of applying a *Harris*-like plain statement rule in this very different context can be seen most clearly in its application in a state that has a specific filing deadline. Let us assume that a state prisoner appeals the denial of post-conviction relief 250 days after the denial, even though a state rule requires the appeal to be filed within sixty days of the denial (with no exceptions). Then assume that the state appellate court summarily denies the application (a practice common in most states, not just California). According to Chavis and amicus, a federal court would have to treat the

appeal as timely and treat the application as "pending" during the entire 250-day period because the state court did not plainly address timeliness. There is no sound jurisprudential or policy reason for such a result.

c. *Pace v. DiGuglielmo* and *Gonzalez v. Crosby*. Chavis and amicus further argue that the Ninth Circuit's presumption is supported by the recent decisions in *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005), and *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005). Resp. Br. 22-24; NACDL Br. 11-14. *Pace* and *Gonzalez* (in passing) dealt with the requirement that an application for state collateral review be "properly filed" to merit tolling while under consideration by the state court. *Pace*, 125 S. Ct. at 1810; *Gonzalez*, 125 S. Ct. at 2650 n.8. This Court held in *Pace* that, if the state trial court rejects a petition for post-conviction relief as untimely, it is not properly filed and cannot toll the AEDPA period of limitation. *Pace*, 125 S. Ct. at 1814. A footnote in *Gonzales* suggested that the Florida courts' failure to mention untimeliness in dismissing petitioner's post-conviction motions might make *Pace* inapplicable. *Gonzalez*, 125 S. Ct. at 2650 n.8. It follows, according to Chavis and amicus, that a state appellate court's failure to mention untimeliness also must be treated as a state-court finding that the application was timely and thus "pending" during the entire period prior to its filing. Chavis and amicus are once more mixing apples and oranges.

The "properly filed" and "pending" requirements are different in nature, leading to different presumptions arising from state court silence. The requirement in the AEDPA tolling provision that a state application be properly filed recognizes that all state courts have requirements that serve as filing conditions for all types of documents. These filing conditions "go to the very initiation of a petition and a court's ability to consider that petition." *Pace*, 125 S. Ct. at 1814. If the state court does not reject the document for noncompliance, it is

reasonable to conclude that it was properly filed with that court.[2/]

By contrast, as discussed above, state appellate court silence as to the reasons why it denied an application does not logically imply that the application was timely filed. Moreover, whereas all state courts have filing requirements, the concept that a state application for collateral relief can remain "pending" during the intervals between filings when nothing is actually before a court arises out of a construction of AEDPA's language and is a matter of federal habeas corpus law. *Gibson v. Klinger*, 232 F.3d 799, 806 (10th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 883 (8th Cir. 1999). Under AEDPA, a state court application remains "pending" between filings regardless of whether state law would treat it that way. *See Saffold*, 536 U.S. at 221-23. Indeed, California law specifically holds that a habeas corpus proceeding is *not* "'pending' at any time after judgment" by the state court. *Zany*, 130 P. at 711. Rather, in the context of AEDPA's tolling provision, applications are considered continuously pending throughout "one complete round" because one purpose of the AEDPA tolling provision is to allow prisoners to exhaust their state remedies before proceeding to federal court. *Saffold*, 536 U.S. at 219-20. Inclusion of a state's "appellate filing periods" — and "California's 'reasonableness' periods" — between timely filings furthers this purpose of the tolling provision. *Id.* at 222-23. Inclusion of long periods of inactivity do not. It is therefore not consistent with either federal *or* state law to deem an application pending during such intervals of inactivity. Were those periods included, it would threaten the equally important goal of the tolling provision to respect the finality of state court judgments. *See id.* at 222.

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2. The Warden does not suggest, as Chavis and amicus fear, that the federal courts determine for themselves whether a state application was properly filed. *See* Resp. Br. 32 n.11, 45 n.19; NACDL Br. 13-14, 21.

### C. The Ninth Circuit's Presumption Improperly Requires The State Court To Anticipate And Decide A Federal Question

As the Warden's opening brief argued, the Ninth Circuit's presumption improperly dictates to the state courts how they should handle and decide state habeas cases. Pet. Br. 38; *see also* Pet. Br. 34-35. Chavis's response is that the Ninth Circuit's presumption "only require[s] the state courts to make an explicit determination of timeliness in those cases where the state court *wishes to foreclose statutory tolling under* [28 U.S.C.] *§ 2244(d)(2).*" Resp. Br. 29. There are several problems with this position.

First, Chavis ignores this Court's plain words:

> We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that federal courts might not be bothered with reviewing state law and the record in the case.

*Coleman*, 501 U.S. at 739.

Second, the state court, while concerned about the finality of convictions, does not have an overriding interest in making the precise finding that Chavis would have it make. State law does not require state appellate courts to decide whether a habeas application was timely filed if such a decision is not necessary to the resolution of the case. Furthermore, the California Supreme Court has explained that it does not impose procedural bars "merely as a means of promoting finality by

insulating our judgments from federal court review." *In re Robbins*, 959 P.2d 311, 316 n.1 (Cal. 1998). Rather, California's concern is broader: For "decades" the California Supreme Court has "recognized and imposed . . . procedural bars, including the untimeliness bar . . . to advance, among other institutional goals, the integrity of our appeal and habeas corpus process." *Id.* In many cases, California courts can advance these goals without making the precise timeliness finding that Chavis would impose on them. California appellate courts should not be required to elevate speculative concerns as to the application of the AEDPA tolling provision in a potential future federal habeas case above those other state concerns.

Chavis has it exactly backwards when he asserts that having federal habeas courts determine the timeliness of a state habeas application is an "intrusion" on the state courts. Resp. Br. 28. A federal court is not "second-guess[ing]," *id.*, a California appellate court when it reaches an issue that the state court had no reason to reach. As shown above, the state courts' decision not to explicitly address timeliness (or the merits or any of a dozen other possible procedural bars) is a pragmatic decision that cannot seriously be understood as expressing the desire that a future federal court not address those issues either.

Indeed, to the extent that second-guessing is a concern, the Ninth Circuit's rule is more problematic. As Chavis points out, freed from the statute of limitations issue, the federal court may consider whether the federal petition is subject to dismissal under Habeas Rule 4 for failure to make a prima facie case for relief on the merits. Resp. Br. 37. But the state appellate court may well have summarily denied the state application for precisely that failure. Chavis's assumption that the federal court will necessarily arrive at the same conclusion as the state court when the state court has found that no prima facie case has been presented, and that it will necessarily dismiss the petition under Rule 4 (Respondent. Br. 36-37), is unfounded. In practice, the federal court will be more hesitant to summarily dismiss the

petition because it usually will have less information than its state counterpart.[3/]

## II.

## THE WARDEN'S APPROACH DOES NOT IMPOSE AN UNDUE BURDEN ON THE FEDERAL COURTS AND BEST SERVES THE OBJECTIVES OF AEDPA

### A. California's Timeliness Standards For State Habeas Petitions Are Not "Extraordinarily Difficult" To Apply

In addition to minimizing the burden that the Ninth Circuit's rule would impose on the state courts, Chavis overstates its benefits to the federal courts and prisoners. Chavis insists that the application of California's timeliness standards is "extraordinarily difficult." Resp. Br. 39. That seriously underestimates the federal courts' abilities. The federal courts regularly confront difficult questions of the application of state law in the exercise of their diversity jurisdiction. *See, e.g., Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) ("Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought"), *judgment set aside and remanded*, 365 U.S. 293 (1961). An application of settled California case

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3. At the time of its preliminary assessment under Rule 4, the federal court has before it only the federal petition and any exhibits the prisoner attaches, unless the court has ordered a response from the custodian. The state courts, on the other hand, are in a better position to determine whether the prisoner states a prima facie case on the merits. They will be familiar with the trial (if it is the superior court) or will have the trial record from direct appeal available (if the appellate courts). *See In re Clark*, 855 P.2d 729, 761 n.35 (Cal. 1993).

law to the discrete question of tolling does not approach that level of complexity.

Moreover, the Warden's proposed limited presumption as a "partial solution," *Coleman*, 501 U.S. at 732, would reduce the federal courts' work. Under this partial solution, where the state petition has been filed within sixty days of denial by the lower court, it may be presumed timely. Pet. Br. 47. If the state petition was filed outside sixty days of denial, the federal court should consider whether the prisoner has nevertheless demonstrated due diligence in discovering and presenting the factual and legal bases for his claims. *Robbins*, 959 P.2d at 337; *Clark*, 855 P.2d at 785 n.21. This is done by looking at the prisoner's response to question 15 of the California Judicial Council form petition, which requires the petitioner to "[e]xplain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition."[4/] J.A. 20.

The present case is fairly representative of the type of explanation that will be offered. As discussed in the Warden's opening brief, Chavis offered an explanation and exhibits to the state court that only purported to account for three months out of the three-*year* lull after the California Court of Appeal's denial. Pet. Br 47-49. It is no difficult matter to conclude that the November 1997 state petition was untimely.

To the extent that there may be harder cases, that cannot be enough of a reason for the federal courts to avoid this issue and permit tolling even though it is "highly likely that the prisoner failed to seek timely review in the state appellate courts." *Saffold*, 536 U.S. at 226. Even though it may be more challenging than the mechanical application of timeliness rules

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4. Explanations offered to the federal court, but not the state court, should not be considered in deciding the timeliness of the state petition. Chavis's current claim (Resp. Br. 11, 41) that a "series of lockdowns" prevented him from having access to the law library from the time he received a job re-assignment in March 1996 (*see* J.A. 73-74), until he finally filed his California Supreme Court petition in November 1997 (*see* Pet. App. F) was not presented to the state court (*see* J.A. 20-31).

expressed in days, California's standard sets understandable parameters. Furthermore, examples of the federal courts deciding timeliness issues under indeterminate guidelines like California's habeas standards abound. *See, e.g., Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (doctrine of laches); Rules Governing § 2254 Cases, Rule 9(a) (repealed 2004); Fed. R. Civ. P. 4(m); Fed. R. Civ. P. 60(b)(4)-(6); *see* Pet. Br. 44.

In fact, federal courts have extensive experience in applying indeterminate timeliness requirements in the federal habeas context. The AEDPA limitations period itself does not begin to run until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence" if that is later than the date of finality of the judgment. 28 U.S.C. § 2244(d)(1)(D); *see also* § 2255, ¶ 4; *Johnson v. United States*, 125 S. Ct. 1571, 1582 (2005). This Court has suggested, as a number of circuits hold, that petitioners who fail to meet the requirements of the AEDPA limitations period may seek equitable tolling. *Pace*, 125 S. Ct. at 1814-15. That generally requires the federal court to decide whether the petitioner had been "pursuing his rights diligently" but "some extraordinary circumstance stood in his way." *Id.* at 1814. In addition, a prisoner who is concerned that he is in danger of violating the federal limitations period while exhausting state remedies may seek to file and then stay a federal petition, which requires the federal court to decide whether the prisoner has shown "good cause" for his failure to exhaust remedies within the allotted time and to prescribe "reasonable time limits" for the prisoner to return to state court. *Rhines*, 125 S. Ct. at 1535. These inquiries are almost identical to the inquiry required under California's timeliness standards.

Moreover, the federal court's task is easier than the California appellate court's task in this regard. If the *state* court decides that the petition before it was unreasonably delayed, it must then proceed to "read the petition to assure [itself] petitioner's factual allegations do not make a prima facie showing his case falls within one of the four exceptions to the

timeliness requirement set forth in *Clark*" before deciding whether to impose the procedural bar of untimeliness or decide the case on the merits.[5] *Sanders*, 981 P.2d at 1044; *see* Pet. Br. 22-23. The *federal* court, on the other hand, should decide only whether the state petition was timely, and not whether the state court would have or should have imposed a procedural bar. The federal court, unlike the state court, therefore need not apply the *Clark* exceptions.

The federal court's inquiry into state law would, in practice, be limited rather than burdensome. Generally, the claim will have been presented in a prior petition or else the petitioner will have asserted to the state appellate court that he only recently discovered the factual basis for the claim. If he asserted recent discovery of the facts, then the question for the federal court is no longer one of state law or even tolling, for AEDPA's limitations period does not even begin to run until the factual predicate could have been discovered with due diligence. 28 U.S.C. § 2244(d)(1)(D). The same is true if the petitioner claimed that he was impeded "by State action," 28 U.S.C. § 2244(d)(1)(B), or if he relied on a new rule of law made retroactive by this Court, 28 U.S.C. § 2244(d)(1)(C).

If, as is more common, the prisoner is presenting claims that were already known and raised in a prior petition, many of the usual justifications for delay simply will not apply. For example, the federal court need not delve into the question of whether the prisoner was conducting an ongoing investigation into a potentially meritorious claim, *see Robbins*, 959 P.2d at 318, because that question is generally relevant only to the timeliness of the prior petition in which the claim was first raised.

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5. These exceptions to the procedural bar of untimeliness are for a fundamental miscarriage of justice and have nothing to do with whether facts exist that somehow excuse the delay. *In re Sanders*, 981 P.2d 1038, 1054 n.14 (Cal. 1999); *see* Pet. Br. 22.

Finally, the NACDL needlessly complicates the issue by suggesting that a prisoner who files an untimely application with a state appellate court is entitled to tolling during the period when he *could have* filed a timely petition, thus forcing federal habeas courts to calculate when the time for filing the application ended. NACDL Br. 24 n.4. This misreads how the AEDPA tolling provision operates. Where a prisoner files an untimely application with a state appellate court, the AEDPA limitations period is not tolled during *any* of the period between the lower court denial of relief and the filing of the untimely application. This Court held in *Saffold* that a prisoner will receive statutory tolling for the intervals between denial of relief by a lower court and application to a higher court only if the prisoner complies with state timeliness requirements in proceeding from the lower court to the higher court. *Saffold*, 536 U.S. at 225; *see also id.* at 235 (Kennedy, J., dissenting) ("on the Court's holding only timely petitions cause an application to be (retroactively) pending"). Congress expressly provided that the limitations period does not begin to run until the expiration of the time for seeking direct review, 28 U.S.C. § 2244(d)(1)(A), but required a "properly filed" and "pending" petition to *toll* the limitations period. 28 U.S.C. § 2244(d)(2); *see Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000).

### B. The Warden's Approach Reduces The Need For Protective Petitions Filed In Federal Court

Chavis raises the specter of increased numbers of protective petitions filed in federal court before state remedies have been exhausted. Resp. Br. 31-32. According to him, the "fear that any significant delay in filing [a state] petition may result in an independent determination of untimeliness *even if the California state court makes no such finding*" will lead prisoners to file protective petitions in federal court. Resp. Br. 33. But no matter how the Court decides this case, a prisoner will face uncertainty about tolling if his state application is not clearly timely. In *Pace*, this Court recognized that a prisoner

exhausting state remedies runs the risk that the state court will expressly rule that his petition was untimely, with the consequence that his state petition does not toll the limitations period even while under consideration. *Pace*, 125 S. Ct. at 1813. He cannot know whether the limitations period is tolled while he awaits the state court's ruling. This Court has already accepted the fact that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." *Id.* at 1813. Chavis does not explain how the Warden's position exacerbates this situation.

Actually, adoption of the Warden's proposed sixty-day presumption would minimize the incentive for California prisoners to file protective federal petitions as well as encourage the timely exhaustion of remedies in state court. A prisoner who proceeds to a higher appellate court within sixty days after denial by a lower court could then be confident that the federal court will not later deny tolling for the time he spent preparing his petition for a higher court.

### C. The Ninth Circuit's Presumption Does Not Advance The Objectives Of AEDPA

Chavis supports the Ninth Circuit's presumption on the ground that the AEDPA limitations period is concerned only with "ensur[ing] that federal petitions are filed expeditiously *once state proceedings have finally been concluded.*" Resp. Br. 25. The language of the statute does not support this conclusion. If that had been Congress's only concern, the statute would have been drafted so that the limitations period ran from the conclusion of state collateral proceedings. *See Burger v. Scott*, 317 F.3d 1133, 1138 (10th Cir. 2003). Instead, it begins to run (in most cases) upon the conclusion of direct review and is tolled only while "properly filed" state applications are "pending." 28 U.S.C. § 2244(d)(2).

Furthermore, this Court has long been concerned with the passage of time from *conviction* to resolution of federal habeas

proceedings. *See Engle v. Isaac*, 456 U.S. 107, 127-28 (1982) (noting the difficulty of re-trying prisoners after the "[p]assage of time, erosion of memory, and dispersion of witnesses"); *see also McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-53 (1986). Likewise, one of Congress's goals in enacting AEDPA was to reduce the abuse of the habeas corpus process resulting from delay by incorporating a new period of limitation that would preserve the availability of federal review only for prisoners who "diligently pursue[] state remedies." H.R. Rep. No. 104-23, at 29 (1995), 1995 WL 56412 at *9. AEDPA now "'reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan v. Walker*, 533 U.S. 167, 179 (2001).

For this reason, federal courts have rejected arguments like Chavis's and enforce AEDPA's one-year limitations period even though the state may have a longer statute of limitations for the filing of an initial state post-conviction motion. *See Ferguson v. Palmateer*, 321 F.3d 820, 822-23 (9th Cir. 2003); *Tinker v. Moore*, 255 F.3d 1331, 1334-35 (11th Cir. 2001); *Painter v. Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001). "It is unreasonable for a federal habeas petitioner to rely on a state statute of limitations rather than the AEDPA's statute of limitations." *Ferguson*, 321 F.3d at 823. A prisoner is free to use whatever time the state court may afford him, but "[i]f . . . he also seeks federal relief, he must conform his petition to the federal rules." *Id.* "[A]s a federal statute that interacts with state procedural rules, § 2244(d) will sometimes force a state prisoner to act expeditiously to preserve his federal claims despite the procedural lenience of state law, which may forgive substantial delay." *Burger*, 317 F.3d at 1138. Here, too, a prisoner may file habeas petitions in California state courts at his leisure and gamble that the state courts will not impose a procedural bar, but if he plans to seek federal relief, he must be

mindful that he will not receive indefinite tolling of the AEDPA statute of limitations.

Chavis also complains that it is not fair for prisoners to have to prove the timeliness of their state petitions twice, once before the California courts, and again before the federal court. Resp. Br. 31. But this is a necessary consequence of the opportunity to seek relief in two systems. California requires that prisoners assume the burden of establishing the timeliness of their state habeas petitions. *Robbins*, 959 P.2d at 317, 322, 327 n.16; *Clark*, 855 P.2d at 738, 750-51, 753, 761 n.35. If the prisoner then proceeds to federal court and the record shows that his federal petition was filed outside the one-year limitations period, the petitioner bears the burden of demonstrating that the AEDPA limitation period was sufficiently tolled. In any event, if there was delay in seeking state habeas relief, the prisoner need only direct the federal court to the explanation he offered the state court.

Lastly, Chavis argues that there is a danger that truly meritorious cases will be dismissed pursuant to the AEDPA limitations period if the federal court ensures that the tolling provision is properly applied. Resp. Br. 38, 46. It is, of course, inherent in the nature of a statute of limitations that "a substantive claim will be barred without respect to whether it is meritorious." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Moreover, it is far from clear that prisoners with meritorious claims will be better off under the Ninth Circuit's presumption. The Ninth Circuit's presumption permits prisoners to be dilatory and encourages them to gamble that the state appellate court will not issue an untimeliness finding due to the large volume of cases that it must decide. The arguably meritorious cases are, however, the very cases in which the state court is most likely to find a prima facie case and issue an order to show cause instead of a summary order. The Attorney General will then respond and raise the issue of timeliness, possibly resulting in an express finding of untimeliness. The prisoner will proceed to federal court to find that he not only is

denied the benefit of tolling for the interval preceding that petition, but also that the petition itself did not toll the limitations period while under consideration.

In the end, the solution to the problem presented by this case must be "compatible with AEDPA's purposes." *Rhines*, 125 S. Ct. at 1534. It is beyond dispute that the limitations period "'quite plainly serves the well-recognized interest in the finality of state court judgments.'" *Id.* (quoting *Duncan*, 533 U.S. at 179).

In this case, the Ninth Circuit has instituted a rule that "threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226. It does so by pretending that unexplained summary orders issued after a California appellate court's preliminary assessment are in fact decisions that the state petition was timely. This threatens the careful balance struck in the AEDPA limitations period and tolling provision as well as the uniformity of the application of the federal statute. When one "ask[s] whether [Chavis] delayed 'unreasonably' in seeking California Supreme Court review," *Saffold*, 536 U.S. at 225, the answer can only be "yes."

## CONCLUSION

For the foregoing reasons and those stated in the Warden's opening brief, it is respectfully submitted that the judgment of the Ninth Circuit should be reversed.

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Respectfully submitted,

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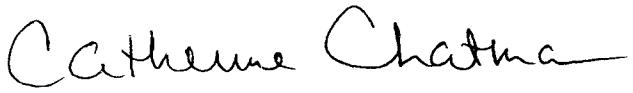

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