1 2 3 4 5 6 7 IN THE UNITED STATES DISTRICT COURT 8 9 FOR THE EASTERN DISTRICT OF CALIFORNIA BENITO JULIAN LUNA, 10 11 Petitioner, No. CIV S-04-0627 FCD GGH P 12 VS. SCOTT KERNAN, 13 Respondent. **ORDER** 14 15 Petitioner is a state prisoner proceeding with appointed counsel with a petition for 16 17 a writ of habeas corpus pursuant to 28 U.S.C. § 2254. 18 On September 14, 2004, the undersigned granted petitioner's motion to voluntarily dismiss this case without prejudice. On June 3, 2011, petitioner filed a first amended 19 petition for writ of habeas corpus. Petitioner indicates that he returned to state court to exhaust 20 21 additional claims, however it appears that those claims were exhausted when the California 22 Supreme Court denied a petition on July 18, 2007. It is not clear what has transpired in the four 23 years since the California Supreme Court denied the petition, or why petitioner waited to re-file in federal court. 24 25 ¹ Respondent has never been served with this petition. 26

Petitioner shall show cause within twenty-one days why the petition should not be dismissed for being filed beyond the one year statute of limitations.² Accordingly, IT IS HEREBY ORDERED that petitioner shall show cause within twenty-one days why the petition should not be dismissed for being filed beyond the one year statute of limitations. **DATED:** June 8, 2011 /s/ Gregory G. Hollows GREGORY G. HOLLOWS UNITED STATES MAGISTRATE JUDGE GGH:AB luna0627.ors ²A dismissal without prejudice is treated for limitations purposes as if the case had never

been filed, Henry v. Lundgren, 164 F.3d 1240, 1241 (9th Cir. 1999), i.e., there is no filing to which the later filed habeas petition can relate back.