

1 finds also that it lacks jurisdiction due to Petitioner’s failure to name a proper respondent.² Therefore,
2 the Court recommends the petition be dismissed.

3 **DISCUSSION**

4 A. Procedural Grounds for Motion to Dismiss

5 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition
6 if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is
7 not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases; See,
8 e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to
9 dismiss petition for failure to exhaust state remedies). Thus, a Respondent can file a Motion to Dismiss
10 after the court orders a response, and the Court should use Rule 4 standards to review the motion. See
11 Hillery, 533 F. Supp. at 1194 & n. 12.

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

13 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
14 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus
15 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);
16 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).
17 The instant petition was filed on January 15, 2015, and thus, it is subject to the provisions of the
18 AEDPA.

19 The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal
20 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). In most cases, the limitation period begins
21 running on the date that the petitioner’s direct review became final. Here, Petitioner filed a petition
22 for review that was denied by the California Supreme Court on October 1, 2008. (Lodged Document
23 (“LD”) 4). Thus, direct review would have concluded on December 30, 2008, when the ninety day
24 period for seeking review in the United States Supreme Court expired. Barefoot v. Estelle, 463 U.S.
25 880, 887 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999); Smith v. Bowersox, 159 F.3d
26

27 ² In addition, though the Court ordered Petitioner to file a motion to substitute the warden of his present place of
28 confinement in lieu of “The People Of The State Of California” as the proper respondent, Petitioner has not filed an
opposition to the motion to dismiss nor has he filed a motion to substitute the correct respondent.

1 345, 347 (8th Cir.1998). Petitioner then had one year from the following day, December 31, 2008, or
2 until December 30, 2009, absent applicable tolling, within which to file his federal petition for writ of
3 habeas corpus. The petition was filed on January 15, 2015, over six years *after* the date the one-year
4 period would have expired. Thus, unless Petitioner is entitled to either statutory or equitable tolling,
5 the instant petition is untimely and should be dismissed.

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

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

14 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
15 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
16 omitted).

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

1 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling when the
2 petitioner's later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir.
3 2006).

4 Here, Petitioner does not claim to have filed any post-appeal habeas petitions until he filed a
5 state habeas petition on March 5, 2015. (LD 5). However, that single petition does not entitle
6 Petitioner to any statutory tolling under the AEDPA because the limitations period has already expired
7 prior to filing a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v.
8 Rice, 276 F.3d 478 (9th Cir. 2001). As mentioned, the limitations period expired on December 30,
9 2009, over five years *before* Petitioner filed his first state habeas petition. Accordingly, he cannot avail
10 himself of the statutory tolling provisions of the AEDPA.

11 D. Equitable Tolling.

12 The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable
13 tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652, 130 S.Ct. 2549, 2561
14 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period
15 is subject to equitable tolling when “extraordinary circumstances beyond a prisoner’s control make it
16 impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir.
17 2005)(internal quotation marks and citations omitted). “When external forces, rather than a
18 petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the
19 statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
20 “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: “(1) that
21 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
22 way.” Holland, 560 U.S. at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807
23 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest the
24 exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation
25 omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at
26 1107.

27 Here, Petitioner has made no claim of entitlement to equitable tolling and, based on the record
28 now before the Court, the Court sees no basis for such a claim. Accordingly, the petition is untimely

1 and should be dismissed.

2 E. Exhaustion.

3 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
4 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
5 exhaustion doctrine is based on comity to the state court and gives the state court the initial
6 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S.
7 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th
8 Cir. 1988).

9 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
10 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.
11 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88
12 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full
13 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the
14 claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504
15 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

16 Additionally, the petitioner must have specifically indicates to the state court that he was
17 raising a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
18 669 (9th Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.
19 1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). Where none of a petitioner's claims
20 have been presented to the highest state court, the Court must dismiss the petition. Raspberry v.
21 Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001). The
22 authority of a court to hold a mixed petition in abeyance pending exhaustion of the unexhausted claims
23 has not been extended to petitions that contain no exhausted claims. Raspberry, 448 F.3d at 1154.

24 Here, Respondent has lodged documents with the Court establishing that Petitioner's sole claim
25 for relief in the instant petition, i.e., a claim of ineffective assistance of trial counsel, was never
26 presented to the California Supreme Court on direct review. Moreover, there is no evidence that
27 Petitioner has ever presented such a claim to the California Supreme Court via other legal avenues, e.g.,
28 through habeas proceedings.

1 Thus, the Court concludes that Petitioner has not presented his claim to the California Supreme
2 Court as required by the exhaustion doctrine. Because Petitioner has not presented his claim for federal
3 relief to the California Supreme Court, the Court must dismiss the petition. See Calderon v. United
4 States Dist. Court, 107 F.3d 756, 760 (9th Cir. 1997) (en banc); Greenawalt v. Stewart, 105 F.3d 1268,
5 1273 (9th Cir. 1997). The Court cannot consider a petition that is entirely unexhausted. Rose v.
6 Lundy, 455 U.S. 509, 521-22 (1982); Calderon, 107 F.3d at 760.

7 F. Failure To Name A Proper Respondent.

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

19 Here, Petitioner has named as Respondent "the People of the State of California." However,
20 "the People of the State of California" is not the warden or chief officer of the institution where
21 Petitioner is confined and, thus, does not have day-to-day control over Petitioner. Petitioner is
22 presently confined at the California Institution For Men, Chino, California. The current director or
23 warden of that facility is Tim Perez. This is the person Petitioner should have named as Respondent.
24 Petitioner was expressly instructed to file a motion to substitute Tim Perez for the currently named
25 Respondent, i.e., The People Of The State Of California. However, Petitioner failed to do so.
26 Petitioner's failure to name a proper respondent requires dismissal of his habeas petition for lack of
27 jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326, 1326 (9th Cir.
28 1970); see also, Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976). Lack of

1 jurisdiction is thus an additional ground on which to dismiss the petition.

2 G. Motion for Stay of Proceedings.

3 Rather than responding to the motion to dismiss, Petitioner filed a motion to stay proceedings
4 while he exhausted his unexhausted claim in state court. However, there is no federal law authorizing a
5 stay of proceedings for a petition that is completely unexhausted. Instead, the Court must dismiss a
6 fully unexhausted petition. Raspberry v. Garcia, 448 F.3d at 1154; Jiminez v. Rice, 276 F.3d at 481.
7 Accordingly, the motion for stay of proceedings must be denied.

8 **ORDER**

9 For the reasons set forth above, the Court **ORDERS** that Petitioner’s motion for stay (Doc. 9),
10 is DENIED.

11 **RECOMMENDATION**

12 Accordingly, the Court **RECOMMENDS** that the motion to dismiss (Doc. 11), be
13 **GRANTED** and the habeas corpus petition be **DISMISSED** for lack of exhaustion, lack of
14 jurisdiction, and for violation of 28 U.S.C. § 2244(d).

15 This Findings and Recommendation is submitted to the United States District Court Judge
16 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
17 Local Rules of Practice for the United States District Court, Eastern District of California.

18 **Within 21 days** after being served with a copy, any party may file written objections with the court
19 and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate
20 Judge’s Findings and Recommendation.” Replies to the objections shall be served and filed **within**
21 **ten days** after service of the objections. The Court will then review the Magistrate Judge’s ruling
22 pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the
23 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d
24 1153 (9th Cir. 1991).

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26 IT IS SO ORDERED.

27 Dated: May 13, 2015

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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