

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RICARDO BELTRÁN,

Case No. 3:13-cv-00048-MMD-WGC

Petitioner,

ORDER

3

RENEE BAKER, *et al.*

Respondents.

14 This represented habeas matter under 28 U.S.C. § 2254 comes before the Court
15 on a pending show-cause inquiry as to whether the petition is subject to dismissal as
16 time-barred under 28 U.S.C. § 2244(d).

I. BACKGROUND

18 Petitioner Ricardo Beltrán challenges his Nevada state conviction, pursuant to a
19 jury verdict, of two counts of first-degree kidnapping and six counts of sexual assault
20 with a deadly weapon.

21 The original judgment of conviction was entered on January 10, 2006, and
22 petitioner filed a timely appeal. (ECF Nos. 21-12 & 21-13.)

23 On February 14, 2006, while the appeal was pending, an amended judgment of
24 conviction was filed in the state district court. The amended judgment corrected the
25 original judgment to reflect that the judgment was entered following a jury verdict rather
26 than a guilty plea. (ECF No. 21-15.)

27 The Supreme Court of Nevada affirmed on November 8, 2006, but with a remand
28 for the limited purpose of correcting the original judgment of conviction to reflect that

1 Beltrán was convicted pursuant to a jury verdict. (ECF No. 22-5 at 10-11.)¹

2 No amended or corrected judgment was entered in the state district court
3 thereafter, likely due to the fact that the error identified by the state supreme court
4 already had been corrected by the February 14, 2006, amended judgment of conviction.

5 The ninety-day time period for filing a *certiorari* petition expired on February 6,
6 2007.²

7 On or about February 1, 2008, petitioner mailed two state post-conviction
8 petitions, one of which was filed by the state district court's clerk on February 4, 2008.
9 (ECF No. 22-7.)

10 The state supreme court's clerk filed the other, substantially identical, petition in
11 that court on February 5, 2008. The state supreme court denied the petition in that court
12 in a March 5, 2008, order; and notice in lieu of remittitur was issued on April 1, 2008.
13 (ECF Nos. 22-8, 22-13 & 22-14.)

14 Thereafter, in the state district court, the State filed a response on April 23, 2008,
15 seeking dismissal of the petition as, *inter alia*, untimely. The state district court
16 dismissed the petition as, *inter alia*, untimely via a June 10, 2008, notice of entry of
17 decision and order. The Supreme Court of Nevada affirmed on the basis of untimeliness
18 via a February 4, 2009, order of affirmance. (ECF Nos. 22-15, 22-17 & 22-20.)

19 No other timely petitions, motions, or other proceedings seeking collateral review
20 of the conviction (as distinguished from motions seeking other procedural relief) were
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22 ¹Unless otherwise noted, all page citations to exhibits herein are to the electronic
23 page numbers in the header generated at the top of the page by CM/ECF, without
24 regard to any internal page numbering in the original document.

25 ²Petitioner states in error at one point in his response that the order of affirmance
26 was dated November 8, 2007, and that the *certiorari* period expired on February 5,
27 2008. (ECF No. 19 at 6:6.) The order of affirmance was filed on November 8, 2006.
28 (ECF No. 22-5 at 2.) Regardless of the year, the *certiorari* period did not expire until
February 6, not February 5. The day of the event from which a designated period of
time begins to run is not included in the calculation. *E.g. Patterson v. Stewart*, 251 F.3d
1243, 1245-46 (9th Cir. 2001). November 8, 2006, therefore was "day zero" rather than
"day one" in the count. The ninetieth day thereafter was February 6, 2007, a day which
in turn counted as "day zero" rather than "day one" in the ensuing count from that
triggering event.

1 pending in the state courts before the constructive filing date of the federal petition.
2 There has been no other intervening amended or corrected judgments of conviction
3 filed in the district court after the February 14, 2006, amended judgment of conviction.

4 Petitioner mailed the federal petition to the Clerk for filing on or about January 28,
5 2013.

6 **II. DISCUSSION**

7 **A. Base Calculation of the Federal Limitation Period**

8 Under 28 U.S.C. § 2244(d)(1)(A), the federal one-year limitation period, unless
9 otherwise tolled or subject to delayed accrual, begins running after "the date on which
10 the judgment became final by the conclusion of direct review or the expiration of the
11 time for seeking such direct review."

12 Putting the February 14, 2006, amended judgment of conviction to the side for
13 the moment, the base calculation of the federal limitation period otherwise would
14 proceed as follows. The federal limitation period, absent a basis for tolling or delayed
15 accrual, would begin running after the February 6, 2007, expiration of the
16 *certiorari* period and, absent such tolling or delayed accrual, expire one year later on
17 February 6, 2008. Petitioner's original petition in the state supreme court, however,
18 would statutorily toll the federal limitation period under § 2244(d)(2) from February 5,
19 2008 — one day before the putative expiration of the federal limitation period — through
20 April 1, 2008. *Blair v. Crawford*, 275 F.3d 1156 (9th Cir. 2002). His untimely petition filed
21 in the state district court, however, would not statutorily toll the limitation period under §
22 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). Accordingly, absent other tolling
23 or delayed accrual, the federal expiration period would expire one day after April 1,
24 2008, *i.e.*, on April 2, 2008.

25 The Ninth Circuit's recent decision in *Smith v. Williams*, 871 F.3d 684 (9th Cir.
26 2017), potentially would appear to suggest, however, that the federal limitation period
27 began to run instead from the expiration of the time for seeking direct review of the
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1 February 14, 2006, amended judgment of conviction, *i.e.*, after March 16, 2006. *Smith*
2 states, without qualification:

3 The text of § 2244 establishes that the one-year statute-of-
4 limitations period for state prisoners runs from the date on which the
5 judgment pursuant to which the prisoner is being held became final. The
6 statute, by its terms, applies to “a person in custody *pursuant to the*
7 *judgment* of a State court” and states that the statute of limitations runs
8 from “the date on which *the judgment*” became final. *Id.* §
2244(d)(1)(emphasis added). “The judgment” can only refer to the state
judgment pursuant to which the petitioner is being held because that is the
only judgment identified in the statute-of-limitations provision. Thus, the
statute of limitations must run from the judgment pursuant to which the
petitioner is being held.

9 * * *

10 . . . If the Second Amended Judgment is the judgment pursuant to
11 which the petitioner is being held, and the petitioner is entitled to file a
12 federal habeas petition challenging that judgment, then it follows as the
night the day that the federal habeas petition must be filed within one year
from the entry of *that judgment*.

13 871 F.3d at 686-87 & 688 (footnote omitted; last emphasis added).

14 *Smith* was decided in a procedural context in which the amended judgment of
15 conviction in question was filed years after completion of the direct appeal proceedings
16 challenging the original judgment of conviction. See 871 F.3d at 685-86. The court’s
17 stated rationale for decision does not appear to turn upon that distinction, however.
18 Rather, under the unqualified language in the opinion, the matter of when the one-year
19 period begins to run under § 2244(d)(1) appears to turn solely upon which judgment the
20 petitioner was being held under when he filed his federal petition. Under the court’s
21 stated rationale, that judgment is “*the judgment*” for purposes of applying § 2244(d)(1),
22 without qualification.

23 Applying the rationale of *Smith* to the facts of the present case would appear to
24 lead to a conclusion that the federal limitation period began running after March 16,
25 2006, and putatively expired, absent tolling or delayed accrual, one year later on March
26 16, 2007.

27 *Smith* was decided only recently, after the completion of the briefing on the
28 current show-cause inquiry. However, the Court need not resolve any issue as to the

1 application of *Smith* to this case or call for further supplemental briefing. As discussed
2 *infra*, petitioner is unable to establish a basis for equitable tolling or delayed accrual for
3 a sufficient period of time regardless of whether the limitation period otherwise
4 putatively expired on March 16, 2007, or instead a little over a year later on April 2,
5 2008.

6 **B. Equitable Tolling**

7 Equitable tolling is appropriate only if the petitioner can show that: (1) he has
8 been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his
9 way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Equitable
10 tolling is "unavailable in most cases," *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th
11 Cir.1999), and "the threshold necessary to trigger equitable tolling is very high, lest the
12 exceptions swallow the rule," *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir.2002)
13 (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.2000)). The petitioner
14 ultimately has the burden of proof on this "extraordinary exclusion." 292 F.3d at 1065.
15 He accordingly must demonstrate a causal relationship between the extraordinary
16 circumstance and the lateness of his filing. *E.g., Spitsyn v. Moore*, 345 F.3d 796, 799
17 (9th Cir. 2003). *Accord Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1061 (9th
18 Cir. 2007).

19 Petitioner seeks to establish equitable tolling in the present case for over a six-
20 year period from the conclusion of his direct appeal (via issuance of the remittitur) in
21 December 2006, through the constructive filing of the federal petition in January 2013.
22 He bases his claim of equitable tolling upon: (a) his limited ability to speak, read and
23 write English rather than his native Spanish; the absence of Spanish-language materials
24 in the prison law library; and restrictions on his access to the law library, inmate legal
25 assistance, and other inmates during his incarceration at Ely State Prison ("Ely")
26 through his May 2008 transfer to Lovelock Correctional Center ("Lovelock"); and (b) a
27 February 2009 statement by an inmate law clerk at Lovelock that "there was nothing
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1 else to be done" after the Supreme Court of Nevada affirmed the denial of his state
2 petition as untimely.

3 These circumstances do not present extraordinary circumstances that stood in
4 the way of and prevented petitioner from filing a federal petition continuously through to
5 within a year of the constructive filing of the federal petition on or about January 28,
6 2013.

7 First, while still at Ely, petitioner was able with the resources available to him at
8 Ely to file two state petitions in two different state courts in early February 2008. Even if
9 the Court were to assume for purposes of this review that petitioner was unable to file a
10 federal petition prior to that point, the filing of the two state petitions in early February
11 2008 demonstrated his capability to file a federal petition while incarcerated at Ely at the
12 very latest at and after that point.³ Indeed, petitioner filed his state petitions and his
13 eventual federal petition while incarcerated at Ely; and he maintains that he filed his
14 notice of appeal from the state district court's denial of state post-conviction relief while
15 at Lovelock based upon advice he previously had received at Ely. (ECF No. 22-30 at 3
16 ¶ 9.)⁴ According to his own representations, petitioner thus filed no paper in a court
17 while at Lovelock based upon allegedly better assistance provided at Lovelock. There
18 accordingly is no demonstrated causal link between being incarcerated at Ely rather
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20 ³Indeed, under the initial base calculation of the limitation period outlined in the
21 prior section, petitioner would have had until April 2, 2008, within which to file a timely
22 petition.

23 Moreover, nothing occurred in the state district court that objectively would have
24 affirmatively misled petitioner that his state petition in that court was timely. The State
25 sought dismissal of the petition in its initial response on the basis of untimeliness; the
26 district court dismissed the petition on, *inter alia*, that basis; and the Supreme Court of
27 Nevada affirmed on that basis. This Court thus is not persuaded that petitioner is
28 entitled to equitable tolling during the pendency of the February 4, 2008, district court
petition.

Having demonstrated the capability not only to file a petition, but to do so in multiple courts at the same time, petitioner thus had no objectively valid reason to further delay raising at the very least exhausted direct appeal claims in a protective federal petition, perhaps with a request also for a stay.

⁴ Petitioner was returned to Ely in October 2012.

1 than Lovelock and an inability to file pleadings continuously through all relevant periods
2 of time. The alleged differences in resources at the two prisons in particular did not
3 cause Beltrán to be unable to dispatch a federal petition at the very least on and after
4 the February 1, 2008, mailing date of the state petitions. The alleged circumstances at
5 Ely thus do not provide a basis for tolling continuously thereafter through to his transfer
6 to Lovelock in May 2008.⁵

7 Second, the Lovelock inmate's alleged statement after the state supreme court's
8 February 4, 2009, order of affirmance that "there was nothing else to be done" after that
9 point does not provide a viable basis for equitable tolling.

10 Petitioner urges that the Lovelock inmate law clerk's statement constituted "gross
11 negligence" and thus presented extraordinary circumstances preventing him from filing
12 a timely federal petition thereafter, citing to cases involving attorney malfeasance. As
13 Justice Alito noted in his concurring opinion in *Holland*, however, "it has been aptly said

14 ⁵The Court makes no holding that petitioner was entitled to equitable tolling prior
15 to the mailing of the state petitions on February 1, 2008. Given the large period of time
16 to be covered and petitioner's inability to establish equitable tolling across a sufficient
portion of that time period, the Court has no occasion to reach that issue.

17 Petitioner's arguments with regard to the paging system at Ely are unpersuasive
18 as establishing a *per se* basis for equitable tolling. As this Court discussed extensively
19 in *Felix v. McDaniel*, No. 3:09-cv-00483-LRH-WGC, 2012 WL 666742 (D. Nev., Feb. 29,
2012), prior precedents in this District such as *Koerschner v. Warden*, 508 F.Supp.2d
849 (D. Nev. 2007), do not establish that the use of a "paging system" for indirect law
library access either is unconstitutional or a *per se* basis for equitable tolling. See *Felix*,
at *5-*8. Indeed, any such holding by this Court would be problematic given how the
concept of a paging system was involved in the discussion by the justices in *Lewis v. Casey*, 518 U.S. 343 (1996). See *Felix*, at *7. Petitioner's reliance upon the over two
decades old decision in *Evans v. Hatcher*, No. 3:92-cv-00297-ECR (D. Nev., Oct. 4,
1995), provides even less authority for petitioner's particular position in this case given
the intervening Supreme Court authority and the changes over time in the specific
procedures followed at the sundry institutions. These decisions in all events clearly do
not establish a basis for equitable tolling at any and all times, at Ely or any other
institution.

25 In the present case, petitioner was able to file multiple petitions in multiple courts
26 in early February 2008, just as this Court's records reflect that countless inmates,
27 including also Spanish-speaking inmates, have been doing for years from Ely,
28 notwithstanding the use of a paging system for indirect law library access. Nothing in
petitioner's showing reflects that the use of a paging system, singly or in combination
with other factors, established a basis for equitable tolling continuously throughout his
incarceration at Ely. And his filing of multiple petitions in early February 2008 clearly
belies any such claim of equitable tolling on this basis thereafter.

1 that gross negligence is ordinary negligence with a vituperative epithet added;" and,
2 accordingly, "the mere fact that a missed deadline involves 'gross negligence' on the
3 part of counsel does not by itself establish an extraordinary circumstance." 560 U.S. at
4 657-58 (Alito, J., concurring). A distinction between "gross" and "ordinary" negligence
5 thus is not determinative. Rather, the distinction drawn in the case law instead is
6 between attorney negligence, miscalculation, ignorance, or mistake — which does not
7 provide a basis for equitable tolling — and egregious misconduct and/or abandonment
8 — which does. *E.g., Holland*, 560 U.S. at 651-52; *Luna v. Kernan*, 784 F.3d 640, 646 &
9 648-49 (9th Cir. 2015).

10 The cases presenting egregious misconduct and/or abandonment involved
11 circumstances, often in combination and typically spanning a number of years, where
12 an attorney, *inter alia*, variously failed to notify a petitioner that the state appellate courts
13 had denied relief such that the federal limitation period had begun running again,
14 despite repeated requests for updates; unilaterally voluntarily dismissed a timely *pro*
15 *se* federal petition and then failed to file a timely counseled petition for years thereafter;
16 failed to file a timely federal petition after being repeatedly requested to do so and even
17 being advised by the petitioner of the applicable legal rules; led the petitioner to believe
18 that counsel was working on filing a federal petition and thereafter either continued to
19 affirmatively lead the petitioner on and/or failed to respond to requests for status
20 updates; affirmatively misled the petitioner that a federal petition had been filed when it
21 had not been or that time still remained for counsel to file a timely federal petition;
22 and/or failed to return the petitioner's files after first failing to file the federal petition
23 timely. *E.g., Holland*, 560 U.S. at 652; *Luna*, 784 F.3d at 646-48; *Rudin v. Myles*, 781
24 F.3d 1043, 1048-51 & 1056-57 (9th Cir. 2015); *Gibbs v. LeGrand*, 767 F.3d 879, 883-84
25 & 886 (9th Cir. 2014); *Doe v. Busby*, 661 F.3d 1001, 1009-10 & 1011-12 (9th Cir. 2011);
26 *Spitsyn*, 345 F.3d at 798-99 & 801-02.

27 Nothing like the foregoing is alleged to have occurred here. The Lovelock law
28 clerk, in the single conversation relied upon by petitioner, simply said that there was

1 nothing else to be done. He did not promise Beltrán that he could and would file a timely
2 federal petition and thereafter either mislead petitioner as to the status of the work
3 and/or fail to respond to petitioner's inquiries for months and years running. Nor did he
4 accept delivery of Beltrán's legal files from him, thereafter fail to do any significant work,
5 and then thereafter fail to return Beltrán's files to him. The Lovelock law clerk, again,
6 simply said during a conversation that there was nothing else to be done.

7 Moreover, in the foregoing cases, the petitioners relied upon an attorney to timely
8 seek federal habeas relief at a point when substantial time still remained in the one-year
9 federal limitation period on its face. In contrast, the Lovelock law clerk provided his
10 pessimistic appraisal of the then-existing state of affairs at a time when the federal
11 limitation period — on its face — already putatively had expired.

12 Further to the point, petitioner cites no case where egregious misconduct was
13 found based simply upon a legal advisor allegedly being wrong. Such cases instead do
14 not present extraordinary circumstances giving rise to equitable tolling.⁶

15 Whether due to ignorance of the general availability of federal habeas relief,
16 ignorance of equitable tolling principles, or instead simply a pessimistic appraisal of the
17 likelihood of success in Beltrán's particular case, the Lovelock law clerk's giving of this

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20 ⁶*E.g., Miranda*, 292 F.3d at 1068 (rejecting the argument that once appeal
21 counsel undertook to provide advice as to the federal limitation period "it must be
22 accurate" or the petitioner would be entitled to equitable tolling); *Frye v. Hickman*, 273
23 F.3d 1144, 1146 (9th Cir. 2001)(noncapital counsel's negligence and miscalculation of
24 the federal limitation period did not provide a basis for equitable tolling); *see also Holland*, 560 U.S. at 652 (counsel's failure to file a timely petition and apparent
ignorance of the date that the limitation period expired were "two facts that, alone, might
suggest simple negligence" absent the further egregious circumstances presented in
the case); *Luna*, 784 F.3d at 647 ("the misconduct in this case extends beyond an
isolated misleading statement").

25 Petitioner relies on *Busby*, *supra*. *Busby* is distinguishable in substance. In
26 *Busby*, the court "held that extraordinary circumstances existed where counsel failed to
27 timely file his client's habeas petition despite having promised to do so, even though the
28 petitioner hired him over a year before the AEDPA deadline, paid him \$20,000, gave
him his files and repeatedly inquired about his case." *Gibbs*, 767 F.3d at 886. Nothing of
the sort occurred here.

1 isolated piece of advice constituted neither egregious misconduct nor an extraordinary
2 circumstance.⁷

3 Petitioner accordingly cannot establish that extraordinary circumstances stood in
4 his way and prevented a timely federal filing continuously through to within a year of the
5 January 28, 2013, constructive filing of the federal petition. The Court thus has no
6 occasion to consider also whether petitioner pursued his rights diligently, including
7 during the over three-year period where he did nothing to pursue his rights in any court,
8 even after obtaining his legal file from counsel several months *after* the Lovelock
9 inmate's alleged February 2009 statement.⁸

10 The federal petition therefore is not rendered timely by equitable tolling. Nor has
11 petitioner made a factual showing on the issue that would warrant an evidentiary
12 hearing.

13 **C. Delayed Accrual**

14 In a footnote, petitioner suggests that the same circumstances upon which he
15 relies to establish equitable tolling also establish a basis for delayed accrual under 28
16 U.S.C. § 2244(d)(1)(B). (ECF No. 19 at 6 n.6.) Under § 2244(d)(1)(B), the limitation

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18 ⁷The Court has assumed for purposes of this discussion that the standards under
19 which alleged behavior by an inmate law clerk would present extraordinary
20 circumstances are equivalent to those pertaining to attorney behavior. In all events,
21 conduct that would not present extraordinary circumstances if committed by an attorney
22 having an ethical obligation to represent a petitioner will not constitute such
23 circumstances when committed by an inmate law clerk who does not. Petitioner's
argument that he is entitled to equitable tolling because he relied upon what he
describes as a "prison-designated law clerk" is not supported by any apposite case law.
Cf. Chaffer v. Prosper, 592 F.3d 1046, 1049 (9th Cir. 2010)(the fact that an inmate law
clerk was assisting a petitioner did not relieve him of the personal responsibility of
complying with the law); *see also Ford v. Pliler*, 590 F.3d 782, 789 (9th Cir. 2009)(the
extraordinary-circumstances "standard has never been satisfied by a petitioner's
confusion or ignorance of the law alone").

24 ⁸Petitioner relies in his argument upon not having his legal file from counsel until
25 2009. (ECF No. 19, at 8.) Petitioner (a) filed two state petitions without the file; (b) did
26 not seek the legal file until a June 17, 2009, motion in the state district court filed well
after the expiration of the federal limitation period; and (c) did *nothing* with the file once
he obtained it, for over three years. Petitioner clearly cannot establish a causal link
between his not having counsel's file and the lateness of his filing, particularly after
having not requested the file during the limitation period. *Cf. Randle v. Crawford*, 604
F.3d 1047, 1058 (9th Cir. 2009) (counsel's delay in providing the file was not a cause of
the untimely federal filing).

1 period would begin to run only from “the date on which the impediment to filing an
2 application created by State action in violation of the Constitution or laws of the United
3 States is removed, if the applicant was prevented from filing by such State action.”

4 Delayed accrual under § 2244(d)(1)(B) cannot render Beltrán’s federal petition
5 timely. In order to establish a sufficient impediment for purposes of § 2244(d)(1)(B), the
6 petitioner must demonstrate that the impediment “altogether prevented him from
7 presenting his claims in *any* form, to *any* court.” *Ramirez v. Yates*, 571 F.3d 993, 1001
8 (9th Cir. 2009) (emphasis in original). Petitioner clearly cannot make this showing on and
9 after the February 1, 2008, date on which he mailed his two state petitions, even if the
10 Court were to assume that he could make such a showing prior to that date. As
11 discussed in the preceding section, petitioner cannot establish a viable basis for
12 equitable tolling after that date continuously through to within a year of the January 28,
13 2013, constructive filing date of the federal petition. Delayed accrual under §
14 2244(d)(1)(B) therefore could not render the federal petition timely.⁹

15 **III. CONCLUSION**

16 It therefore is ordered that the petition will be dismissed with prejudice as
17 untimely.

18 It further is ordered that the Court denies a certificate of appealability, as
19 reasonable jurists would not find the district court’s dismissal of the petition as untimely
20 to be wrong or debatable, for the reasons discussed herein. Any issue regarding the
21 application of *Smith v. Williams*, 871 F.3d 684 (9th Cir. 2017), to this case is not
22 outcome-determinative.

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26 ⁹The Court makes no express or implied holding that petitioner has established a
27 basis for delayed accrual under § 2244(d)(1)(B) prior to February 1, 2008. The Court
28 simply has no occasion to consider whether a basis for either delayed accrual or
equitable tolling has been established for that earlier time period due to the extended
period of time involved in this case and petitioner’s inability to establish a basis for
delayed accrual or equitable tolling after February 1, 2008.

1 The Clerk of Court is directed to enter final judgment accordingly, in favor of
2 respondents and against petitioner, dismissing this action with prejudice.

3 DATED THIS 13th day of November 2017.



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5 MIRANDA M. DU
6 UNITED STATES DISTRICT JUDGE
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