No. 12-55307

In the United States Court of Appeals for the Ninth Circuit

STEVEN PELESASA FUE,
Petitioner-Appellant,

v.

MARTIN BITER, Warden
Respondent-Appelle.

On Appeal from the United States District Court
for the Central District of California
No. CV 11-2436-DMG-MRW

Appellant's Petition for Rehearing En Banc

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I. INTRODUCTION

In finding petitioner Seven Fue was not reasonably diligent and denying him the benefit of equitable tolling of 28 U.S.C. § 2244(d)'s one-year limitations period, the majority panel opinion, *Fue v. Biter*, No. 12-44307, 2016 WL 192000 (9th Cir. Jan. 15, 2016),[1] over Judge Bybee's dissent, ignores the Supreme Court's directive that the court should exercise its equity power on a case-by-case basis. *Holland v. Florida*, 560 U.S. 631, 649-50 (2010). Instead, the majority tallied time periods found to be reasonable and unreasonable in cases from other courts and denied Fue based on arithmetic, rather than reason or equity. Rehearing is required.

With about three months remaining in the limitations period, Fue filed his exhaustion petition in the California Supreme Court. Although the California Rules of Court require the California Superior courts to act on a habeas petition within sixty days of its filing, there is no like rule for the Supreme Court, and there is no outside time limit for a ruling. The court rules, however, require the clerk to promptly send copies to the parties of any decision. Fourteen months after filing and not having heard from the court, Fue wrote to the clerk asking about the petition. The clerk responded that it had no record of any pending petition. Worried about the limitations period, Fue filed his federal habeas petition within a month.

[1] The Court's slip opinion is attached as Appendix A.

The majority found Fue dilatory in waiting fourteen months. The majority reached that result with no consideration of the particular facts of Fue's case; that he was unrepresented, there was no time limits for the court's decision, and that the rules required the clerk to notify him of a decision. The majority considered only the time Fue waited, fourteen months, and compared that to other cases from other courts. The majority decided that Fue did not exercise reasonable diligence because the fourteen months he waited before inquiring was closer to the sixteen-month and twenty-one month periods found unreasonable than the nine-month periods found reasonable by other courts.

Both the process and the resulting arbitrary measure of diligence conflicts with the principles universally used by the Supreme Court and this Court in resolving issues of equitable tolling. In finding fourteen months to be unreasonable, the majority opinion also conflicts with this Court's decision in *Huizar v. Carey*, 273 F.3d 1220, 1224 (9th Cir. 2001) finding twenty-one months a reasonable period of time to wait and the Eleventh Circuit's decision finding sixteen months reasonable. *Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002). The opinion obligates state prisoners with pending habeas petitions to write early and often to the state courts, creating an unnecessary and unwarranted burden for both the state courts and the state prisoners. Finally, the opinion is wrong. It is entirely

reasonable for someone in Fue's position to wait fourteen months before bothering the court. This case should be reheard.

II. REASONS FOR GRANTING REHEARING

A. The Majority Opinion's Mode of Analysis Conflicts with the Equitable Tolling Jurisprudence of this Court and the Supreme Court

In determining whether any petitioner who files beyond the AEDPA statute of limitations is entitled to equitable tolling, courts must consider the particular facts and circumstances and decide on a "case-by-case basis." *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010). The process emphasizes the need for "flexibility" and the avoidance of "mechanical rules." *Holland*, 560 U.S. at 650.[2]

The majority eschews this approach. In deciding whether petitioner acted with reasonable diligence in waiting fourteen months before inquiring about his case, the opinion merely surveys other periods of time found reasonable and unreasonable in cases from other jurisdictions, and then finds Fue's actions

[2] The decisions of this Court on equitable tolling reflect this principle. *See, e.g.*, *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011) ("Equitable tolling is not the arena of bright-lines and dates certain . . ."); *Forbess v. Franke*, 749 F.3d 837, 842 (9th Cir. 2014) (finding petitioner entitled to equitable tolling because of unique nature of his mental illness and the flexible, totality-of-the-circumstances approach required by Circuit law); *Sossa v. Diaz*, 729 F.3d 1225 (9th Cir. 2013) (remanding for further fact-finding because although institutional lock downs do not ordinarily entitle a prisoner to equitable tolling, facts alleged by Sossa might); *Bills*, 628 F.3d 1092 (remanding for further fact-finding on determining whether mental impairment warranted equitable tolling).

unreasonable because the "delay in *Hardy* [*v. Quarterman*, 577 F.3d 596 (5th Cir. 2009)] was eleven months as opposed to the considerably longer period of fourteen months here." Slip op. at 11. The opinion admits that had Fue written the state court six weeks earlier, it might well have found him reasonably diligent. Slip Op. at 10. The majority establishes a "mechanical rule" that the court's failure to notify a prisoner of its decision, the petitioner exercises reasonable diligence only if he or she inquires within twelve months and two weeks of filing. A week or two longer, and the petitioner's action is unreasonable. As the dissent explains, "the majority's line-drawing is an exercise in rule making, not an exercise in equity." Slip op. at 20 (Bybee, J., dissenting).

The majority justifies this departure from equitable principles as consistent with the purpose of the AEDPA statute of limitations in encouraging prompt federal filings. Slip op. at 10. That, however, confuses the general purpose of the Act with the more specific analysis required for equitable tolling. Equitable tolling analysis takes as a given that the statute of limitations has been exceeded and asks only whether that is excused because extraordinary circumstances (shown here and not disputed) prevented timely filing and petitioner acted with reasonable diligence under the circumstances. And although the reasonable of a petitioner's actions is informed by the existence of a limitations period, it does not require line drawing and the creation of an alternative period, characterized by the dissent as an

"asymptote, a limit that approaches a finite number, around 13 months." Slip op. at 20 (Bybee, J., dissenting).

The majority's establishment of a mechanical rule and arbitrary time period to measure diligence directly conflicts with the mode of analysis established by the Supreme Court in *Holland* and consistently followed by this Court. Rehearing is necessary to resolve this conflict.

B. The Majority Opinion Creates a Circuit Intra-Circuit Conflict with *Huizar*

- "So Huizar waited an additional twenty-one months, not an unusually long time to wait for a court's decision."

Huizar, 273 F.3d at 1224.

- "Fue's unwarranted delay [of fourteen months] persuades us that he failed to act with sufficient diligence to justify application of equitable tolling principles."

Slip op. at 10.

Petitioner Fue waited fourteen months before writing the California Supreme Court about the status of his petition, a period the majority finds disentitles him to equitable tolling. In *Huizar*, this Court found that a petitioner who waited twenty-one months was reasonably diligent, because twenty-one months is "not an unusually long time to wait for a court's decision." Slip op. at 10. Although the

majority purports to distinguish *Huizar*, the distinctions are immaterial and demonstrate the irreconcilable conflict between the cases.

The majority claims that Fue did not display diligence similar to that of Huizar, because Fue did not write the court immediately after its filing to inquire and because he made no further inquiries after his first one. But as noted by the dissent, "that misses the point." *Huizar* found a delay of twenty-one months between inquiries to be reasonable given the petitioner's pro se status. Presumably had Fue written the court immediately after filing to inquire whether it had decided his case and then waited another twenty-one months—seven more than he actually waited— the majority would have found him diligent. That he acted *more* promptly than Huizar cannot make him less diligent.

Other comparisons between the two cases reveal Fue to have been more diligent than Huizar. Huizar filed his petition in the Superior Court. The California Superior Court must act on a habeas petition within sixty days of its filing. Cal. R. Ct. 4.551(a)(3)(A). And the court rules specifically provide that the petitioner may file a notice and request for ruling if the court does not rule within sixty days. Cal. R. Ct. 4.551(a)(3)(B). Although Huizar received no response to his initial inquiry after sixty days, he waited an additional nineteen months beyond the court's deadline for a ruling before writing again.

Fue's petition in the California Supreme Court was subject to different rules. Unlike the Superior Court, the Supreme Court rules provide no deadline for a ruling. And also unlike the Superior Court rules, the Supreme Court rules specifically obligate the clerk to promptly send copies of the court's decision to the parties upon filing. Cal. R. Ct. 8.532(a). There was no reason for Fue to believe that his petition would be decided within 60 days and therefore no reason to ask about its status after 60 days. Because there was no deadline for the court's ruling and because the clerk was obligated to promptly notify Fue of any ruling, Fue's wait of fourteen months, seven months fewer than Huizar, showed much more diligence. *Huizar* cannot be squared with this case. Slip op. at 17 (Bybee, J., dissenting). There is an irreconcilable conflict.

C. The Majority Opinion Creates an Inter-Circuit Conflict with *Hardy*, 577 F.3d 596 and *Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002)

The Fifth Circuit resolved an almost identical issue in *Hardy*. Hardy filed his habeas petition in the Texas state court. Like California, Texas rules require notification to the petitioner once a decision has been rendered. Although the court denied his petition, it failed to notify him. Hardy wrote the court eleven months after filing the petition and received notice of its denial one month later. He filed his federal habeas petition seven days after receiving notice of the state-court denial. The Fifth Circuit found Hardy's inquiries were not too late to evidence his

diligence in pursuing his rights, entitling him to equitable tolling. *Hardy*, 577 F.3d at 600.

The only difference between *Hardy* and this case is that Fue waited fourteen months before inquiring, three months or about 20 percent longer than Hardy. In determining, as an equitable matter, whether a petitioner exercised reasonable diligence, three months out of fourteen is not a qualitative difference. Yet, the majority disregards *Hardy* with the observation that eleven months is "considerably longer" than fourteen months. Slip op. at 11.

Similarly in *Knight*, the Eleventh Circuit found reasonable diligence where the petitioner waited eighteen months before inquiring about the status of his petition. The majority distinguished *Knight*, because the petitioner had been assured by the state court when he filed it that the court would notify him of any ruling.[3] But that is no different that here where the exact same assurance is given by operation of the court's rule. Petitioner did not need assurance from the clerk; he had it from the court's rules. *Knight* is indistinguishable. Where the court states it will notify the petitioner of any ruling, eleven, fourteen, and eighteen months are

[3] The Eleventh Circuit distinguished *Knight* on this basis in finding that a petitioner who waited sixteen months was not diligent. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1288 n.3 (11th Cir. 2002). The majority opinion cites this fact as dispositive. *S*lip op. at 11-12. Nothing in *Drew* suggests that the state court rules required notice to the petitioner of a ruling. And, of course, as argued by the dissent, *Drew* is simply wrong. Slip op. at 22 n.4 (Bybee, J., dissenting).

all reasonable amounts of time for a pro se petitioner to wait before further inquiry. The majority's opinion conflicts with the reasoning and rulings of the Fifth and Eleventh Circuits.

D. The Majority Opinion Creates and Unwanted and Unnecessary Administrative Burden for the State Courts

The majority opinion establishes a new rule for all pro se habeas petitioners with petitions pending in state court. Irrespective of any advisements to the contrary[4] or guarantees of prompt notice by the state courts, petitioners must engage in a "steady stream of correspondence" inquiring about the petition's status. Slip op. at 7. If they rely only on the court's rules requiring notice of any decision, they will not have "demonstrate[d] the required diligence on the part of the habeas petitioner." Slip op. at 7.

Following this case, petitioners will know that a letter two months after filing is probably required and one fourteen months after filing is too late. An inquiry after 11 months might demonstrate reasonable diligence, slip op. at 11, but

[4] For example, in a letter sent upon filing, the Washington State Court of Appeals, Division Two specifically advises petitioners that any "**request limited solely to the status of the petition will be placed in the file without further action.**" Letter from David C. Ponzoha, Court Clerk (Oct. 15, 2015) attached as Appendix B (original emphasis). The Clerk of the Eastern District of California sends a similar response, informing petitioners that the clerk will *not* respond to status inquiries and they will receive notice of any decision. Clerk's Notice attached as Appendix C.

a pro se petitioner would be well-advised to send one earlier to be on the safe side. This constant stream of letters serves no purpose. In virtually every case, the response (when there is one) will be that the petition is pending; in the normal course, the court notifies the petitioner when the court takes action. Repeated correspondence accomplishes nothing, other than to burden court clerks. 2326 habeas petitions were filed in the California Supreme Court in fiscal year 2014. Judicial Council of California, 2015 Court Statistics Report, Statewide Caseload Trends, at 10, *available at* http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf. An inquiry every two months by those with pending petition would mean about 14,000 additional letters to be answered by the clerk each year. The majority's opinion would require a colossal waste of time and effort to satisfy its arbitrary measure of "reasonable diligence."

E. The Majority Opinion Is Wrong

"[A] 'petitioner' is entitled to 'equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). As the majority concedes, the California Supreme Court's failure to notify Fue it had denied his habeas petition was an "extraordinary circumstance." Slip op. at 7. The majority

denies Fue's claim to equitable tolling, saying that Fue was not reasonably diligent in pursuing his post-conviction rights.

The "diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Id.* at 653 (internal quotation marks and citation omitted). "The standard for reasonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief. It requires the effort that a reasonable person might be expected to deliver under his or her particular circumstances." *Doe*, 661 F.3d at 1015. Fue acted diligently in filing his state habeas petition in November 2009 and in filing his federal habeas petition in March 2011 after hearing from the state court in February 2011 it had "no record of a pending petition for writ of habeas corpus having been filed on or about November 2009." ER 29. The only issue was whether Fue acted reasonably in waiting fourteen months to inquire about the status of his habeas petition.

"The standard for reasonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief. It requires the effort that a reasonable person might be expected to deliver under his or her particular circumstances." *Id.* Here, Fue was in state prison and had no lawyer to file his habeas petition. The California Supreme Court has no deadlines for acting on habeas petition and obligates its clerk to promptly notify the parties of any decision. A reasonable person in Fue's position "might refrain from asking the

court about a petition until the petition has remained pending for an unusually long time."Slip op. at 16 (Bybee, J., dissenting). And twenty-one months, much less fourteen months, "'is not an unusually long time to wait for a court's decision.'" *Id*. (quoting *Huizar*, 273 F.3d at 1224). Fue exercised reasonable diligence.

The majority errs in founding its contrary conclusion on a mechanical survey of time periods from other cases, irrespective of the differing facts and circumstances, and a gross mathematical comparison, finding that fourteen months is closer to the sixteen months found unreasonable by the Eleventh Circuit in *Drew*, 297 F.3d at 1278 and the twenty-one months found unreasonable by Third Circuit in *LaCava v. Kyler*, 398 F.3d 271, 277 (3d Cir. 2005) than the nine months found reasonable by the Second and Sixth Circuits in *Diaz v. Kelly*, 515 F.3d 149, 155-56 (2d Cir. 2008) and *Miller v. Collins*, 305 F.3d 491, 495-96 (6th Cir. 2002). Slip op. at 5-6. The establishment of an arithmetical rule,[5] applicable without regard to the facts before it, is antithetical to application of the equitable principles underlying equitable tolling. Although it might be unreasonable to wait fourteen months where the court rules require a decision in a much shorter period or where the court rules do not require notice of a decision, that same fourteen months

[5] The majority decided fourteen months was unreasonable because fourteen was closer to sixteen than to nine. If the decision stands, the new rule will be whether it is closer to fourteen than to nine. Thus, for future petitioners, waiting twelve months is likely unreasonable but eleven months might be reasonable.

becomes reasonable if the facts and circumstances are, as here, different. The majority's failure to recognize these differences leads it to an erroneous result.[6]

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III. CONCLUSION

The panel opinion stands as an outlier in this Court's equitable tolling jurisprudence. Instead of examining the specific facts and circumstances to determine whether Fue acted reasonably in waiting fourteen months before first writing the court about his case, the opinion synthesizes a discrete number, "around thirteen months," to arbitrarily measure diligence. This is bad precedent.

[6] This same indiscriminate analysis leads the majority to rely on two unpublished district court cases to support its conclusion: "But we do know that at least two district courts in California have determined that delays similar to Fue's reflected a lack of reasonable diligence. *See Baek*, 2013 WL 6587873, at *5 (holding that a delay of thirteen months "does not constitute the required diligence") (citations and footnote reference omitted); *see also Retano v. Jand*a, No. CV 12–8214–GW (OP), 2013 WL 6499702, at *4 (C.D.Cal. Dec. 10, 2013) (concluding that a delay of approximately fifteen months "indicate[d] a lack of diligence"). Fue's fourteen-month delay falls squarely between these two California federal court decisions finding a lack of diligence." Slip op. at 11. *Retano* involved a petition in the California Superior Court which has a 60 day deadline for acting and *Baek* provides no reasoning for its conclusion.

The Court should grant rehearing, reverse the dismissal of Fue's federal habeas petition, and remand for a determination of its merits.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: February 19, 2016 By /s/ *Michael Tanaka*
MICHAEL TANAKA
Deputy Federal Public Defender
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this petition is proportionally spaced, has a typeface of 14 points or more, does not exceed 15 pages, and, according to the word processor used to prepare this brief, contains approximately 3500 words.

DATED: February 19, 2016

/s/ *Michael Tanaka*
Michael Tanaka

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN PELESASA FUE, *Petitioner-Appellant*, v. MARTIN BITER, Warden, *Respondent-Appellee*.	No. 12-55307 D.C. No. 2:11-cv-02436- DMG-MRW OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Submitted August 28, 2014*
Pasadena, California

Filed January 15, 2016

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

Opinion by Judge Rawlinson
Dissent by Judge Bybee

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

SUMMARY**

Habeas Corpus

Affirming the district court's dismissal, as untimely, of a California state prisoner's habeas corpus petition, the panel held that the prisoner failed to act with the requisite diligence to justify application of the equitable tolling doctrine where he waited fourteen months before inquiring into the status of his state habeas petition.

Dissenting, Judge Bybee wrote that, since it is only the extraordinary case in which the state court fails to send notice of a decision, a rule requiring prisoners to seek early and frequent updates about the status of a pending petition would be a waste of time for prisoners and a heavy administrative burden for state courts.

COUNSEL

Sean K. Kennedy, Federal Public Defender, Michael Tanaka, Deputy Federal Public Defender, Los Angeles, California, for Petitioner-Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Yun K. Lee, Deputy Attorney General, Los Angeles, California, for Respondent-Appellee.

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

OPINION

RAWLINSON, Circuit Judge:

California state prisoner Steven Pelesasa Fue (Fue) appeals the district court's dismissal, as untimely, of his petition for a writ of habeas corpus, filed pursuant to the Antiterrorism and Effective Death Penalty Act (the Act), 28 U.S.C. § 2254. Fue contends that he is entitled to equitable tolling because the state court never notified him that it had denied his state habeas petition. The district court held that Fue was not entitled to equitable tolling because he did not act diligently in waiting fourteen months before inquiring into the status of his petition. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, and we agree with the district court's conclusion that Fue failed to act with the requisite diligence.[1]

I. BACKGROUND

Fue's habeas petition challenges his 2007 convictions for armed carjacking. Under the Act, Fue had one year from the date his convictions became final to file a federal habeas corpus petition. *See* 28 U.S.C. § 2244(d). His convictions became final on or about May 19, 2009, ninety days after the California Supreme Court denied his petitions for review on direct appeal. *See Sossa v. Diaz*, 729 F.3d 1225, 1227 (9th Cir. 2013). Six months later, on November 19, 2009, Fue

[1] We have no quarrel with the principle that equitable tolling may require us to calculate time with the awareness that special treatment may be warranted "in an appropriate case." *Dissenting Opinion*, p. 13 (quoting *Holland v. Florida*, 560 U.S. 631, 650 (2010). We simply disagree that Fue's case is "special."

filed a state petition for a writ of habeas corpus in the California Supreme Court, thereby tolling the one-year limitations period while his state post-conviction petition was pending. *See* 28 U.S.C. § 2244(d)(2). On May 20, 2010, the California Supreme Court denied the state habeas petition. What happened next is relevant to Fue's equitable tolling claim.

According to Fue, the California Supreme Court never notified him that it had denied his state habeas petition. After waiting fourteen months for a decision, on January 31, 2011, Fue mailed a letter to the California Supreme Court to inquire into the status of his case. By letter dated February 3, 2011, the Clerk of the California Supreme Court informed Fue that his habeas case was no longer active.[2]

Fue's federal habeas petition, filed on March 7, 2011, was dismissed as untimely. In this timely appeal, Fue contends that the district court misapplied the doctrine of equitable tolling when determining the timeliness of his federal habeas petition. We do not agree.

II. STANDARDS OF REVIEW

We review a district court's dismissal of a petition for a writ of habeas corpus for failure to comply with the applicable one-year statute of limitations *de novo*. *See Sossa*, 729 F.3d at 1229. If the underlying facts are undisputed, the question whether the statute of limitations should be

[2] The dissent takes the position that this letter was deceptive. *See Dissenting Opinion*, p. 18. We disagree. Informing a habeas petitioner that his case is no longer active conveys that there are no pending matters before the court.

equitably tolled is reviewed *de novo*. *See id*.; *see also Gibbs v. LeGrand*, 767 F.3d 879, 890–93 (9th Cir. 2014) (reviewing the district court's diligence determination *de novo*). Otherwise, a district court's findings of fact are reviewed for clear error. *See Sossa*, 729 F.3d at 1229.

III. DISCUSSION

A prisoner seeking equitable tolling bears the burden of showing (1) that an extraordinary circumstance prevented the timely filing of his habeas petition and (2) that he diligently pursued his rights. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). Lack of knowledge that the state court has reached a decision on his state habeas petition may constitute an extraordinary circumstance so as to justify equitable tolling if the prisoner has acted diligently. *See Ramirez v. Yates*, 571 F.3d 993, 997–98 (9th Cir. 2009). In order to determine whether Fue is entitled to such tolling, we consider "(1) on what date [Fue] actually received notice; (2) whether [Fue] acted diligently to obtain notice; and (3) whether the alleged delay of notice caused the untimeliness of his filing and made a timely filing impossible." *Id*. at 998 (citations omitted).

Only the second consideration is at issue in this appeal. We must decide whether a prisoner who waits fourteen months before inquiring into the status of his state habeas petition has acted with sufficient diligence to apprise himself of the status of his pending proceedings. While the availability of equitable relief commends a flexible, case-by-case approach, we permissibly look to how other courts have evaluated various delays to inform our reasonable diligence inquiry. *Holland*, 560 U.S. at 650 (recognizing that "courts of equity can and do draw upon decisions made in other similar cases"). A brief survey of similar cases in other

circuits reflects that courts have generally determined that a prisoner who delayed fewer than ten months before inquiring into the status of his case acted with sufficient diligence. *See Diaz v. Kelly*, 515 F.3d 149, 155–56 (2d Cir. 2008) (nine months); *see also Miller v. Collins*, 305 F.3d 491, 495–96 (6th Cir. 2002) (same). On the other hand, a prisoner who delayed sixteen months and more was deemed not to have acted with sufficient diligence. *See LaCava v. Kyler*, 398 F.3d 271, 277 (3d Cir. 2005) (twenty-one months); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002) (nearly two years); *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1288 (11th Cir. 2002) (sixteen months). While not dispositive, Fue's delay of fourteen months before inquiring into the status of his state habeas petition is closer to the majority of cases finding a lack of reasonable diligence.

Unlike our dissenting colleague, we easily see how waiting fourteen months before inquiring about the status of his state court petition was unreasonable in these circumstances. Although no statute or rule requires prisoners to seek periodic updates from the California Supreme Court, reasonable diligence requires action on the part of the petitioner – including one appearing *pro se*. *See Diaz*, 515 F.3d at 155 (suggesting that a *pro se* litigant should inquire "as to whether a pending motion has been decided" after "a substantial period of time has elapsed," in that case nine months); *see also Miller*, 305 F.3d at 496 (noting that the *pro se* petitioner "did not passively await decision," but acted reasonably in filing a motion asking the court to rule on his application after approximately nine months); *Drew*, 297 F.3d at 1288 (criticizing the *pro se* petitioner for sending only one letter inquiring about this case); *Emp. Painters' Trust v. Ethan Enters.*, 480 F.3d 993, 997 n.7 (explaining that diligence requires "keeping apprised of recent filings").

The dissent inquires why we would require habeas petitioners to pursue a "steady stream of correspondence" regarding filings that have been pending for a considerable time. *Dissenting Opinion*, p. 14. The answer is obvious: to demonstrate the required diligence on the part of the habeas petitioner. *Cf. Drew*, 297 F.3d at 1288 (criticizing the sending of only one letter).

The dissenting opinion rests its analysis largely on the failure of the California Supreme Court to notify Fue of its decision. *See Dissenting Opinion*, pp. 15–17. However, the failure of the court to notify Fue of its decision has absolutely nothing to do with Fue's diligence. Rather, the failure of the court to notify Fue satisfied the extraordinary circumstances prong of the equitable tolling equation. *See Ramirez*, 571 F.3d at 997 ("We agree with our sister circuits that a prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling *if* the prisoner has acted diligently . . . ") (citations and internal quotation marks omitted) (emphasis added). The diligence requirement is separate and apart from the extraordinary circumstances requirement. The extraordinary circumstances requirement focuses on the action(s) of a party or parties outside the petitioner's control. *See Sossa*, 729 F.3d at 1229 (describing extraordinary circumstances as those circumstances "beyond a prisoner's control" and attributable to "an external force"). The diligence requirement focuses squarely on the habeas petitioner's actions, or lack thereof. *See Holland*, 560 U.S. at 649 (clarifying that a habeas petitioner warrants equitable tolling only if "*he* has been pursuing his rights diligently") (citation omitted) (emphasis added).

We readily acknowledge that we previously determined in *Huizar v. Carey*, 273 F.3d 1220, 1224 (9th Cir. 2001), that a prisoner was diligent despite a longer delay. However, in *Huizar*, the prisoner engaged in a "steady stream of correspondence" with a non-responsive court. *Id.* The prisoner first contacted the court two months after he delivered his state habeas petition to prison officials. *See id*. Twenty-one months later, after receiving no response from the court, the prisoner had his sister mail a second copy of the petition by certified mail. *See id*. After five months more of waiting, the prisoner sent yet another letter to the court, his fourth mailing. *See id*. It was the prisoner's "steady stream of correspondence . . . [that] show[ed] reasonable diligence on his part." *Id*.

There is really no credible comparison to be made between Huizar and Fue. Huizar was also entitled to rely on notice from the California court. But he didn't just wait for notice from the court. He undertook an investigation within a reasonable time after he expected a decision to have been rendered.[3] By contrast, Fue sat on his hands and did not

[3] Although the *Huizar* opinion did not so explain, superior courts in California at the time Huizar filed his state petition were required to "rule on a petition for writ of habeas corpus within 30 days after the petition [was] filed." Cal. R. Ct. 4.551(a)(3)(A)(1996); *see also* Cal. R. Ct. 4.550(a) (providing that Rule 4.551 "applies to habeas corpus proceedings in the superior court"); *Jackson v. Superior Court*, No. B164449, 2003 WL 22146535, at *1 (Cal. Ct. App. Sept. 18, 2003) (applying the 30-day rule). Judge Bybee correctly observes that the California Supreme Court does not have an analogous deadline for ruling on habeas petitions, so Fue did not know exactly when the court would issue its opinion. *Dissenting Opinion*, p. 15 n.1. But that fact is quite beside the point. Fue was undeserving of equitable tolling regardless of what he knew (or didn't know) about his petition because it was unreasonable for him not to take

bother to inquire into the status of his petition, even after "a substantial period of time" – more than a whole year – "elapsed." *Cf. Diaz*, 515 F.3d at 156 (involving less than a year delay). In addition, Huizar didn't stop with only one mailing to the state court. Although the dissent takes issue with a "steady stream of correspondence" as reflecting due diligence, *see Dissenting Opinion*, p. 14, we explicitly held that Huizar's "steady stream of correspondence . . . would show reasonable diligence on his part." *Huizar*, 273 F.3d at 1224.

Our colleague in dissent seeks to characterize our holding in *Huizar* as sanctioning a delay of twenty-one months in contacting the state court. *See Dissenting Opinion*, p. 17. However, that characterization completely ignores Huizar's initial inquiry after two months, and Huizar's "steady string of correspondence" thereafter that persuaded us that Huizar was reasonably diligent. *See Huizar*, 273 F.3d at 1224. Fue's single inquiry after fourteen months comes nowhere close to the diligence exercised by Huizar. *Cf. Drew*, 297 F.3d at 1288 (concluding that the sending of a single letter did not establish reasonable diligence).

Fue simply did not display diligence similar to that displayed by Huizar. Rather, he waited fourteen months before initially inquiring into the status of his state habeas petition. There was no indication in the record that any impediment prevented Fue from inquiring earlier about the status of his habeas petition. The dissenting opinion seeks to blunt the force of Fue's dilatoriness by pointing to the relative alacrity of Fue's filing in federal court after receiving notice

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any action to investigate its status for as many as fourteen months after filing.

from the state court. *See Dissenting Opinion*, p. 19. However, it is the pre-notice lack of diligence that dooms Fue's claim of diligence. *See Huizar*, 273 F.3d at 1224 (focusing on pre-notice diligence). Fue's unwarranted delay persuades us that he failed to act with sufficient diligence to justify application of the equitable tolling doctrine. *See Emp. Painters' Trust*, 480 F.3d at 999 n.7 ("Once a party appears in a civil action it is responsible for the diligent presentation of its case, which includes, inter alia, keeping apprised of recent filings . . .").[4]

Finally, the dissent takes issue with the "fine line" drawn by our holding. *Dissenting Opinion*, p. 20. However, our colleague in dissent would also draw a line. He merely prefers that the line be drawn on the other side of the facts in this case. The fact of the matter is that regardless of where the line is drawn, cases will fall on either side of the line. We are persuaded that our conclusion is more consistent with the purpose of the Act, to "encourag[e] prompt filings in federal court in order to protect the federal system from being forced to hear stale claims. . . ." *Baek v. Long*, No. 13CV421-MMA(BLM), 2013 WL 6587873, at *4 (S.D. Cal. Dec. 16, 2013) (quoting *Guillory v. Rose*, 329 F.3d 1015, 1018 (9th Cir. 2003).

The dissent speculates that if Fue had been more diligent by six weeks, "perhaps then the majority would say he was sufficiently diligent." *Dissenting Opinion*, p. 20. Perhaps so. But that is not the case before us. Fue did not inquire of

[4] The fact that Fue's case has been pending in this Court for over fourteen months, *see Dissenting Opinion*, p. 24 n.5, in no way excuses his lack of diligence in the state court. *See Emp. Painters' Trust*, 480 F.3d at 999 n.7 (requiring a litigant to keep track of court filings).

the state court six weeks earlier, and we are persuaded that the length of his delay and the attendant circumstances place his case squarely on the non-diligent side of the scale.

We are not persuaded by the dissent's reliance on *Hardy v. Quarterman*, 577 F.3d 596 (5th Cir. 2009), *see Dissenting Opinion*, p. 21. The delay in *Hardy* was eleven months as opposed to the considerably longer period of fourteen months here. Performing the same line-drawing analysis we have undertaken, the Fifth Circuit concluded that the eleven-month delay was closer to the eight-month delay in one case than to the thirty-month delay in a different case. *See Hardy*, 577 F.3d at 599. It is also completely understandable that the Fifth Circuit would consider a delay of eleven months to be comparable to the delay of nine months discussed in *Diaz* and *Miller*. The Fifth Circuit was not called upon to decide the diligence of a habeas petitioner who delayed longer, and we do not know how it would have ruled. But we do know that at least two district courts in California have determined that delays similar to Fue's reflected a lack of reasonable diligence. *See Baek*, 2013 WL 6587873, at *5 (holding that a delay of thirteen months "does not constitute the required diligence") (citations and footnote reference omitted); *see also Retano v. Janda*, No. CV 12-8214-GW (OP), 2013 WL 6499702, at *4 (C.D. Cal. Dec. 10, 2013) (concluding that a delay of approximately fifteen months "indicate[d] a lack of diligence"). Fue's fourteen-month delay falls squarely between these two California federal court decisions finding a lack of diligence.

We can dispose of the dissent's reliance on *Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002), in short order. *See Dissenting Opinion*, p. 22. As the dissent acknowledges, the Eleventh Circuit almost immediately distinguished *Knight*.

See Dissenting Opinion, p. 22 n.4; *see also Drew*, 297 F.3d at 1288 & n.3 (distinguishing *Knight* and concluding that a sixteen-month delay reflected a lack of diligence). Although the dissent takes issue with the basis upon which the Eleventh Circuit distinguished its prior precedent, *see Dissenting Opinion*, p. 22 n.4, the fact remains that *Knight* was distinguished by the same court that authored it.

The dissent accuses both the majority and the Eleventh Circuit of relying "on an instinctive sense of what *seems* like a long time . . ." *Dissenting Opinion*, p. 24 (emphasis in the original). However, the *exact* same point could be made regarding the dissent's view.

At bottom, comparing the facts of this case to those within and without our circuit leads us to the conclusion that the district court committed no error in denying Fue's request for equitable tolling, In particular, unlike the prisoner in *Huizar*, Fue took no initiative to inquire about the status of his petition within a time frame we and other courts have recognized as reasonably diligent. The district court properly dismissed Fue's petition as untimely.

AFFIRMED.

BYBEE, Circuit Judge, dissenting:

In one of his brilliant books explaining physics to non-rocket scientists, Brian Greene wrote that "[o]f the many strange things Einstein's work revealed, the fluidity of time is the hardest to grasp." Although "everyday experience convinces us that there is an objective concept of time's

passage," in fact, "[t]he passage of time depends on the particulars . . . of the measurer." Brian Greene, The Hidden Reality: Parallel Universes and the Deep Laws of the Cosmos 66 (2011). As in physics, so in law. At least in equity. In a case that turns on equitable tolling, unlike one involving jurisdictional limitations, we must measure time "with awareness of the fact that specific circumstances, often hard to predict in advance, . . . warrant special treatment in an appropriate case." *Holland v. Florida*, 560 U.S. 631, 650 (2010).

No one disputes that Steven Fue has alleged extraordinary circumstances, beyond his control, that caused him to file his federal habeas petition after the statutory deadline. The California Supreme Court decided his habeas petition six months after he filed it, but the court never told Fue. In fact, when he wrote the court to inquire about his petition, the Clerk told him the court had "no record" of his petition. We have held that this very situation can justify equitable tolling of AEDPA's statute of limitations if the prisoner has acted with reasonable diligence. *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009).

Yet, with Newtonian precision, the majority holds that Fue did not behave reasonably—and is thus ineligible for equitable tolling—because he waited 14 months before sending a letter to the California Supreme Court asking about the status of his petition. Maj. Op. at 5–6. But I fail to see how this was at all unreasonable. The California Supreme Court is required to "promptly" send a copy of its decisions to prisoners. *See* Cal. R. Ct. 8.387(a)(2), 8.532(a). Fue had not received a copy of any decision, and no statute or rule requires prisoners to seek periodic status updates from the California Supreme Court. Perhaps we should expect

prisoners to inquire with the court after an unusually long time has passed with no decision, but 14 months is not an unusually long time for a court—least of all the California Supreme Court—to decide a petition. *See Huizar v. Carey*, 273 F.3d 1220, 1224 (9th Cir. 2001) (21 months "not an unusually long time [for a prisoner] to wait for a court's decision").

Why would we require Fue, and other prisoners like him, to pursue a "steady stream of correspondence," Maj. Op. at 8, with the California Supreme Court to verify that the court has followed its own rules? This is a burden I expect neither the prisoners nor the California Supreme Court will welcome. I respectfully dissent.

I

"The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Holland*, 560 U.S. at 653 (citations and internal quotation marks omitted). Reasonable diligence is not an exacting standard. It simply requires "the effort that a reasonable person might be expected to deliver under his or her particular circumstances." *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011).

The key "particular circumstances" in this case are as follows: Fue, proceeding without the aid of counsel, filed a habeas corpus petition with the California Supreme Court. Unlike superior courts in California, the California Supreme

Court has no deadline for deciding habeas petitions.[1] And, unlike habeas proceedings in the superior courts, no rule permits prisoners proceeding before the California Supreme Court to file a request for decision after a certain amount of time has elapsed.[2] The California Supreme Court has, however, obligated itself by rule of court to "promptly" inform prisoners when it renders a decision on their habeas petitions.[3] Habeas petitioners such as Fue may rely on this rule and look for "prompt[]" delivery when the California Supreme Court reaches a decision. Conversely, relying on this rule, they may reasonably assume the court has not reached a decision when the clerk has not "sen[t them] copies showing the filing date."

We are asked to decide what effort a reasonable person might be expected to undertake in the circumstance in which

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[1] Superior courts "must rule on a petition for writ of habeas corpus within 60 days after the petition is filed." Cal. R. Ct. 4.551(a)(3)(A); *see also* Cal. R. Ct. 4.550(a) (providing that Rule 4.551 "applies to habeas corpus proceedings in the superior court"). Although the California Supreme Court has no analogous deadline for deciding habeas petitions, it does have a deadline for deciding petitions for review of lower court decisions. *See* Cal. R. Ct. 8.512(b) (petitions for review filed with the California Supreme Court are "deemed denied" if the court does not rule on the petition or grant an extension within 60 days).

[2] *See* Cal. R. Ct. 4.551(a)(3)(B) ("If the [superior] court fails to rule on the petition within 60 days of its filing, the petitioner may file a notice and request for ruling.").

[3] *See* Cal. R. Ct. 8.532(a) ("The Supreme Court clerk must promptly file all opinions and orders issued by the court and promptly send copies showing the filing date to the parties . . . ."); *see also* Cal. R. Ct. 8.387(a)(2) (providing that Rule 8.532(a) governs the filing of the California Supreme Court's decisions in habeas corpus proceedings).

the court has not sent notice of a decision. In answering this question, we must keep in mind that, "[f]rom a litigant's perspective, it is a difficult, if not impossible endeavor, to estimate how long a reviewing court will take to decide a [petition]." *Miller v. Collins*, 305 F.3d 491, 496 (6th Cir. 2002). Understanding this, courts have "see[n] no point in obliging a *pro se* litigant to pester a state court with frequent inquiries as to whether a pending [petition] has been decided, at least until a substantial period of time has elapsed." *Diaz v. Kelly*, 515 F.3d 149, 155 (2d Cir. 2008).

In my view, a "reasonable person," knowing that the court will send notice when a decision has been made, might refrain from asking the court about a petition until the petition has remained pending for an unusually long time. How long is unusually long depends, of course, "on the particulars . . . of the measurer." In light of the "particulars" of a pro se prisoner, and perhaps thinking of our own docket, we have charitably allowed that even 21 months is "not an unusually long time to wait for a court's decision." *Huizar v. Carey*, 273 F.3d 1220, 1224 (9th Cir. 2001).

In *Huizar*, a California superior court failed to respond to a state prisoner's habeas petition. Knowing that the superior court must act within 60 days, Cal. R. Ct. 4.551(a)(3)(A), Huizar first inquired about his petition two months after it was filed. When he got no reply he waited 21 months before mailing a second copy to the same court. He waited five months, got no reply, and sent another letter. Huizar went a total of 28 months before learning that his petition had not been received by the superior court and then another four months before filing his federal petition. *Id.* at 1222. The district court dismissed his federal petition as untimely. We reversed, however, and instructed the district court to

determine on remand if Huizar's efforts were as he claimed them to be and, if so, to "deem his petition timely and consider it on the merits." *Id.* at 1224.

It is very difficult to square *Huizar* with our decision in this case. The majority attempts to distinguish *Huizar* on the ground that the prisoner there engaged in a "steady stream of correspondence" with a non-responsive court. Maj. Op. at 8–9. But that misses the point. The point is that *Huizar* found a delay of 21 months between correspondences followed by a delay of five months to be a "steady stream of correspondence." Given the misleading answer Fue received from the Clerk of the California Supreme Court in response to his January 31, 2011 inquiry (I discuss the details of the Clerk's response below), Fue, hardly less than Huizar, sufficiently corresponded with a non-responsive court.

Fue never delayed so much as 21 months. Indeed, in comparison with *Huizar*, he was downright chatty. After 14 months and no word from the California Supreme Court, Fue took the initiative and sent a letter to the Clerk of the California Supreme Court. A prisoner could show his diligence by sending inquiries to a state court each and every day after the case has been submitted. Yet that does not mean that a prisoner who shows something less than *hyper* diligence in initially reaching out and then following up with a state court has acted unreasonably. In other words, simply because Fue was less proactive than some other prisoner does not mean Fue has acted *unreasonably*. In light of Fue's pro se status and the California Supreme Court's obligation to notify him of its decision, I believe Fue's actions were entirely consistent with what a reasonable person might be expected to do.

II

Ordinarily, a prisoner must show reasonable diligence not only before but also after receiving delayed notice of a state court's decision. *Miller*, 305 F.3d at 496 (considering whether the petitioner "acted promptly after receiving notice of the appellate court's decision"); *see, e.g.*, *Earl v. Fabian*, 556 F.3d 717, 724 (8th Cir. 2009) (petitioner who filed habeas petition more than eight months after receiving delayed notice failed to pursue rights with diligence). Here, however, Fue need not meet that requirement because he did not receive notice of the California Supreme Court's decision until after he filed his federal habeas petition.

The majority says Fue received notice when the Clerk of the California Supreme Court informed him, in a letter dated February 3, 2011, "that his habeas case was no longer active." Maj. Op. at 4. But the Clerk told him no such thing. The Clerk's February 3, 2011 letter stated in full: "This will acknowledge receipt of your letter received February 3, 2011, I checked our dockets and found no record of a pending petition for writ of habeas corpus having been filed on or about November 2009." The misleading implication of the Clerk's response was that the court never received Fue's November 2009 petition. Certainly that was how Fue understood it. He "did not know what to think of it," so he wrote to his appellate lawyer and asked, "What should I do?" The majority understands this letter differently; it thinks the letter informed Fue "that his case [was] no longer active" and that there was therefore "no pending matter[] before the court." Maj. Op. at 4 n.2. I do not think that is a fair reading of the Clerk's language quoted above. Even Fue's lawyer understood the Clerk's response to mean the court never received Fue's petition. He told Fue to "explain to the Court

. . . that you already sent your petition" and to seek leave to file the petition again.

Taking the letter at face value, Fue instead decided to file his federal habeas petition immediately. In the questionnaire attached to his petition, he wrote that the date of the California Supreme Court's decision on his habeas petition was "N/A" and the result was "waiting for a response still." Fue claims—and the State does not dispute—that "the first [he] knew of the denial was when he read the state's motion to dismiss the petition in this case." By that time, of course, he had already filed his federal habeas petition, so his need to act with post-notice diligence was moot.

In any event, even if the Clerk's February 3, 2011 was sufficient to put Fue on notice that his state habeas petition had been denied, Fue still acted with complete diligence after receiving notice of the court's decision. Based on the facts as he understood them, Fue expected to have three months after receiving notice of the California Supreme Court's decision to prepare and file his federal habeas petition. (He actually had six months, but his appellate lawyer misinformed him.) Yet once he learned that the California Supreme Court had "no record" of his petition, he filed his federal petition within 32 days. *Cf. Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000) (petitioner who filed federal habeas petition within one month of receiving delayed notice pursued rights with diligence). And Fue was not just sitting on his hands; those 32 days included the time he took to write his appellate lawyer for advice on how to proceed and then to wait for his lawyer's response. These actions clearly show that Fue made "the effort that a reasonable person might be expected to deliver under his or her particular circumstances." *Busby*, 661 F.3d at 1015.

III

The majority bases its holding on what other circuits have held in "similar cases." Maj. Op. at 5. But the majority does not effectively deal with the cases most similar to ours, and the unreasonable-delay cases the majority relies on are either unpersuasive or not similar at all.

The majority divides the cases into two groups. First are the cases in which the petitioner inquired about a petition after less than 10 months; in these cases, the courts found, the petitioners acted with sufficient diligence. *Id.* at 5. Then are the cases in which the petitioner waited sixteen months or more; those petitioners were deemed not to have acted with sufficient diligence. *Id.* The majority reasons that because Fue's 14 months is "closer to the majority of cases finding a lack of reasonable diligence," Fue was therefore not reasonably diligent. *Id.* In other words, the majority effectively argues, because 14 months is closer to 16 months than it is to 10 months, Fue's petition cannot be reviewed.

While I cannot argue with the mathematical precision of the majority's approach, this certainly draws a fine line. *See Busby*, 681 F.3d at 1015 ("Equitable tolling is not the arena of bright-lines and dates certain[.]"). Under this reasoning, if Fue had only inquired just six weeks earlier, his delay of 12 and a half months would have been closer to 10 months than to 16; perhaps then the majority would say he was sufficiently diligent. But the majority's line-drawing is an exercise in rule making, not an exercise in equity. Although the majority does not create a hard deadline—such as might be found in a statute of limitations—it has created an asymptote, a limit that approaches a finite number, around 13 months.

The majority draws the line finer still by its treatment of the Fifth Circuit's decision in *Hardy v. Quarterman*, 577 F.3d 596 (5th Cir. 2009). The court there held that a prisoner acted reasonably in waiting 11 months before contacting the Texas Court of Criminal Appeals about his petition. *Id.* at 599. Two circumstances were particularly relevant to the court: first, Hardy's pro se status, and second, the fact that the court had a legal duty to notify him when it issued a decision. *Id.*; *see also id.* at 598 (noting that, under Texas rules of appellate procedure, "[t]he [Texas Court of Criminal Appeals] is . . . legally obligated to notify a petitioner once a decision has been rendered on his habeas petition"). Looking to its own prior decisions, the court reasoned that "[Hardy's] eleven-month wait is much more analogous to the eight months the petitioner in [one case] allowed to elapse than the two and a half-year wait in [another case]." *Id.* at 599. The court also cited two of the cases cited by the majority here—*Diaz v. Kelly*, 515 F.3d 149, 155 (2d Cir. 2008), and *Miller v. Collins*, 305 F.3d 491, 495–96 (6th Cir. 2002)—and reasoned that "the timing of Hardy's inquiry is not significantly different from time periods found to be reasonable by other circuits." *Id.*

Our case is quite similar to *Hardy*. Fue, like Hardy, was representing himself in his habeas proceedings before the California Supreme Court. The California Supreme Court, like the Texas Court of Criminal Appeals, is legally required to notify prisoners "promptly" when it has rendered a decision on their habeas petitions. *See* Cal. R. Ct. 8.387(a)(2), 8.532(a). And the timing of Fue's inquiry is not significantly different from the time period found reasonable in *Hardy*, despite the majority's assertion that a fourteen-month delay is "considerably longer" than eleven months. Maj. Op. at 11.

Another similar case the majority fails to appreciate is *Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002). In that case, the court held that a prisoner's delay of *18 months* before inquiring about the status of his petition was reasonable. If Knight's 18-month delay was reasonable, Fue's 14-month delay should be reasonable too.[4]

Of the three cases cited by the majority that found a prisoner's delay unreasonable, two involved much more delay than 14 months (one was 21 months, the other 24 months), and both of those cases involved a prisoner who was represented by counsel. *See LaCava v. Kyler*, 398 F.3d 271, 276 (3d Cir. 2005) (noting that "LaCava was not entitled to personal notice of the Pennsylvania Supreme Court's order" because he "was represented by counsel during his state collateral proceedings"); *Cousins v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002) (declining to grant equitable tolling

[4] Soon after *Knight* was decided, the Eleventh Circuit distinguished it on the ground that a court clerk told Knight when he filed his petition that he would be notified as soon as a decision was issued. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1288 n.3 (11th Cir. 2002). But I believe the *Drew* majority was wrong to distinguish *Knight* on this ground. The court in *Drew* treated equitable tolling as though it required equitable estoppel. *See id.* ("[M]ost importantly, [Drew] received no assurances from the Clerk on which to rely."). But equitable tolling does not; it only requires reasonable diligence.

Fue, like Drew, "had every reason to expect that the court would notify him once it ruled on his petition; every litigant knows that the court is supposed to inform the parties when a result has been reached." *Id.* at 1300 (Barkett, J., dissenting). Indeed, as explained above, the California Supreme Court's rules obligate it to notify prisoners promptly when it rules on their habeas petitions. To suggest "that it would make all the difference to [Fue]'s case had the Clerk of the [California Supreme Court] told him, at the time he filed his petition, that he would be notified of the result [would be] disingenuous." *Id.*

because "[t]he petition at issue in this case remained submitted but unfiled for almost two years, at least in part because counsel failed adequately to investigate the status of the case"). These decisions are not similar to ours, so we should not follow them.

That leaves just one case: *Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002), which determined that a prisoner's 16-month delay before contacting the court constituted a lack of reasonable diligence. Notably, however, *Drew* never held that a 16-month delay is unreasonable as a matter of law; it held that it was not *clear error* for the district court to determine that Drew's 16-month delay was unreasonable. *Id.* at 1289–90. Indeed, in the face of statistics showing that Drew's 16-month wait was not far off of the average time courts take to rule on petitions like his, the *Drew* majority refused to consider the evidence. To consider the evidence, the majority reasoned, would amount to "*de novo* fact-finding" and would "eviscerate[]" the trial court's central role. *Id.* at 1289–90 & n.4; *see also id.* at 1289 ("Even if there were some reasonable debate as to Drew's diligence, . . . the dissent offers no reason to find clear error . . . ."). Given that the majority here reviews the district court's diligence determination de novo, Maj. Op. at 4, it makes little sense to hold that Fue's 14-month delay was unreasonable because it was "close" to the 16-month delay the *Drew* majority deemed unreasonable under a highly deferential standard of review.

Even if we set aside the fact that *Drew* was decided under clear-error review, the decision is unpersuasive. I see no basis articulated in the *Drew* majority's opinion for its "finding . . . that a sixteen month 'delay' before contacting the court about the status of the petition constitutes a lack of

diligence." *Id.* at 1301 (Barkett, J., dissenting). The *Drew* majority's opinion, much like the majority's opinion here, appears to be based on an instinctive sense of what *seems* like a long time; it does not appear to be based on evidence of what any reasonable pro se prisoner would know or do under the circumstances.

If Drew's 16-month delay was indeed close to the average amount of time a court takes to decide petitions like his, it would seem to me that Drew acted well within the bounds of reasonable diligence. *See id.* at 1300–01. Ultimately, however, such proof is unnecessary. Recognizing that it may be nearly impossible for a pro se prisoner to know how long it may take a court to decide a petition, *Miller*, 305 F.3d at 496, a prisoner should be able to trust that the court will send notice when a decision has been made—at least until the petition has remained pending for an unusually long time. And neither 16 months nor 14 months is an unusually long time. *Huizar*, 273 F.3d at 1224.[5]

At bottom, the only case cited by the majority that comes even remotely close to ours (*Drew*) involved a longer delay, was decided under a different and highly deferential standard of review, and refused to consider evidence that the delay involved there in fact was reasonable. We should not feel bound by it.

* * *

[5] Indeed, it has taken our court a good deal longer than 14 months to decide Fue's case. The wheels of justice often turn slowly, and it is not unreasonable for a pro se prisoner to be aware of that fact and act accordingly.

Since it is only the extraordinary case in which the state court fails to send notice of a decision, a rule requiring prisoners to seek early and frequent updates would be a waste of time for almost all prisoners, would be a heavy administrative burden for state courts, and would only minimally serve the interest of preventing stale federal habeas petitions. Fue affirmatively inquired with the California Supreme Court about the status of his petition after 14 months, he sent a letter to his appellate attorney, and he then promptly filed his federal habeas petition. In doing all this, Fue acted just as we should expect a reasonable person in his shoes to act. I would give him his day in federal court. Accordingly, I dissent.

APPENDIX B

Washington State Court of Appeals

Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

October 7, 2015

[redacted]

[redacted]

CASE #: [redacted]
Personal Restraint Petition of [redacted]

Dear Counsel:

We have received the Personal Restraint Petition for post-conviction relief noted above. Since this petition is in proper form, and the filing fee has been paid, we have accepted it for filing. RAP 16.3 et seq.

As RAP 16.9 requires, the respondent must, within 60 days of receiving this letter and the attached copy of the petition, file and serve a response to the petition on petitioner or petitioner's counsel and this court. If referring to the record of another proceeding answers the petition, include a copy of the relevant parts of that record. If a brief supports the petition, we have attached a copy, and the respondent's answering brief is likewise due within 60 days. RAP 16.10. If the respondent determines that the relief sought is appropriate, he should so stipulate. Petitioner may file a reply brief if done so within 30 days of receiving service of the respondent's brief. *See* RAP 16.10(a)(2).

When the time for filing briefs has expired, the Chief Judge will consider the petition and enter appropriate orders. **The court will defer any decisions on motions for appointment of counsel and/or motions for production of the record at public expense, if any, until we submit your petition to the Chief Judge for consideration. RAP 16.11(a). Any request limited solely to the status of the petition will be placed in the file without further action.** You will be notified if the court decides to call for additional briefs or portions of the record other than what the parties filed or decides that oral argument will be scheduled. Thank you for your attention to this matter.

Very truly yours,

David C. Ponzoha,
Court Clerk

DCP: sw

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Marianne Matherly, Clerk

REPLY TO:
Office of the Clerk
501 I Street #4-200
Sacramento, CA 95814

CLERK'S NOTICE

TO: [redacted]

Case No.: [redacted]

Case Title: [redacted]

RE: Pleadings and/or Correspondence received on: 2/4/2016

[ ] **CASE NUMBER:** The Eastern District case number could not be identified for the attached filing. You must write your case number on all documents submitted to the court.

[ ] **FILING FEE:** The filing fee of $400.00 was not received ($5.00 for habeas petitions), nor was an application to proceed In Forma Pauperis. Enclosed is an Application to Proceed In Forma Pauperis along with your original documents. Please resubmit your documents with the completed application or filing fee.

[ ] **COPYWORK:** The Clerk's Office will provide copies of documents and of the docket sheet at $0.50 per page. Checks in the exact amount are made payable to "Clerk, USDC." Please Note: In Forma Pauperis status does not include the cost of copies. Copies of documents in cases may also be obtained by printing from the public terminals at the Clerk's Office or by contacting Cal Legal Support Group at: 3104 "O" Street, Suite 291, Sacramento, CA 95816, phone 916-441-4396, fax 916-400-4948.

[ ] **CONFORMED COPIES:** The Court requires the original plus one copy of most pleadings. See Local Rule 133 (d) (2). If you wish to have a conformed copy returned to you, you must file an original plus two copies and provide the court with a self-addressed stamped envelope with the correct postage.

[X] **CASE STATUS INQUIRES:** The Court will notify you as soon as any action is taken on your case. Due to the large number of civil actions pending before the court, THE CLERK IS UNABLE TO RESPOND IN WRITING TO INDIVIDUAL INQUIRIES REGARDING THE STATUS OF YOUR CASE. As long as you keep the court apprised of your current address, you will receive all court decisions which might affect the status of your case. If you have not submitted a document required in your case, the court will notify you.

[ ] **DISCOVERY DOCUMENTS:** Pursuant to Local Rule 250.2 (c) Interrogatories, responses and proofs of service shall not be filed with the clerk of court until there is a proceeding in which the interrogatories, responses or proofs of service are AT ISSUE.

[ ] **LOCAL RULES:** The Eastern District of California Local Rules is available at the prison law library or on the court website at www.caed.uscourts.gov.

[ ] **LEGAL ADVICE:** The court cannot give legal advice.

[ ] **EVIDENCE SUBMITTED:** The court cannot serve as a repository for the parties' evidence. The parties may not file evidence with the court until the course of litigation brings the evidence into question.

[ ] **REQUESTED FORMS:** Your requested form(s) are enclosed.

[ ] **OTHER:**

Thank you for your future attention to this matter.

K. Yin
Deputy Clerk

2/8/2016
Date

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2016, I electronically filed the foregoing Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: February 19, 2016

/s/ *Maria Aguillon*
Maria Aguillon

12-55307

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN PELESASA FUE,

Petitioner-Appellant,

v.

MARTIN BITER, Warden,

Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. CV 11-02436-DMG
The Honorable Dolly M. Gee, Judge

OPPOSITION TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

The district court denied Petitioner's habeas petition under 28 U.S.C. § 2254 on the basis that he is not entitled to equitable tolling due to his failure to inquire diligently regarding the status of his state petition. In a published opinion, the majority of this Court affirmed. *Fue v. Biter*, 810 F.3d 1114 (9th Cir. 2016).

Petitioner has filed a Petition for Rehearing En Banc asserting five grounds: (1) the majority opinion conflicts with Supreme Court and Ninth Circuit jurisprudence on equitable tolling; (2) the majority opinion creates an intra-circuit conflict with *Huizar v. Carey*, 273 F.3d 1220 (9th Cir. 2001); (3) the majority opinion creates an inter-circuit conflict with *Hardy v. Quarterman*, 577 F.3d 596 (5th Cir. 2009), and *Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002); (4) the majority opinion creates an unwanted and unnecessary administrative burden for the state courts; and (5) the majority opinion is wrong. Petitioner's first three grounds for rehearing en banc fail because the majority opinion does not conflict with equitable tolling jurisprudence of the Supreme Court or this Court, and did not create a conflict with *Huizar*, *Hardy*, or *Knight*. Petitioner's last two grounds for rehearing en banc fail because they fail to meet the standard required under Rule 35(b)(1) of the Federal Rules of Appellate Procedure. Petitioner fails

to show that rehearing en banc is warranted, and the petition should therefore be denied.

ARGUMENT

PETITIONER HAS FAILED TO IDENTIFY A SINGLE ISSUE WARRANTING REHEARING EN BANC

A. The Majority Opinion Did Not Conflict With Equitable Tolling Jurisprudence Of This Circuit Or The Supreme Court

Petitioner argues that the majority opinion conflicts with the equitable tolling jurisprudence of this Circuit and the Supreme Court. He argues that the majority established a "mechanical rule" in measuring diligence by surveying cases from other jurisdictions and failed to follow the rule that each case must be decided on a "case-by-case basis." (Reh'g Pet. at 3-5.) To the contrary, the Supreme Court explicitly permitted the approach taken by the majority. As explained in *Holland v. Florida*, 560 U.S. 631, 650 (2010), and cited by the majority, the case-by-case approach to determining equitable tolling "recognize[s] that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *See Fue v. Biter*, 810 F.3d at

1117. The majority simply surveyed similar cases for guidance and exercised its judgment as applied to Petitioner's case in determining whether he was entitled to equitable tolling as permitted by the Supreme Court.

Moreover, equitable tolling analysis is not considered apart from purpose of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254. (*See* Reh'g Pet. at 4-5.) Rather, the purpose of AEDPA underlies the "high bar" required to satisfy equitable tolling. In *Guillory v. Roe*, 329 F.3d 1015, 1018 (9th Cir. 2003), relied on by the majority, the court explained that granting Guillory's equitable tolling claim would be "not only contrary to our previous cases requiring a petitioner to proceed with reasonable diligence, but also inconsistent with AEDPA's 'statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.'" *See Fue v. Biter*, 810 F.3d at 1120; *see also Mendoza v. Carey*, 449 F.3d 1065, 1068 (9th Cir. 2006). Indeed, equitable tolling "will not be available in most cases," because district courts are expected to "take seriously Congress's desire to accelerate the federal habeas process" and to allow equitable tolling only when the above-noted "high hurdle is surmounted." *Calderon v. United States District Court* (*Beeler*), 128 F.3d 1283, 1288-1289 (9th Cir. 1997), *overruled in part on other grounds by Calderon v. United States*

District Court (*Kelly V*), 163 F.3d 530, 540 (9th Cir. 1998) (en banc); *see also Irwin v. Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("Federal courts have typically extended equitable relief only sparingly."). While the dissent argued that the majority was drawing a "fine line," the majority rightly noted that the dissent was also drawing a line but only preferred the line to fall in Petitioner's favor. *Fue v. Biter*, 810 F.3d at 1120-21. The majority's conclusion that Petitioner failed to exercise due diligence was consistent with the purpose of AEDPA. *See Miranda v. Castro*, 292 F.3d 1063, 1067 (9th Cir. 2002) ("'the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exception swallow the rule'"). Petitioner is not entitled to equitable tolling on this basis.

B. The Majority Opinion Did Not Create An Intra-Circuit Conflict With *Huizar*

Petitioner contends that the majority opinion created an intra-circuit conflict with *Huizar v. Carey*, 273 F.3d 1220, 1224, because *Huizar* found waiting twenty-one months before inquiring about the status of a petition was reasonably diligent. (Reh'g Pet. at 5-7.) Petitioner is mistaken. As the majority noted, the finding of reasonable diligence in *Huizar* was not based on the one inquiry that took place twenty-one months after the first inquiry, but on Huizar's "steady stream of correspondence" to the court. *Fue v.*

Biter, 810 F.3d at 1118-19. Indeed, after mailing his state habeas petition to the superior court, Huizar alleged he had made three additional inquiries: a letter to the court asking about the status of his petition (two months later); a second copy of the petition mailed by Huizar's sister (twenty-one months later); and a second letter to the court (five months later). The superior court only responded after receiving Huizar's second letter. *Huizar v. Carey*, 273 F.3d at 1224. This Court found "Huizar's steady stream of correspondence, if proven, would show reasonable diligence on his part." *Id*.

Unlike Huizar, Petitioner mailed a single letter to the California Supreme Court fourteen months after mailing his habeas petition. That Petitioner filed his habeas petition in the California Supreme Court where there was no deadline for the court's ruling and that Huizar filed his habeas petition in the superior court where there was a thirty-day deadline for the court's ruling is irrelevant. (*See* Reh'g Pet. at 6-7.) As the majority noted, Petitioner "was undeserving of equitable tolling regardless of what he knew (or didn't know) about his petition because it was unreasonable for him not to take *any action* to investigate its status for as many as fourteen months after filing." *Fue v. Biter*, 810 F.3d at 1119 n.3 (italics original).

Indeed, Petitioner had ample reason not to sit on his hands for fourteen months. As argued below, on February 19, 2009, Petitioner's appellate

lawyer informed Petitioner that he had one year from February 18, 2009, to file his habeas petition in federal court. Because counsel had neglected to add the additional ninety days from the date the California Supreme Court denied Petitioner's review petition, Petitioner was led to believe his one-year limitations period expired on February 18, 2010, instead of May 19, 2010. Thus, Petitioner filed his habeas petition in the California Supreme Court on November 19, 2009, believing he only had three months remaining in his one-year limitations period. Nevertheless, he did not inquire about the petition's status until fourteen months after filing. The earlier date should have led Petitioner to be more diligent in inquiring about the status of his state court petition; Petitioner's failure to act for fourteen months was unwarranted and failed to show diligence. Petitioner is not entitled to equitable tolling on this basis.

C. The Majority Opinion Did Not Create An Inter-Circuit Conflict With *Hardy* And *Knight*

Petitioner contends that the majority opinion created an inter-circuit conflict with *Hardy v. Quarterman*, 577 F.3d 596, where an eleven-month delay was deemed reasonable, and *Knight v. Schofield*, 292 F.3d 709, where an eighteen-month delay was deemed reasonable. (Reh'g Pet. at 7-9.) These cases are distinguishable.

Initially, Petitioner is not similar to Hardy. Hardy filed his state petition two months after his conviction became final. Eleven months later, Hardy inquired regarding the status of his petition. Two months later, Hardy inquired again regarding the status of his petition. Not receiving any response, Hardy inquired again a month later. Two weeks later, Hardy learned that his state petition had been denied ten months earlier. Hardy filed his federal petition a week later. *Hardy v. Quarterman*, 577 F.3d at 597-98, 599. In finding Hardy was diligent, the Fifth Circuit noted the following:

> He timely inquired to the [trial] court, and after receiving no response, persistently inquired to the [state high court]. Finally, Hardy filed his federal habeas petition only seven days after obtaining notice that the [state high court] denied his petition. Given these facts, Hardy acted diligently and is entitled to equitable tolling of the statute of limitations.

Id. at 599-600.

On the other hand, Petitioner filed his state petition nine months after February 18, 2009, when he believed his one-year limitations period began to run. He then waited fourteen months before inquiring about the status of his petition. After learning that the court had no record of a pending habeas

petition from November 2009, he waited another month before filing his federal petition. Petitioner's single inquiry made after fourteen months of filing is unlike the "steady stream of correspondence" engaged in by Hardy (and Huizar). *Fue v. Biter*, 810 F.3d at 1118.

Moreover, had the trial court responded to Hardy's first inquiry made on September 17, 2007, about the denial of his petition, Hardy could have timely filed his federal petition before his one-year limitations period had run on November 14, 2007. *Hardy v. Quarterman*, 577 F.3d at 597. Petitioner, however, did not make his inquiry until the one-year limitations period had already run and then waited another month to file his federal petition. Petitioner's case is not similar to *Hardy*.

Similarly, Petitioner's reliance on *Knight v. Schofield*, 292 F.3d 709, is misplaced. (*See* Reh'g Pet. at 8-9.) There, Knight filed an application for discretionary review with the Georgia Supreme Court after the denial of his state superior court habeas petition. The Georgia Supreme Court clerk told Knight that he would be notified of the court's decision. Knight's petition was denied in September 1996, but Knight was not notified because the clerk sent the notice to the wrong person. In January 1998, Knight inquired regarding the status of his petition. In March 1998, the clerk of the Georgia Supreme Court notified him that his petition had been denied. Five months

later, Knight filed his federal petition. *Knight v. Schofield*, 292 F.3d at 710. In finding Knight was reasonably diligent, the Eleventh Circuit noted that the clerk had personally told Knight that he would be notified and that Knight "had every reason to delay" filing his federal petition. *Id*. at 711. The Eleventh Circuit also cautioned:

> We should note that not in every case will a prisoner be entitled to equitable tolling until he receives notice. *Each case turns on its own facts.* In this case, Knight was assured that the court would contact him, then demonstrated diligence in pursuing information when it did not do so.

Id. (italics added).

Petitioner's circumstances are unlike Knight's; Petitioner did not receive a personal assurance from the court clerk that he would be notified regarding the court's decision. That the California Supreme Court required the court clerk to notify all parties of its decision under California Rules of Court, rule 8.532(a), does not lead to a different result. (*See* Reh'g Pet. at 8.) Rule 8 of Georgia Supreme Court Rules also requires the clerk to notify parties of "the docketing dates of all appeals, petitions for certiorari, and applications for appeal." Knight, however, had received additional assurance personally from the clerk. *Knight*, 292 F.3d at 711. As the

majority in this case noted, since *Knight*, the Eleventh Circuit in *Drew v. Dep't of Corr.*, 297 F.3d 1278 (11th Cir. 2002) has distinguished *Knight* on this basis. *Fue v. Biter*, 810 F.3d at 1120; *see also San Martin v. McNeil*, 633 F.3d 1257, 1270 (11th Cir. 2011) (noting that the petitioner failed to show "that anyone had agreed to contact him as soon as a decision was made concerning the final disposition of his appeal").

Further, when Knight filed his petition in the Georgia Supreme Court, AEDPA had not yet been enacted; AEDPA was enacted in April 1996, while Knight's petition was still pending. *Knight*, 292 F.3d at 710. Thus, Knight's one-year limitations period had not begun to run when he filed his state petition. On the other hand, when Petitioner filed his habeas petition in the California Supreme Court, he believed he only had three months left in his limitations period. And yet, he did not inquire about the status of his petition until fourteen months had passed. Petitioner failed to exercise reasonable diligence, and he is not entitled to equitable tolling on this basis.

D. Petitioner Is Not Entitled To Rehearing En Banc Based On His Last Two Issues

A petition for rehearing en banc must show either that "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed . . . and consideration by the full

court is therefore necessary to secure and maintain uniformity of the court's decision" or that "the proceeding involves one or more questions of exceptional importance." (Fed. R. App. P. 35(b)(1).)

Here, Petitioner is not entitled to rehearing en banc based on his last two issues—the majority opinion creates an unwanted and unnecessary administrative burden for the state courts, and the majority opinion is wrong—as they fail to meet the above standard. (*See* Reh'g Pet. at 9-13.) In any event, whether a rule created by the federal court creates an administrative burden on the state courts is of no consequence. A petitioner must show "that he has been pursuing his rights diligently" to receive equitable tolling. *Holland v. Florida*, 560 U.S. at 649. A petitioner's exercise of diligence does not require that a state court respond to the petitioner's inquiries. When a petitioner only has a few months remaining in his one-year limitations period, it would behoove him not to sit on his hands but to inquire regarding the status of his state petition. Further, as discussed above, the majority's opinion that Petitioner's delay of fourteen months before inquiring about the status of his state petition was unreasonable was not in conflict with the Supreme Court, the Ninth Circuit, or other circuit courts. Petitioner is not entitled to equitable tolling on this basis.

CONCLUSION

For the foregoing reasons, Petitioner's petition for rehearing en banc should be denied.

Dated: April 8, 2016

Respectfully submitted,

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12-55307

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN PELESASA FUE,

Petitioner-Appellant,

v.

MARTIN BITER, Warden,

Respondent-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: April 8, 2016

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 12-55307

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing enbanc/answer is: (check (x) applicable option)

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2,448 words (petitions and answers must not exceed 4,200 words).

or

[ ] In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

April 8, 2016
Dated

s/ Yun K. Lee
Yun K. Lee
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: ***Steven Pelesasa Fue v. Martin Biter, Warden*** No. **12-55307**

I hereby certify that on April 8, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

OPPOSITION TO PETITION FOR REHEARING EN BANC

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 8, 2016, at Los Angeles, California.

Frances Conroy	s/ Frances Conroy
Declarant	Signature

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