

1 which the California Supreme Court did not notify a habeas petitioner that it had denied his state
2 habeas petition until fourteen months after the denial. Fue, however, does not affect the finding
3 of diligence in this case for the following reasons. Although both Petitioner and the petitioner in
4 Fue did not seek to ascertain the status of their respective cases for fourteen months, Petitioner
5 Luna had corresponded with his attorney before and after that fourteen month period,
6 correspondence which included over thirty letters in a six-year period, and initiating his
7 correspondence immediately on his attorney's appointment to the case. The petitioner in Fue, on
8 the other hand, did not correspond with the California Supreme Court at all until writing and
9 mailing a single letter after fourteen months had passed. Petitioner therefore meets the "steady
10 stream of correspondence" requirement discussed in Fue, whereas the petitioner in Fue did not
11 satisfy that standard. Moreover, Petitioner's attorney affirmatively misrepresented the status of
12 his case (that is, that the case was active and proceeding forward), which caused Petitioner to rely
13 on this advice to his detriment. No such misrepresentation occurred in Fue. Given that the Ninth
14 Circuit in Fue noted cases finding diligence where prisoners waited fewer than ten months before
15 inquiring and cases finding lack of diligence where prisoners waited sixteen months or more, this
16 case—in which Petitioner wrote no letters for fourteen months but otherwise steadily inquired
17 over a six-year period—is an example of why "the availability of equitable relief commends a
18 flexible, case-by-case approach." Fue, 2016 WL 192000, at *2. In this instance, Petitioner
19 exercised the requisite diligence.

20 Accordingly, IT IS HEREBY ORDERED that:

21 1. The Findings and Recommendations filed December 23, 2015 (ECF No. 72) are
22 ADOPTED IN FULL;

23 2. The amended petition filed June 3, 2011 (ECF No. 15) is REINSTATED as timely
24 filed based on equitable tolling principles, and all previous orders dismissing the petition are
25 VACATED;

26 ///

27 ///


28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3. Respondent is directed to file an answer to the amended petition within sixty (60) days from the date this order is electronically filed. See Rule 4, 28 U.S.C. foll. § 2254. An answer shall be accompanied by all transcripts and other documents relevant to the issues presented in the petition. See Rule 5, 28 U.S.C. foll. § 2254; and

4. Petitioner's reply, if any, shall be filed and served within thirty (30) days after service of Respondent's answer.

Dated: February 2, 2016



MORRISON C. ENGLAND, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT