

No. 11-56949

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FREDDY CURIEL,

Petitioner and Appellant,

v.

KATHLEEN ALLISON, Warden,

Respondent and Appellee.

Appeal from the United States District Court  
Central District of California, Los Angeles  
The Honorable Dean D. Pregerson, Judge Presiding  
D.C. No.: 8:10-CV-00301 DDP (FMO)

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**APPELLANT'S PETITION FOR REHEARING AND  
REHEARING EN BANC**

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**INTRODUCTION**

Appellant Freddy Curiel (“appellant”) filed a Petition for Writ of Habeas Corpus (“petition”) in the United States District Court seeking a reversal of his convictions for special circumstance first degree murder and street terrorism based upon several constitutional violations, including improper impeachment, ineffective assistance of counsel, improper admission of evidence and improper jury instructions. In his state court habeas proceedings, the Orange County Superior Court denied his claims as untimely. The California Court of Appeal denied his state habeas without any explanation. The California Supreme Court

denied his state habeas with citations to *In re Swain*, 34 Cal.2d 300, 304 (1949)(“*Swain*”) and *People v. Duvall*, 9 Cal.4th 464, 474 (1955)(“*Duvall*”).

The district court dismissed the petition on the grounds that it was untimely. In reaching this conclusion, the district court rejected appellant’s arguments that he was entitled to both statutory during the pendency of his state habeas petitions filed in the trial court and the California Court of Appeal and equitable tolling during the time his former trial counsel failed to provide him with his trial files.

In its March 19, 2015 published opinion, the panel rejected appellant’s statutory and equitable tolling claims and affirmed the district court’s finding that the petition was untimely. Opinion, filed March 19, 2015 (“Opinion”). A copy of this Opinion is attached. The panel found that the denial of appellant’s claims by the California Supreme Court citing *In re Swain*, 34 Cal.2d 300, 304 (1949) and *People v. Duvall*, 9 Cal.4th 464, 474 (1955) presumed that the California Supreme Court “decided that his state petitions were not timely filed. *See, Ylst*, 501 U.S. at 803, 805.” Opinion, at p. 9.<sup>1</sup>

The panel’s published opinion warrants review because it incorrectly ascribes a finding of untimeliness in the California Supreme Court’s denial appellant’s petition on the specific ground that his claims failed to state the facts on

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<sup>1</sup> The panel rejected appellant’s equitable tolling claim on the grounds that he could have preserve his federal claims by “‘filing a ‘protective’ petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies [were] exhausted.’” Opinion, at pp. 10-11. To expect a pro se petitioner to discover and apply this sophisticated federal procedure while litigating his state habeas proceedings is manifestly unreasonable.

which relief was sought.” *Duvall, supra*, 9 Cal.4th at p. 474; *Swain, supra*, 34 Cal.2d at pp. 303-304. The panel’s decision improperly creates a timeliness bar to federal habeas petitions where the last reasoned decision of the state court denies a habeas petition for failing to state a claim.

**ARGUMENT - En Banc Review is Necessary to Resolve Whether the Denial of a Habeas Petition by the State Court for Failing to State a Claim Can Be Found to Create a Timeliness Bar**

**A. Statement of Proceedings**

On March 15, 2006, appellant was convicted by a jury of special circumstances first degree murder and street terrorist. The trial court imposed a sentence of life without the possibility of parole. Appellant appealed his conviction and sentence. In an unpublished opinion filed February 21, 2008, the California court of appeal affirmed the conviction and sentence. Appellant’s petition for review in the California Supreme Court was denied on June 11, 2008.

On May 11, 2009, appellant filed a petition for writ of habeas corpus in the Orange County Superior Court. The superior court denied the petition as, *inter alia*, “untimely” on June 10, 2009. Appellant’s petition for writ of habeas corpus was denied by the California Court of Appeal on August 6, 2009 without comment, and the California Supreme denied the petition for writ of habeas corpus on February 18, 2010, citing *In re Swain*, 34 Cal.2d 300, 304 (1949) and *People v. Duvall*, 9 Cal.4th 464, 474 (1955).

Appellant constructively filed his Petition for Writ of Habeas Corpus (“petition”) in the United States District Court for the Central District of California

on March 8, 2010. On August 31, 2011, the opinion and judgement dismissing the petition as untimely with prejudice was entered.

On appeal, appellant argued that he was entitled to statutory tolling for the entire time he was pursuing relief in his state habeas proceedings. Appellant filed his first state habeas petition on May 11, 2009, and the California Supreme Court denied his last state habeas petition on February 18, 2010. This statutory tolling extended the date for filing appellant's federal habeas petition to June 19, 2010. Appellant's federal habeas petition was timely filed on March 8, 2010.

**B. The Panel Incorrectly Found that the California Supreme Court Denied Appellant's Petition as Untimely**

The panel's decision affirming the district court's finding that appellant's petition was untimely was predicated on an erroneous assumption. The panel began its analysis by mistakenly assuming that the decision of the California Supreme Court was unclear and needed amplification. "To understand what the California Supreme Court determined here, we must parse the meaning of its two-line denial of Curiel's petition." Opinion at p. 6. The California Supreme Court denied appellant's state habeas petition with explicit reference to *Swain* and *Duvall*. A denial based upon *Swain* and *Duvall*, 9 Cal.4th 464, 474 (1955) was a denial on the ground that appellant's state habeas petition failed to state a claim for relief. No reason existed for the panel to "parse" the meaning of the California Supreme Court ruling. The meaning was clear even though brief.<sup>2</sup>

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<sup>2</sup> The panel also refers to the citation to *Swain* and *Duvall* as "ambiguous." Opinion at p. 9. The citations were not equivocal or confusing. The citations

Starting from this incorrect premise, the panel then improperly expanded United States Supreme Court and previous Ninth Circuit decisions to reach its conclusion that appellant's federal petition was untimely. The panel began by citing *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (“*Ylst*”) as holding that when “the last reasoned opinion on a claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.” Opinion at p. 6. The panel presumes that in appellant's case “the California Supreme Court agreed with the lower court determination that the petition was untimely, unless ‘strong evidence’ rebuts such a presumption. *See id.* at 804; *Bonner v. Carey*, 425 F.3d 1145, 1148, n. 13 (9<sup>th</sup> Cir. 2005). *amended by* 439 F.3d 994, 994 (9<sup>th</sup> Cir. 2006).” Opinion at p. 6.

The panel misinterprets the scope of *Ylst*. In *Ylst*, the Supreme Court considered whether a state court's unexplained denial of a habeas petition was sufficient to lift a procedural bar imposed on direct appeal. The “unexplained” denial was “without opinion or case citation.” *Ylst, supra*, 501 U.S. at 800. The need for the petition to provide “strong evidence” to refute a presumption that the later decision adopted the former decision only arose when the last decision said “absolutely nothing about the reasons for the denial.” *Id.* at 804-805.<sup>3</sup> In

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indicated that appellant's petition was denied for failure to state a claim.

<sup>3</sup> The citation by the panel to *Bonner* stands only for the proposition that where California Supreme Court denied a petition without citation to any authority, federal courts look to last reasoned decision of state court. *Bonner, supra*, 4265 F.3d at 1149, n. 13

appellant's case, the California Supreme Court was not silent. It denied appellant's claim for failure to state a cause of action. Appellant need not present any evidence to rebut a presumption that does not exist.

The panel also misread *Ylst* to hold that "even when a state supreme court's otherwise unexplained denial of a habeas petition includes citations, the state court's failure to elaborate on its reasoning renders its order uninformative as to whether it concluded the petition was timely. *Id.* at 805." Opinion at pp. 7-8. In *Ylst*, the Supreme Court found the California Supreme Court citations in its second-to-last denial uninformative for reasons completely unrelated to timeliness. The California Supreme Court citations were uninformative for two reasons. First, the citations did not explain which grounds were applicable to which claims. Second, the claim at issue in *Ylst* was not subject to state habeas review as it had already been exhausted on direct state appeal and consequently any habeas citations were irrelevant. *Ylst, supra*, 501 U.S. at 805.

The panel began its analysis with the erroneous assumption that the California Supreme Court's denial was unclear or ambiguous. It was neither. The panel then compounded its error by misreading the Supreme Court decision in *Ylst*.

### CONCLUSION

Even before his direct appeal was denied, appellant repeatedly wrote trial counsel indicating that he needed his trial files to prepare a habeas petition and that the one-year statute of limitations under AEDPA was running. Appellant was denied access to his trial files for more than two years. Once appellant received his

trial files, he filed his first state habeas petition in slightly more than nine weeks. Roughly four months later, he filed his last state habeas petition in the California Supreme Court. His federal habeas petition was filed eighteen days after his last state habeas petition was denied. Appellant exhausted his state remedies and filed his federal habeas petition in roughly ten months.

The California Supreme Court denied appellant's state habeas petition on the ground that it failed to state a cause of action. The panel's claim that this denial was unclear, ambiguous or equivocal is erroneous. The panel's misreading of *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) when applied to this erroneous assumption resulted in a misstatement of law with serious implications for future habeas cases. For these reasons, appellant respectfully requests that this petition be granted.

Dated: April 4, 2015

Respectfully submitted,

JAN B. NORMAN

By: /s/ Jan B. Norman  
Jan B. Norman

Attorney for Petitioner-Appellant  
Freddy Curiel

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that this petition is proportionately spaced with a Times New Roman typeface of 14 points; text and footnotes are double spaced; and contains 2085 words according to my word processing program.

Dated: April 4, 2015

Respectfully submitted,

*/s/ Jan B. Norman*  
Jan B. Norman

Attorney for Petitioner-Appellant  
Freddy Curiel

FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FREDDY CURIEL,  
*Petitioner-Appellant,*

v.

AMY MILLER, Warden,  
*Respondent-Appellee.*

No. 11-56949

D.C. No.  
8:10-cv-00301-DDP-FMO

OPINION

Appeal from the United States District Court  
for the Central District of California  
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted  
August 28, 2014—Pasadena, California

Filed March 19, 2015

Before: Diarmuid F. O'Scannlain, Johnnie B. Rawlinson,  
and Jay S. Bybee, Circuit Judges.

Opinion by Judge O'Scannlain

**SUMMARY\***

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**Habeas Corpus**

The panel affirmed the district court's order dismissing as untimely California state prisoner Freddy Curiel's habeas corpus petition brought pursuant to 28 U.S.C. § 2254.

The panel held that Curiel is not entitled to statutory tolling of AEDPA's one-year statute of limitations during the time in which his state post-conviction petition was pending. The panel explained that the California Supreme Court's citations to *In re Swain* and *People v. Duvall*, in its two-line denial of Curiel's petition, do not overcome the presumption that the California Supreme Court did not silently disregard the lower court's determination that the petition was untimely.

The panel rejected Curiel's contention that he is entitled to equitable tolling due to the actions of his former trial counsel. The panel explained that even if it is true that Curiel could not file his habeas petition until his trial counsel provided him with the trial files, Curiel had ample time to file a protective federal petition. The panel wrote that Curiel's *pro se* status does not change the result.

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

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**COUNSEL**

Jan B. Norman, Davis, California, argued the cause and filed the briefs for the petitioner.

Kevin Vienna, Supervising Deputy Attorney General for the State of California, San Diego, California, argued the cause for respondent. Angela M. Borzachillo, Deputy Attorney General for the State of California, San Diego California, filed the briefs for the petitioner.

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**OPINION**

O'SCANNLAIN, Circuit Judge:

We must decide whether a California prisoner's state habeas petition was timely filed under the Antiterrorism and Effective Death Penalty Act.

I

In 2006, Freddy Curiel was convicted by a California Superior Court jury of first-degree murder and street terrorism. He was sentenced to life in prison without the possibility of parole, plus twenty-five years.<sup>1</sup> *Id.*

Curiel appealed his conviction to the California Court of Appeal and, thereafter, to the California Supreme Court, which denied his petition for review on June 11, 2008. On May 12, 2009, Curiel filed a petition for a writ of habeas

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<sup>1</sup> As Curiel notes, because the issue on appeal is timeliness, "a summary of the state trial facts is not relevant."

corpus with the Orange County Superior Court, which was denied on the “separate and independent grounds” that it was untimely and unmeritorious. Curiel filed a further petition with the California Court of Appeal on July 7, 2009, but that court summarily denied it without comment or citation to authority. On September 7, 2009, Curiel filed a third petition, this time with the California Supreme Court, which was denied in a two-line decision.

Six months later, on March 8, 2010, Curiel filed his federal habeas petition in district court, which dismissed it with prejudice on the ground that it was untimely, and denied Curiel’s motion for a certificate of appealability (COA). We issued a COA on the following question:

[W]hether the district court erred in dismissing appellant’s 28 U.S.C. § 2254 petition as untimely filed, including whether appellant was entitled to statutory tolling during the pendency of his state habeas petitions filed in the trial court and the California Court of Appeal, and whether appellant was entitled to equitable tolling based on counsel’s delay in sending appellant his legal file.

## II

The only issue on appeal is whether the district court erred in determining that Curiel’s federal habeas petition was untimely filed.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), after judgment becomes final on direct review, a

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state prisoner has one year to file a petition for a writ of habeas corpus in federal court. 28 U.S.C. § 2244(d)(1)(A). Curiel acknowledges that the judgment on direct review became final on September 9, 2008. Thus, he had until September 9, 2009 to file his federal habeas petition, but he did not file it until March 8, 2010, well past the statute of limitations deadline. As Curiel concedes, unless he is entitled to statutory or equitable tolling, his petition was untimely, and the district court should be affirmed.

We review the district court's order dismissing Curiel's habeas petition *de novo*. *Espinoza-Matthews v. California*, 432 F.3d 1021, 1025 (9th Cir. 2005). We also review *de novo* whether the statute of limitations should be tolled on statutory or equitable grounds. *Id.*

III

Curiel first argues that his petition was statutorily tolled during the pendency of his state court petitions.

A

The AEDPA one-year statute of limitations is subject to tolling during the time in which “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) (emphasis added).

We look to state law to determine whether an application is “properly filed” under § 2244(d)(2). As the Supreme Court has explained, “[w]hen a postconviction petition is untimely under state law, that [is] the end of the matter for purposes of § 2244(d)(2).” *Pace v. DiGuglielmo*, 544 U.S. 408, 414

(2005) (internal quotation marks omitted). The question, then, is whether Curiel's state petition was untimely under California law.

Such question is resolved by looking to whether the highest state court to render a decision on the petition, here the California Supreme Court, found it timely. *Campbell v. Henry*, 614 F.3d 1056, 1061 (9th Cir. 2010) (“[I]f the highest court to render a decision determines that the claim is timely, then that claim was timely when it was before the lower court.”).

1

To understand what the California Supreme Court determined here, we must parse the meaning of its two-line denial of Curiel's petition. The denial reads in full:

The petition for writ of habeas corpus is denied. (See *In re Swain* (1949) 34 Cal.2d 300, 304; *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

In interpreting this laconic statement, we are guided by the Supreme Court's declaration that, when “the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.” *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). We presume that the California Supreme Court agreed with the lower court determination that the petition was untimely, unless “strong evidence” rebuts such a presumption. See *id.* at 804; *Bonner v. Carey*, 425 F.3d 1145, 1148 n.13 (9th Cir. 2005), amended by 439 F.3d 993, 994 (9th Cir. 2006).

While their import is far from clear, the citations—to pages in *Swain* and *Duvall* that recite basic habeas procedural requirements<sup>2</sup>—do not constitute the requisite “strong evidence” to overcome the presumption that the California Supreme Court did not “silently disregard” the lower court’s reasoning. *See Ylst*, 501 U.S. at 803–04. As explained by the Supreme Court, even when a state supreme court’s otherwise

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<sup>2</sup> In *Swain*, the California Supreme Court denied the habeas petition of Cecil Swain on insufficient pleading grounds. *In re Swain*, 34 Cal.2d 300, 301–04 (1949); *see also Ylst*, 501 U.S. at 805 (describing *Swain* as “hold[ing] that facts relied upon in a habeas petition must be alleged with particularity”). On the page cited in the denial of Curiel’s petition, the *Swain* court noted that its conclusions did not amount to “a ruling on the merits” and that it was only enforcing its rule that a habeas petitioner “allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts.” *Swain*, 34 Cal.2d at 304.

Inasmuch as it indicates anything, the “*See*” citation to this page of *Swain* indicates that the California Supreme Court found Curiel’s pleadings insufficient. In other words, the citation does not indicate affirmative agreement *or disagreement* with the Superior Court’s timeliness determination.

The pin-cite of *Duvall* is also of little help here. On the cited page the California Supreme Court set out to “summariz[e] the applicable procedural requirements” for habeas corpus petitions. *Duvall*, 9 Cal.4th at 474. Such summary includes an emphasis on the petitioner’s “heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them,” and an explanation that the petition must “state fully and with particularity the facts on which relief is sought” and consist of more than only “[c]onclusory allegations.” *Id.*

Taken together, the citations to *Swain* and *Duvall* appear to involve only broad discussions of the pleading required in habeas petitions. To conclude from such citations that the California Supreme Court affirmatively disagreed with the Orange County Superior Court would be unwarranted.

unexplained denial of a habeas petition includes citations, the state court's failure to elaborate on its reasoning renders its order uninformative as to whether it concluded the petition was timely. *Id.* at 805.

Indeed, even if we were to take the ambiguous citations to *Swain* and *Duvall* as the equivalent of the California Supreme Court declaring it resolved Curiel's petition "on the merits," we still would not be compelled to conclude Curiel's petition was timely. Even "a California Supreme Court order denying a petition 'on the merits' does not *automatically* indicate that the petition was timely filed." *Evans v. Chavis*, 546 U.S. 189, 197 (2006) (citing *Carey v. Saffold*, 536 U.S. 214 (2002)).

As the Supreme Court has instructed us:

[T]he Ninth Circuit must not take "such words" (i.e., the words "on the merits") as "an absolute bellwether" on the timeliness question. We pointed out that the Circuit's contrary approach (i.e., an approach that presumed that an order denying a petition "on the merits" meant that the petition was timely) would lead to the tolling of AEDPA's limitations period in circumstances where the law does not permit tolling.

*Id.* at 194–95 (citations omitted) (emphasis omitted). Further, we must take heed of the Supreme Court's direction that "where a California Supreme Court order simply states, 'Petition for writ of habeas corpus . . . is DENIED,' and does not contain the words 'on the merits,' it is even less likely the California Supreme Court had considered the petition timely

on the merits.” *Trigueros v. Adams*, 658 F.3d 983, 990 (9th Cir. 2011) (quoting *Evans*, 546 U.S. at 195, 197).

Admittedly, here the California Supreme Court did *slightly* more than state that Curiel’s petition was denied: it also gave a “*See*” citation to *Swain* and *Duvall*. *See Bonner*, 425 F.3d at 1148 n.13 (describing a summary denial as one made “without citation to any authority”). *But see Bailey v. Rae*, 339 F.3d 1107, 1112–13 (9th Cir. 2003) (describing the look-through doctrine as applying to un-explained but also *ambiguous* state court decisions).

But such a cryptic citation hardly indicates that the California Supreme Court intended to override the reasoned opinion of the Superior Court of California. To conclude otherwise would be to assert that by two ambiguous “*See*” citations in a two-line denial, the California Supreme Court intended to override the reasoning of the Superior Court and conclude that Curiel’s nearly three-year delay did not render his petition untimely. Such an assertion strains credulity.

As Curiel has failed to provide “*strong* evidence” to overcome the presumption that the California Supreme Court “did not silently disregard” the timeliness decision of the lower state court, we must conclude that the state supreme court decided that his state petitions were not timely filed. *See Ylst*, 501 U.S. at 803, 805. Curiel is thus not entitled to statutory tolling of AEDPA’s one-year statute of limitations.

B

1

Curiel also argues that the one-year limitations period should be tolled for equitable reasons. In order to receive equitable tolling, a habeas petitioner must show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citation and internal quotation marks omitted). “Under [Ninth Circuit] cases, equitable tolling is available . . . only when extraordinary circumstances beyond a prisoner’s control make it *impossible* to file a petition on time and the extraordinary circumstances were the *cause* of [the prisoner’s] untimeliness.” *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (second alteration in original) (citation and internal quotation marks omitted). This is a “very high threshold.” *Lee v. Lampert*, 653 F.3d 929, 937 (9th Cir. 2011) (en banc) (citation and internal quotation marks omitted).

2

Curiel alleges that his delay in filing his federal habeas petition was due to the actions of his former trial counsel. According to Curiel, he could not file his federal habeas petition until his trial counsel provided him with the trial files.

Even assuming that Curiel’s allegations are true, Curiel received his trial files in March 2009, which left him several months before the September 2009 deadline to file his federal habeas petition. He could easily have met the deadline by,

for instance, “filing a ‘protective’ petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies [were] exhausted,” as the Supreme Court has suggested doing when state habeas proceedings might run up against the AEDPA filing deadline. *Pace*, 544 U.S. at 416. Curiel responds that he “reasonably believed that the statute of limitations was tolled as of the time he filed his first state habeas petition.” But the Superior Court denied his petition as untimely on June 10, 2009, and the Court of Appeal did the same on August 6, 2009. Thus, with more than a month remaining before the statute of limitations ran out, two state courts had informed Curiel that his state petition was untimely, giving Curiel ample time to file a protective federal petition.

Perhaps Curiel’s *pro se* status explains his lack of understanding of the subtleties of habeas practice. Regardless of whether that is true, this Court has held that “a *pro se* petitioner’s lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling.” *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). Therefore Curiel’s *pro se* status does not change the result.

Because Curiel cannot show that his trial counsel’s actions made it “impossible” for him to meet the AEDPA deadline and that such actions were “the cause” of his failure to do so, he is not entitled to equitable tolling. *Bills*, 628 F.3d at 1097 (emphasis omitted).

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III

The district court's dismissal of Curiel's federal habeas petition as untimely is

**AFFIRMED.**

**CERTIFICATE OF SERVICE**

I hereby certify that on April 4, 2015, I electronically filed **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

*/s/ Jan B. Norman*

JAN B. NORMAN

11-56949

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FREDDY CURIEL,**

Petitioner and Appellant,

v.

**AMY MILLER,**

Respondent and Appellee.

On Appeal from the United States District Court  
for the Central District of California

No. 10CV301 DDP (FMO)  
The Honorable Fernando M. Olguin, Judge

**RESPONSE TO APPELLANT'S PETITION  
FOR REHEARING**

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## INTRODUCTION

Pursuant to this Court's Order of April 7, 2015, Appellee-Respondent Kathleen Allison, Warden, files this Response to the Petition for Rehearing and Rehearing En Banc filed by Appellant-Petitioner Freddy Curiel.

In a published opinion, issued on April 4, 2015, *Curiel v. Miller*, 780 F.3d 1201 (9th Cir. 2015), this Court affirmed the judgment of the district court, which dismissed Curiel's 28 U.S.C. § 2254 petition for writ of habeas corpus on the ground that it was untimely.

In his Petition for Rehearing and Rehearing En Banc, Curiel asserts that the panel's decision warrants review because it incorrectly ascribes a finding of untimeliness by the California Supreme Court on the ground that Curiel's claims failed to state facts which warrant habeas corpus relief. He then concludes that this Court improperly created a timeliness bar to federal habeas corpus petitions where the last reasoned decision of the state court denies a petition for failing to state a claim. (Pet. at 2-3.)

But Curiel is wrong. This Court held that Curiel failed to provide "strong evidence" to overcome the presumption that the California Supreme Court "did not silently disregard" the timeliness determination of the state's

lower court. Thus, he incorrectly ascribes to this Court the creation of a timeliness bar grounded on the failure to state a claim.

Curiel's Petition for Rehearing and Rehearing En Banc should be denied because he mischaracterizes this Court's holding. Accordingly, neither panel rehearing nor rehearing en banc is appropriate in this case.

**I. CURIEL'S PETITION FOR REHEARING AND REHEARING EN BANC SHOULD BE DENIED**

**A. Background<sup>1</sup>**

A jury convicted Curiel of special circumstance first degree murder and street terrorism. The trial court sentenced Curiel to life without the possibility of parole plus twenty-five years. Thereafter, Curiel appealed his conviction to the California Court of Appeal, and the California Supreme Court denied review on June 11, 2008. *Curiel v. Miller*, 780 F.3d at 1202; Opn. at 3.

Curiel then filed a petition for writ of habeas corpus in the Orange County Superior Court, which was denied on the "separate and independent grounds" that it was both untimely and unmeritorious. *Curiel v. Miller*, 780

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<sup>1</sup> As this Court observed, because the issue on appeal was timeliness, a summary of the state trial facts was not relevant. Opn. at 3, n 1. Because Curiel does not dispute this Court's procedural findings, Appellee-Respondent derives the Background from the Court's published opinion.

F.3d at 1202; Opn. at 3-4. Curiel filed a second petition in the California Court of Appeal on July 7, 2008, which was denied without comment or citation to authority. *Id.*; Opn. at 4. On September 7, 2009, Curiel filed a third petition for writ of habeas corpus in the California Supreme Court. *Id.* at 1202-03; Opn. at 4. The supreme court denied the petition citing *In re Swain*, 34 Cal. 2d 300, 304 (1949), and *People v. Duvall*, 9 Cal.4th 464, 474 (1995). *Id.* at 1203, 1204; Opn. at 4, 6.

On March 10, 2010, Curiel filed a petition for writ of habeas corpus in the district court, which was denied on the ground that it was untimely.

*Curiel v. Miller*, 780 F.3d at 1203; Opn. at 4. This Court granted a certificate of appealability for the following question:

[W]hether the district court erred in dismissing appellant's 28 U.S.C. 2254 petition as untimely filed, including whether appellant was entitled to statutory tolling during the pendency of his state habeas petitions filed in the trial court and the California Court of Appeal, and whether appellant was entitled to equitable tolling based on counsel's delay in sending appellant his legal file.

*Curiel v. Miller*, 780 F.3d at 1203; Opn. at 4.

#### **B. *Curiel v. Miller***

In its opinion, this Court observed that the Anti-terrorism and Effective Death Penalty Act (AEDPA) one-year statute of limitation is subject to statutory tolling during the pendency of a properly filed state petition for

post-conviction review and that a federal court must look to the highest state court's determination as to whether a state petition was untimely. *Curiel v. Miller*, 780 F.3d at 1203; Opn. at 5.

Citing the United States Supreme Court decision in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), this Court observed that where a state's last reasoned opinion on a claim explicitly imposes a procedural default, a federal habeas corpus court will presume a later decision rejecting the claim did not silently disregard the bar and consider the merits of the claim. *Curiel v. Miller*, 780 F.3d at 1204; Opn. at 6. This Court presumed that the California Supreme Court agreed with the lower court determination that Curiel's petition was untimely, unless "strong evidence" rebutted the presumption. *Id.*; Opn. at 6. Here, the Court found that the supreme court's citation to *Swain* and *Duvall* did not constitute "strong evidence" to overcome that presumption. *Id.*; Opn. at 7.

As this Court noted, even if the "ambiguous" citation to *Swain* and *Duvall* was a declaration that the supreme court had resolved Curiel's petition "on the merits," this Court would not be "compelled to conclude" that his petition was timely. *Curiel v. Miller*, 780 F.3d at 1204; Opn. at 8 (citing *Evans v. Chavis*, 546 U.S. 189, 197 (2006)). This is so because the

words “on the merits” are not “an absolute bellwether” on the timeliness question. *Id.* at 1205; Opn. at 8 (quoting *Evans v. Chavis*, 546 U.S. at 194-95). Moreover, this Court noted that where the California Supreme Court denies a petition without stating that it is on the merits, it is even less likely that the court found the petition timely on the merits. *Id.* (citing *Trigueros v. Adams*, 658 F.3d 983, 990 (2011)); Opn. at 8-9.

This Court found that the California Supreme Court’s “cryptic” “*See*” citation to *Swain* and *Duvall* was hardly an indication that the supreme court intended to override the reasoned opinion of the Orange County Superior Court and conclude that Curiel’s “nearly three-year delay” did not render his petition untimely. As this Court stated, “Such an assertion strains credulity.” *Curiel v. Miller*, 780 F.3d at 1205; Opn. at 9.

Indeed. In California, substantial delay is measured from the time the petitioner knows, or reasonably should have known, of the facts offered in support of a claim and the legal basis for the claim. *In re Robbins*, 18 Cal. 4th 770, 780, (1998). The rule is similar in the federal courts. The AEDPA statute of limitation “begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance.” *Hasan v. Galaza*, 254 F.3d 1150, 1154, n. 3 (9th Cir.

2001) (*citing Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000)). Curiel proffered no evidence that indicates he was unaware of the facts underlying his claims for almost three years.

Curiel also ignores the fact that the California Supreme Court cited first to *Swain*, wherein the court stated:

We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned *and that he fully disclose his reasons for delaying in the presentation of those facts.*

*In re Swain*, 34 Cal. 2d at 304 (emphasis added).

Citing *In re Swain*, specifically, the *Robbins* court noted that *Swain* stood for the proposition that a habeas corpus claim was barred when the petitioner failed to “fully disclose his reasons for delaying in the presentation of [facts asserted as a basis for relief].” *In re Robbins*, 18 Cal. 4th at 779, n.1; *see also Walker v. Martin*, 562 U.S. 307, 131 S. Ct. 1120, 1124 (2011) (in California, “[c]laims substantially delayed without justification may be denied as untimely.”).

Thus, with its citation to *Swain*, the California Supreme Court was unequivocal in its determination that Curiel’s petition was delayed, *in addition to failing to set forth a prima facie case.* *People v. Duvall*, 9 Cal.4th at 474. This determination fails to indicate that the California

Supreme Court disregarded the lower court's finding of untimeliness. In fact, it was an affirmation of that finding.

Accordingly, as this Court concluded, Curiel failed to overcome the presumption that the California Supreme Court did not silently disregard the lower court's finding that his petition was untimely. *Curiel v. Miller*, 780 F.3d at 1205; Opn. at 9.

Curiel's mischaracterization of this Court's holding falls far short of exposing any deficiency in the Court's reasoning or conclusion that would warrant rehearing or rehearing en banc.

In addition, Curiel complains in a footnote that this Court also rejected his argument that he was entitled to equitable tolling. He asserts that to require a pro se petitioner to file a protective petition was "manifestly unreasonable." (Pet. at 2, n. 1.) If Curiel intends to support his Petition For Rehearing and Rehearing En Banc with a two sentence complaint in a footnote, he fails. "The summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal." *See Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n. 4 (9th Cir. 1996).

In any event, filing protective petitions is precisely what the United States Supreme Court has suggested, as this Court noted. *Curiel v. Miller*, 780 F.3d at 1206 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005); Opn. at 11. As the high Court stated, “A prisoner seeking state postconviction relief might avoid this predicament [a time bar], however, by filing a “protective” petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted.” *Pace v. DiGuglielmo*, 544 U.S. at 416.

## CONCLUSION

Curiel's argument rests on a faulty premise, that is, that this Court created a timeliness bar based on a failure to state a claim when the Court did no such thing. Consequently, Curiel has failed to demonstrate that rehearing or rehearing en banc is justified in this case and his Petition should be denied.

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Respectfully Submitted,

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