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28UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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HOMAR GALARZA LUNA,

Case No. 3:17-cv-00565-MMD-VPC

Petitioner,

v.

ORDER

WARDEN BAKER, *et al.*,

Respondents.

This habeas matter under 28 U.S.C. § 2254 comes before the Court for initial review under Rule 4 of the Rules Governing Section 2254 Cases. The filing fee has been paid.

**I. BACKGROUND**

Petitioner Homar Galarza Luna challenges his Nevada state judgment of conviction, pursuant to a guilty plea, of battery with the intent to commit sexual assault. The Supreme Court of Nevada affirmed the conviction on September 18, 2013, in No. 61990 in that court. (ECF No. 1-1 at 14-15.) The online docket of the state supreme court reflects that no petitions for rehearing were filed thereafter.<sup>1</sup> The ninety-day time period for filing a *certiorari* petition in the United States Supreme Court accordingly expired on December 17, 2013.

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<sup>1</sup>The Court takes judicial notice of the online docket records of the state appellate courts. *E.g.*, *Harris v. County of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012). The online docket may be accessed from: <https://nvcourts.gov/Supreme/>.

1 More than two years later, on February 22, 2016, Luna filed a petition in the state  
2 district court that the Supreme Court of Nevada ultimately treated as a combined post-  
3 conviction petition and motion to correct illegal sentence. The state supreme court held  
4 that the post-conviction petition was untimely, but the court addressed the motion to  
5 correct illegal sentence on the merits. The order of affirmance in that case (No. 71507)  
6 was filed in the state supreme court on June 15, 2107. (ECF No. 1-1 at 19-22.) The  
7 remittitur issued on July 14, 2017.

8 Approximately two months thereafter, on or about September 11, 2017, Luna  
9 dispatched the federal petition to the Clerk of this Court for filing. (ECF No. 1-1 at 1.)

## 10 **II. DISCUSSION**

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

15 In the present case, absent a basis for tolling or delayed accrual, the federal  
16 limitation period therefore began running after the December 17, 2013, expiration of the  
17 time to file a *certiorari* petition. Accordingly, absent a basis for tolling or delayed  
18 accrual, the federal one-year limitation period expired one year later on December 17,  
19 2014.

20 Petitioner's motion to correct illegal sentence potentially could statutorily toll the  
21 running of the limitation period under 28 U.S.C. § 2244(d)(2) from February 22, 2016,  
22 through July 14, 2017. *See Pace v. DiGuglielmo*, 544 U.S. 408 (2005). However, the  
23 February 22, 2016, motion was not filed until more than a year after the putative  
24 expiration of the federal limitation period on December 17, 2014. Statutory tolling cannot  
25 render a federal petition timely if the statutory tolling event did not occur until after the  
26 limitation period already had expired. Petitioner therefore must show cause why the  
27 petition should not be dismissed with prejudice as time-barred under § 2244(d).

28 ///

1 In this regard, petitioner is informed that the one-year limitation period may be  
2 equitably tolled. Equitable tolling is appropriate only if the petitioner can show that: (1)  
3 he has been pursuing his rights diligently, and (2) some extraordinary circumstance  
4 stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649  
5 (2010). Equitable tolling is "unavailable in most cases," *Miles v. Prunty*, 187 F.3d 1104,  
6 1107 (9th Cir.1999), and "the threshold necessary to trigger equitable tolling is very  
7 high, lest the exceptions swallow the rule," *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th  
8 Cir.2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.2000)). The  
9 petitioner ultimately has the burden of proof on this "extraordinary exclusion." *Castro*,  
10 292 F.3d at 1065. Petitioner accordingly must demonstrate a causal relationship  
11 between the extraordinary circumstance and the lateness of his filing. *E.g.*, *Spitsyn v.*  
12 *Moore*, 345 F.3d 796, 799 (9th Cir. 2003); *accord Bryant v. Arizona Attorney General*,  
13 499 F.3d 1056, 1061 (9th Cir. 2007).

14 Petitioner further is informed that, under certain circumstances, the one-year  
15 limitation period may begin running on a later date — which is referred to as delayed  
16 accrual — or may be statutorily tolled. See 28 U.S.C. § 2244(d)(1)(B), (C), (D) & (d)(2).<sup>2</sup>

17 \_\_\_\_\_  
18 <sup>2</sup>Subparagraph (d) of § 2244 provides in full:

19 (1) A 1-year period of limitation shall apply to an application for a writ of  
20 habeas corpus by a person in custody pursuant to the judgment of a State  
21 court. The limitation period shall run from the latest of —

22 (A) the date on which the judgment became final by the  
23 conclusion of direct review or the expiration of the time for  
24 seeking such review;

25 (B) the date on which the impediment to filing an application  
26 created by State action in violation of the Constitution or  
27 laws of the United States is removed, if the applicant was  
28 prevented from filing by such State action;

(C) the date on which the constitutional right asserted was  
initially recognized by the Supreme Court, if the right has  
been newly recognized by the Supreme Court and made  
retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or  
claims presented could have been discovered through the  
exercise of due diligence.

(fn. cont...)

1           The federal petition accordingly will be untimely unless petitioner demonstrates a  
2 viable basis for tolling and/or delayed accrual during the period from December 17,  
3 2013, to February 22, 2016 that either stops or delays the running of the limitation  
4 period for a sufficient period of time to render the federal petition timely. Petitioner  
5 additionally potentially may need to demonstrate a basis for tolling and/or delayed  
6 accrual also during the period from July 14, 2017, to September 11, 2017, in order to  
7 render the federal petition timely — depending on the extent, if any, to which he  
8 establishes tolling and/or delayed accrual for the earlier period from December 17,  
9 2013, to February 22, 2016.

10           Additionally, petitioner is informed that if an amended or corrected judgment of  
11 conviction was filed in the state district court, the federal limitation period instead may  
12 begin to run subsequent to the date of the amended or corrected judgment of  
13 conviction. *See Smith v. Williams*, 871 F.3d 684 (9<sup>th</sup> Cir. 2017).

14           Finally, petitioner is informed that, if he seeks to avoid application of the one-year  
15 limitation period based upon a claim of actual innocence, he must come forward with  
16 new reliable evidence tending to establish actual factual innocence, *i.e.*, tending to  
17 establish that no juror acting reasonably would have found him guilty beyond a  
18 reasonable doubt, potentially as to all charges pending against him prior to his plea.  
19 *See McQuiggin v. Perkins*, 568 U.S. 977 (2013); *House v. Bell*, 547 U.S. 518 (2006);  
20 *Bousley v. United States*, 523 U.S. 614 (1998); *Lee v. Lampert*, 653 F.3d 929 (9<sup>th</sup> Cir.  
21 2011) (*en banc*).

### 22   **III.   CONCLUSION**

23           It is therefore ordered that, with the filing fee having been paid, the Clerk of Court  
24 file the petition.

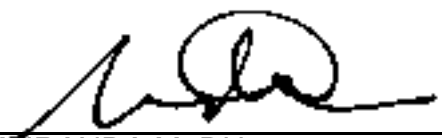
25 \_\_\_\_\_  
26 (...fn. cont.)

27           (2) The time during which a properly filed application for State  
28 postconviction or other collateral review with respect to the pertinent  
judgment or claim is pending shall not be counted toward any period of  
limitation under this section.

1 It is further ordered that, within thirty (30) days of entry of this order, petitioner  
2 must show cause in writing why the petition should not be dismissed with prejudice as  
3 time-barred. If petitioner does not timely respond to this order, the petition will be  
4 dismissed with prejudice without further advance notice. If petitioner responds but fails  
5 to show with specific, detailed and competent evidence why the petition should not be  
6 dismissed as untimely, the action will be dismissed with prejudice.

7 It is further ordered that all assertions of fact made by petitioner in response to  
8 this show-cause order must be detailed, must be specific as to time and place, and  
9 must be supported by competent evidence. The Court will not consider any assertions  
10 of fact that are not specific as to time and place, that are not made pursuant to a  
11 declaration under penalty of perjury based upon personal knowledge, and/or that are  
12 not supported by competent evidence filed by petitioner in the federal record. Petitioner  
13 must attach copies of all materials upon which he bases his argument that the petition  
14 should not be dismissed as untimely, including, but not limited to, any copies of any  
15 additional papers, judgments and/or orders filed in the state courts which he maintains  
16 would render the federal petition timely. Unsupported assertions of fact will be  
17 disregarded.

18 DATED THIS 4<sup>th</sup> day of April 2018.

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23 MIRANDA M. DU  
24 UNITED STATES DISTRICT JUDGE  
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