

1 A. Preliminary Review of Petition.

2 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition
3 if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is
4 not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases. The
5 Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas
6 corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after
7 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001).

8 The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a
9 habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate
10 notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing this
11 Order to Show Cause, the Court is affording Petitioner the notice required by the Ninth Circuit in
12 Herbst.

13 B. Limitation Period For Filing Petition For Writ Of Habeas Corpus

14 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
15 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus
16 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);
17 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).
18 The instant petition was filed on October 9, 2012, and thus, it is subject to the provisions of the
19 AEDPA.

20 The AEDPA imposes a one year period of limitation on petitioners seeking to file a federal
21 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d)
22 reads:

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

26 authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9th Cir. 2003). Accordingly,
27 the Court would normally consider the date of signing of the petition (or the date of signing of the proof of service if no
28 signature appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule
for calculating the running of the statute of limitation. However, Petitioner did not date the petition when signing it nor did
he attach a Proof of Service that contains a date. Therefore, the Court will use the date the petition was actually filed with
the Court, i.e., October 9, 2012.

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

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

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

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

12 (2) The time during which a properly filed application for State post-conviction or
13 other collateral review with respect to the pertinent judgment or claim is pending
14 shall not be counted toward any period of limitation under this subsection.

15 28 U.S.C. § 2244(d).

16 In most cases, the limitation period begins running on the date that the petitioner's direct
17 review became final. Here, the Petitioner was convicted on July 31, 2007 in the Kern County Superior
18 Court. (Doc. 1, p. 2). Petitioner appealed his conviction and, subsequently, filed a petition for review
19 that was denied by the California Supreme Court on September 23, 2009.² Thus, direct review would
20 have concluded on December 22, 2009, when the ninety day period for seeking review in the United
21 States Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d
22 1157, 1159 (9th Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347 (8th Cir.1998). Petitioner would
23 then have one year from the following day, December 23, 2009, or until December 22, 2010, absent
24 applicable tolling, within which to file his federal petition for writ of habeas corpus.

25 As mentioned, the instant petition was filed on October 9, 2012, approximately 22 months after
26 the date the one-year period would have expired. Thus, unless Petitioner is entitled to either statutory
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28 ² The Court has accessed the electronic website for the courts of the State of California in order to determine that Petitioner
filed his petition for review in case no. S174753 on July 21, 2009 and that it petition was denied on September 23, 2009.
The court may take judicial notice of facts that are capable of accurate and ready determination by resort to sources whose
accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th
Cir. 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial
notice may be taken of court records. Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); Valerio v.
Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff'd*, 645 F.2d 699 (9th Cir.); *see also* Colonial Penn Ins.
Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir.
1980). As such, the internet website for the California Courts, containing the court system's records for filings in the Court
of Appeal and the California Supreme Court, are subject to judicial notice.

1 or equitable tolling, the instant petition is untimely and should be dismissed.

2 C. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

3 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
4 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. §
5 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules
6 governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531
7 U.S. 4, 8, 121 S. Ct. 361 (2000). An application is pending during the time that ‘a California
8 petitioner completes a full round of [state] collateral review,’ so long as there is no unreasonable delay
9 in the intervals between a lower court decision and the filing of a petition in a higher court.

10 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
11 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
12 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
13 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
14 (9th Cir. 1999).

15 Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed.
16 For example, no statutory tolling is allowed for the period of time between finality of an appeal and
17 the filing of an application for post-conviction or other collateral review in state court, because no
18 state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v.
19 Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is allowed for the
20 period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the
21 limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v.
22 Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059,
23 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to
24 statutory tolling where the limitation period has already run prior to filing a state habeas petition.
25 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the
26 reinitiation of the limitations period that has ended before the state petition was filed.”); Jiminez v.
27 White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling
28 when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165,

1 1166 (9th Cir. 2006).

2 Here, Petitioner has not alleged that he has filed any state habeas corpus petitions. Therefore,
3 he cannot claim any statutory tolling under the AEDPA in order to extend the one-year limitation
4 period. If Petitioner has actually filed state habeas petitions that would entitle him to statutory tolling,
5 he must notify the Court of that fact in his response to the Order to Show Cause and include
6 documentation indicating the name of the state court, the date of filing, the date of decision, and, if
7 possible, a copy of the petition and the state court's decision denying the petition.

8 D. Equitable Tolling.

9 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable
10 tolling in appropriate cases. See Holland v. Florida, __ U.S. __, 130 S.Ct. 2549, 2561 (2010); Calderon
11 v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period is subject to
12 equitable tolling when “extraordinary circumstances beyond a prisoner’s control make it impossible to
13 file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal
14 quotation marks and citations omitted). “When external forces, rather than a petitioner’s lack of
15 diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations
16 may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “Generally, a litigant
17 seeking equitable tolling bears the burden of establishing two elements: “(1) that he has been pursuing
18 his rights diligently, and (2) that some extraordinary circumstance stood in his way.” Holland, 130
19 S.Ct. at 2652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). “[T]he threshold
20 necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule.”
21 Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation omitted). As a consequence,
22 “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at 1107.

23 Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on the
24 record now before the Court, the Court sees no basis for such a claim. Accordingly, Petitioner is not
25 entitled to equitable tolling. Thus, it appears at this point that the petition is untimely and should be
26 dismissed.

27 The burden of demonstrating that the AEDPA’s one-year limitation period was sufficiently
28 tolled, whether statutorily or equitably, rests with the petitioner. See, e.g., Pace v. DiGuglielmo, 544

1 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297
2 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). For the reasons
3 discussed above, the Court’s preliminary screening of the petition indicates that Petitioner has not met
4 his burden with respect to the tolling issue. However, if Petitioner has additional evidence or
5 information that would establish that the petition is not untimely, it is his burden to provide that
6 evidence or information in his response to this Order to Show Cause. Absent a showing by Petitioner
7 that the petition is timely, the Court intends to issue a Recommendation to dismiss the petition as
8 untimely under the AEDPA.

9 E. Failure to Name a Proper Respondent.

10 A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state officer
11 having custody of him as the respondent to the petition. Rule 2 (a) of the Rules Governing § 2254
12 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme
13 Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having custody of an incarcerated
14 petitioner is the warden of the prison in which the petitioner is incarcerated because the warden has
15 "day-to-day control over" the petitioner. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir.
16 1992); see also, Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). However, the
17 chief officer in charge of state penal institutions is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21
18 F.3d at 360. Where a petitioner is on probation or parole, the proper respondent is his probation or
19 parole officer and the official in charge of the parole or probation agency or state correctional agency.
20 Id.

21 Here, Petitioner has named as Respondent the “People of the State of California.” However,
22 the “People of the State of California” is not the warden or chief officer of the institution where
23 Petitioner is confined and, thus, does not have day-to-day control over Petitioner. Petitioner is
24 presently confined at the R. J. Donovan Correctional Facility, San Diego, California. The current
25 director or warden of that facility is Daniel Paramo. Daniel Paramo is the person Petitioner should
26 name as Respondent.

27 Petitioner’s failure to name a proper respondent requires dismissal of his habeas petition for
28 lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326, 1326

1 (9th Cir. 1970); see also, Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976).
2 However, the Court will give Petitioner the opportunity to cure this defect by amending the petition to
3 name a proper respondent, such as the warden of his facility. See West v. Louisiana, 478 F.2d 1026,
4 1029 (5th Cir.1973), *vacated in part on other grounds*, 510 F.2d 363 (5th Cir.1975) (en banc)
5 (allowing petitioner to amend petition to name proper respondent); Ashley v. State of Washington, 394
6 F.2d 125 (9th Cir. 1968) (same). In the interests of judicial economy, Petitioner *need not* file an
7 amended petition. Instead, Petitioner can satisfy this deficiency in his original petition by filing a
8 motion entitled "Motion to Amend the Petition to Name a Proper Respondent" wherein Petitioner may
9 name the proper respondent in this action.

10 **ORDER**

11 For the foregoing reasons, the Court HEREBY ORDERS:

- 12 1. Petitioner is ORDERED TO SHOW CAUSE within thirty (30) days of the date of
13 service of this Order why the Petition should not be dismissed for violation of the one-
14 year statute of limitations in 28 U.S.C. § 2244(d).
- 15 2. Petitioner is ORDERED to file within thirty days of the date of service of this Order a
16 motion to amend the caption of this case to include the name of the proper Respondent.

17 Petitioner is forewarned that his failure to comply with this Order may result in a
18 Recommendation that the Petition be dismissed pursuant to Local Rule 110.

19
20 IT IS SO ORDERED.

21 Dated: October 18, 2012

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE