

1 however, reveals that the petition may be untimely and unexhausted and should therefore be
2 dismissed.

3 DISCUSSION

4 A. Preliminary Review of Petition.

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. The
8 Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas
9 corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after
10 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001).

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

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

17 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
18 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus
19 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997);
20 Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997).
21 The instant petition was filed on March 10, 2015, and thus, it is subject to the provisions of the
22 AEDPA.

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

25 Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9th Cir. 2000); Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003).
26 The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison
27 authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9th Cir. 2003). Accordingly,
28 for all of Petitioner’s state petitions and for the instant federal petition, the Court will consider the date of signing of the
petition (or the date of signing of the proof of service if no 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.
Petitioner signed the instant petition on March 10, 2015. (Doc. 1, p. 8).

1 reads:

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

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

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

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

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

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

19 28 U.S.C. § 2244(d).

20 In most cases, the limitation period begins running on the date that the petitioner’s direct
21 review became final. Here, Petitioner alleges that he was convicted after a guilty plea entered on
22 September 29, 2010. (Doc. 1, p. 2). Although Petitioner indicates he did not appeal his guilty plea of
23 September 29, 2010, the Court’s review of the California court system’s database shows that Petitioner
24 *did* file a notice of appeal in the Fifth Appellate District (“5th DCA”) on December 8, 2010, but that
25 the appellate court dismissed the appeal as abandoned on March 9, 2011.² It appears that Petitioner
26 did not file a petition for review in the California Supreme Court from this dismissal by the 5th DCA.
27 According to the California Rules of Court, a decision of the Court of Appeal becomes final thirty
28 days after filing of the opinion or dismissal, Cal. Rules of Court, Rule 8.264(b)(1), and an appeal must

² The court may take 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 be taken to the California Supreme Court within ten days of finality. Cal. Rules of Court, Rule
2 8.500(e)(1). Thus, Petitioner’s conviction would become final forty days after the Court of Appeal’s
3 decision was filed, or on April 18, 2011. Petitioner would then have one year from the following day,
4 April 19, 2011, or until April 18, 2012, absent applicable tolling, within which to file his federal
5 petition for writ of habeas corpus.

6 As mentioned, the instant petition was filed on March 10, 2015, almost three years after the
7 date the one-year period would have expired. Thus, unless Petitioner is entitled to either statutory or
8 equitable tolling, the instant petition is untimely and should be dismissed.

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

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

17 Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized
18 by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations
19 omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846 (2006); see Carey v. Saffold,
20 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006
21 (9th Cir. 1999).

22 Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed.
23 For example, no statutory tolling is allowed for the period of time between finality of an appeal and
24 the filing of an application for post-conviction or other collateral review in state court, because no
25 state court application is “pending” during that time. Nino, 183 F.3d at 1006-1007; Raspberry v.
26 Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is allowed for the
27 period between finality of an appeal and the filing of a federal petition. Id. at 1007. In addition, the
28 limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v.

1 Walker, 563 U.S. 167, 181-182, 121 S.Ct. 2120 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059,
2 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to
3 statutory tolling where the limitation period has already run prior to filing a state habeas petition.
4 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the
5 reinitiation of the limitations period that has ended before the state petition was filed.”); Jiminez v.
6 White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling
7 when the petitioner’s later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165,
8 1166 (9th Cir. 2006).

9 Here, Petitioner alleges he filed a single state habeas petition in the Superior Court of Mariposa
10 County that was denied on February 5, 2013. (Doc. 1, p. 12). The petition does not indicate on what
11 date that habeas petition was filed, and thus, the Court is unable to determine at this juncture precisely
12 how much tolling to which Petitioner might be entitled during the pendency of this state petition.
13 However, the Court notes that, in order for the instant petition to be timely, Petitioner would have had
14 to file that state petition prior to April 18, 2012, the date the one-year period expired, in order to avoid
15 being time-barred. Additionally, the Court notes that, even if that were the case, the state petition was
16 denied on February 5, 2013 and, hence, the one-year period would have resumed on February 6, 2013.
17 Again, the instant petition was not filed until over two years after that denial. Thus, it is difficult for
18 this Court to see how the instant petition can possibly be timely.

19 Indeed, the more likely scenario is that the one-year period expired prior to the date when
20 Petitioner filed his state habeas case in the Superior Court. Under those circumstances, he is not
21 entitled to any statutory tolling because a petitioner is not entitled to tolling where the limitations
22 period has already run prior to filing a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th
23 Cir. 2000); Jiminez v. Rice, 276 F.3d 478 (9th Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259
24 (11th Cir. 2000)(same); Ferguson v. Palmateer, 321 F.3d 820 (9th Cir. 2003)(“section 2244(d) does not
25 permit the reinitiation of the limitations period that has ended before the state petition was filed.”);
26 Jackson v. Dormire, 180 F.3d 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state
27 habeas corpus filed after expiration of the one-year limitations period). Hence, unless Petitioner is
28 entitled to equitable tolling, the petition appears to be untimely and should be dismissed.

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D. Equitable Tolling.

The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable tolling in appropriate cases. See Holland v. Florida, 560 U.S. 631, 651-652, 130 S.Ct. 2549, 2561 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). The limitation period is subject to equitable tolling when “extraordinary circumstances beyond a prisoner’s control make it impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)(internal quotation marks and citations omitted). “When external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” Holland, 560 U.S. at 651-652; Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002)(citation omitted). As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at 1107. Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on the record now before the Court, the Court sees no basis for such a claim.

In sum, under any scenario, the petition appears to be untimely by several years. Unless Petitioner can present evidence in his response to this Order to Show Cause that accounts for the substantial delay in filing and makes the petition timely under the AEDPA, this Court must recommend that the petition be dismissed.

E. Exhaustion.

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

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

8 Additionally, the petitioner must have specifically told the state court that he was raising a
9 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669 (9th
10 Cir. 2000), *amended*, 247 F.3d 904 (2001); Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999);
11 Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United States Supreme Court
12 reiterated the rule as follows:

13 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state remedies
14 requires that petitioners “fairly presen[t]” federal claims to the state courts in order to give the
15 State the “opportunity to pass upon and correct alleged violations of the prisoners' federal
16 rights” (some internal quotation marks omitted). If state courts are to be given the opportunity
17 to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact
18 that the prisoners are asserting claims under the United States Constitution. If a habeas
19 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due
20 process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal
21 court, but in state court.

22 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

23 Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his federal
24 claims in state court *unless he specifically indicated to that court that those claims were based*
25 *on federal law. See Shumway v. Payne*, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the
26 Supreme Court's decision in Duncan, this court has held that the *petitioner must make the*
27 *federal basis of the claim explicit either by citing federal law or the decisions of federal courts,*
28 *even if the federal basis is “self-evident,” Gatlin v. Madding*, 189 F.3d 882, 889 (9th Cir. 1999)
(citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be
decided under state law on the same considerations that would control resolution of the claim
on federal grounds. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v.
Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

In Johnson, we explained that the petitioner must alert the state court to the fact that the
relevant claim is a federal one without regard to how similar the state and federal standards for
reviewing the claim may be or how obvious the violation of federal law is.

Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added), as amended by Lyons v.
Crawford, 247 F.3d 904, 904-5 (9th Cir. 2001).

1 Where none of a petitioner's claims has been presented to the highest state court as required by
2 the exhaustion doctrine, the Court must dismiss the petition. Raspberry v. Garcia, 448 F.3d 1150, 1154
3 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001). The authority of a court to hold a
4 mixed petition in abeyance pending exhaustion of the unexhausted claims has not been extended to
5 petitions that contain no exhausted claims. Raspberry, 448 F.3d at 1154.

6 Here, Petitioner does not allege that he has ever presented any of his habeas claims to the
7 California Supreme Court. Further, the Court has reviewed the state court database and determined
8 that no one with Petitioner's name has filed a case in the state high court.

9 From the foregoing, it appears that Petitioner has not presented any of his claims to the
10 California Supreme Court as required by the exhaustion doctrine. Because Petitioner has not
11 presented his claims for federal relief to the California Supreme Court, the Court must dismiss the
12 petition. See Calderon v. United States Dist. Court, 107 F.3d 756, 760 (9th Cir. 1997) (en banc);
13 Greenawalt v. Stewart, 105 F.3d 1268, 1273 (9th Cir. 1997). The Court cannot consider a petition that
14 is entirely unexhausted. Rose v. Lundy, 455 U.S. at 521-22; Calderon, 107 F.3d at 760. However, it
15 is possible that Petitioner has exhausted his claims and simply failed to provide the Court with the
16 documents and information that would establish such exhaustion. Accordingly, Petitioner will be
17 permitted thirty days within which to respond to this Order To Show Cause by filing a response
18 containing evidence that the claims herein are indeed exhausted.

19 F. Proper Respondent.

20 A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state officer
21 having custody of him as the respondent to the petition. Rule 2 (a) of the Rules Governing § 2254
22 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme
23 Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having custody of an incarcerated
24 petitioner is the warden of the prison in which the petitioner is incarcerated because the warden has
25 "day-to-day control over" the petitioner. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir.
26 1992); see also, Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). However, the
27 chief officer in charge of state penal institutions is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21
28 F.3d at 360. Where a petitioner is on probation or parole, the proper respondent is his probation or

1 parole officer and the official in charge of the parole or probation agency or state correctional agency.
2 Id.

3 Here, Petitioner has named as Respondent "Department of Corrections." However,
4 "Department of Corrections" is not the warden or chief officer of the institution where Petitioner is
5 confined and, thus, does not have day-to-day control over Petitioner. Petitioner is presently confined
6 at the High Desert State Prison, Susanville, California. The current director or warden of that facility
7 is Suzanne M. Peery. This is the person Petitioner should name as Respondent.

8 Petitioner's failure to name a proper respondent requires dismissal of his habeas petition for
9 lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326, 1326
10 (9th Cir. 1970); see also, Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976).
11 **However, the Court will give Petitioner the opportunity to cure this defect by amending the**
12 **petition to name a proper respondent, such as the warden of his facility.** See West v. Louisiana,
13 478 F.2d 1026, 1029 (5th Cir.1973), *vacated in part on other grounds*, 510 F.2d 363 (5th Cir.1975)
14 (en banc) (allowing petitioner to amend petition to name proper respondent); Ashley v. State of
15 Washington, 394 F.2d 125 (9th Cir. 1968) (same).

16 **In the interests of judicial economy, Petitioner *need not* file an amended petition. Instead,**
17 **Petitioner can satisfy this deficiency in his petition by filing a motion entitled "Motion to Amend**
18 **the Petition to Name a Proper Respondent" wherein Petitioner may name the proper**
19 **respondent in this action.**

20 **ORDER**

21 For the foregoing reasons, the Court HEREBY ORDERS:

- 22 1. Petitioner is ORDERED TO SHOW CAUSE **within 30 days** of the date of service of
23 this Order why the Petition should not be dismissed for violation of the one-year statute of
24 limitations in 28 U.S.C. § 2244(d), and for lack of exhaustion.
- 25 2. Petitioner is further ORDERED to file a motion to amend the caption to reflect the
26 proper respondent within thirty days of the date of service of this Order to Show Cause.

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