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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JAIME TAPIA PEREA,

Petitioner,

vs.

SHERIFF RAY LOERA, et al.,

Respondents.

Civil No. 10cv1565 RBB

**ORDER DENYING MOTION TO DISMISS
PETITION FOR WRIT OF HABEAS
CORPUS**

I. INTRODUCTION

Petitioner Jaime Tapia Perea has filed a Second Amended
Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254,
challenging his conviction for second degree burglary in Imperial
County Superior Court case number JCF22575. (Second Am. Pet. 1,
ECF No. 9.¹) Respondent has filed a Motion to Dismiss Second
Amended Petition, arguing that it was filed beyond the statute of
/ / /

¹ Because Perea has attached additional pages to his Second Amended
Petition, the Court will cite this document using the page numbers assigned by
the Court's electronic filing system.

1 limitations and is unexhausted. (Mot. Dismiss 1-2, ECF No. 12; id.
2 Attach. #1 Mem. P. & A. 2-9.)

3 The Court has considered the Second Amended Petition,
4 Respondent's Motion to Dismiss and Memorandum of Points and
5 Authorities in Support of the Motion to Dismiss, Petitioner's
6 Opposition to the Motion, the lodgments submitted by Respondent,
7 and all other supporting documents submitted by the parties. For
8 the reasons set forth below, the Motion to Dismiss is **DENIED**.

9 **II. FACTUAL AND PROCEDURAL BACKGROUND**

10 Perea pleaded no contest to second degree burglary on October
11 20, 2008. (See Lodgment No. 1, People v. Perea, No. JCF22575
12 (Imperial Super. Ct. Oct. 20, 2008) (plea of guilty/no contest --
13 felony).) On November 19, 2008, he was sentenced in accordance
14 with the plea agreement to the middle term of two years in state
15 prison, the execution of which was suspended, and placed on three
16 years of formal probation. (Id. (superior court minutes, Nov. 19,
17 2008).) As conditions of probation, Perea was ordered to serve
18 ninety days in the county jail and pay restitution in the amount of
19 \$3,000.00. (Id. at 16.) A restitution hearing was set for
20 December 17, 2008. (Id. at 17.)

21 The court minutes from the December 17, 2008 hearing reflect
22 that a memorandum from the probation department was submitted to
23 the court; Perea asked for and received a continuance of the
24 restitution hearing until January 21, 2009. (Id. (superior court
25 minutes, Dec. 17, 2008).) Another continuance of the restitution
26 hearing was granted on January 21, 2009; the continued hearing was
27 set for March 5, 2009. (Id. (superior court minutes, Jan. 21,
28 2009).)

1 On March 5, 2009, the superior court noted it had received a
2 "court order filed on 3/2/09, in defendant's habeas writ proceeding
3 in Superior Court case EHC01114" (Id. (superior court
4 minutes, Mar. 5, 2000).) The order reads as follows:

5 Petitioner initiated this action by a petition filed
6 January 15, 2009. Petitioner seeks to withdraw a plea of
7 no contest entered in this court on October 20, 2008 in
8 case No. JCF 22575. Petitioner alleges perjury by the
9 victim.

10 Petitioner was sentenced pursuant to his plea on
11 November 10, 2008. A restitution hearing is scheduled
12 for March 11, 2009 at the jail division of this Court.

13 The Court finds that petitioner has failed to make
14 out a *prima facie* showing of entitlement to relief under
15 habeas corpus law. For that reason, the petition is
16 DENIED.

17 The matter is referred to the trial court for a
18 determination as to whether the petition may be treated
19 as a motion pursuant to Penal Code section 1118.

20 (See Second Am. Pet. Attach. #1, Ex. C (order denying petition at
21 1-2), ECF No. 9.) The court calendared Perea's case for March 11,
22 2009, and set a "Review of Defendant's Plea" and "Restitution
23 Hearing." (Lodgment No. 1, People v. Perea, No. JCF22575 (superior
24 court minutes, Mar. 11, 2009).) Counsel was appointed for Perea,
25 and the case was continued until April 15, 2009. (Id.)

26 At the April 15, 2009, hearing, Perea was appointed a new
27 attorney who was to determine whether there was any legal basis for
28 Perea to withdraw his plea. (Id. (superior court minutes, Apr. 15,
2009).) The matter was continued to May 13, 2009, for a
"Restitution (evidentiary) Hearing and Review of Defendant's Plea."
(Id.) On that date, it was continued again until May 27, 2009.
(Id. (superior court minutes, May 13, 2009).) Because a witness
was unavailable for the May 27, 2009 hearing, the matter was reset

1 for June 10, 2009. (Id. (superior court minutes, May 27, 2009).)
2 At the hearing, Perea's counsel told the court he had found no
3 grounds upon which to move to withdraw Perea's plea. (Id.
4 (superior court minutes, June 10, 2009).) The prosecutor and
5 defendant reached an agreement to reduce the amount of restitution;
6 the court accepted the stipulation and ordered restitution in the
7 amount of \$300.00. (Id.) The court modified the November 19, 2008
8 minutes to reflect the change. (Id.)

9 Petitioner did not file a direct appeal, but six months later,
10 on December 11, 2009, he filed a petition for writ of habeas corpus
11 in the California Court of Appeal for the Fourth District, Division
12 One. (Lodgment No. 2, Perea v. County of Imperial, No. D056411
13 (Cal. Ct. App. filed Dec. 11, 2009) (petition).) The appellate
14 court denied the petition in a written, unpublished opinion filed
15 December 23, 2009. (Lodgment No. 3, In re Perea, No. D056411, slip
16 op. (Cal. Ct. App. Dec. 23, 2009).) Perea then attempted to file a
17 petition for review of the appellate court's decision with the
18 California Supreme Court. That document was rejected by the court
19 as untimely. (Second Am. Pet. Attach. #1, Ex. 15, ECF No. 9.)

20 Perea filed a Petition for Writ of Habeas Corpus pursuant to
21 28 U.S.C. § 2241 in this Court on July 23, 2010. (See Pet., ECF
22 No. 1.) The Court construed the Petition as one filed pursuant to
23 28 U.S.C. § 2254 because Perea sought to challenge the validity of
24 his state court conviction. (Order Construing Pet. 1-2, ECF No. 4;
25 see White v. Lambert, 370 F.3d 1002, 1006-07 (9th Cir. 2004)
26 (holding that § 2254 is the proper jurisdictional basis for a
27 habeas petition brought by an individual "in custody pursuant to a
28 state court judgment"). Petitioner failed to name a proper

1 respondent. (See id. at 2-3.) The Court dismissed the case
2 without prejudice and with leave to amend, giving Perea until
3 November 15, 2010, to file a First Amended Petition. (Id. at 3.)

4 On September 23, 2010, Petitioner filed a document which the
5 Court construed as a First Amended Petition. (See First. Am. Pet.,
6 ECF No. 6.) The Court again dismissed the case without prejudice
7 and with leave to amend because Perea had failed to use the proper
8 form, name the proper respondent, and allege exhaustion of his
9 claims. (See Order Dismissing Case Without Prejudice 1-5, ECF No.
10 7.) Petitioner was given leave to file a Second Amended Petition.
11 (Id. at 4.)

12 Perea submitted a Second Amended Petition, which was filed
13 nunc pro tunc to the date received, December 7, 2010. (Second Am.
14 Pet., ECF No. 9); see Houston v. Lack, 487 U.S. 266, 276 (1988)
15 (holding that a notice of appeal by a pro se prisoner is deemed
16 filed when the prisoner delivers it to prison authorities for
17 forwarding to the court); Anthony v. Cambra, 236 F.3d 568, 575 (9th
18 Cir. 2000) (applying the Houston mailbox rule to pro se prisoners'
19 federal habeas petitions). The Court issued an order setting a
20 briefing schedule, notifying Respondents of Petitioner's consent to
21 magistrate judge jurisdiction, and directing Respondents to
22 indicate whether they consented to magistrate judge jurisdiction
23 [ECF No. 10].

24 On February 4, 2011, Respondent filed a Motion to Dismiss and
25 Memorandum of Points and Authorities in Support of Motion. (See
26 Mot. Dismiss Attach. #1 Mem. P. & A. 1-9, ECF No. 12.) Perea
27 submitted an opposition to the motion on February 23, 2011, which
28 / / /

1 he titled a "Traverse." (See Notice Traverse Mot. Dismiss, ECF No.
2 15.)

3 On April 4, 2011, the Court ordered Respondent to submit a
4 supplemental brief addressing two questions:

5 (1) whether and why Petitioner's conviction became final
6 on March 2, 2009, when the state habeas corpus petition
7 he filed in the Imperial County Superior Court was
8 denied, or on June 10, 2009, when Petitioner's court-
9 appointed counsel determined there was no basis for the
10 withdrawal of Petitioner's plea and the superior court
11 modified the original restitution award . . . and (2)
12 whether and why the effective filing date of Petitioner's
13 federal petition is July 23, 2010, the date of the first
14 petition he filed in this Court, September 23, 2010, the
15 date the First Amended Petition was filed, or December 6,
16 2010, the date the Second Amended Petition was filed.

17 (See Order Directing Resp'ts 3, Apr. 4, 2011, ECF No. 17.)

18 Respondent Loera consented to magistrate judge jurisdiction. (See
19 Notice, Consent & Reference 1, ECF No. 18.) The Respondent filed a
20 Supplemental Brief on April 14, 2011. (Resp't's Supplemental Br.,
21 ECF No. 19.) Although not provided for, Perea filed an Opposition
22 to Respondent's Supplemental Brief [ECF No. 20].

23 **III. DISCUSSION**

24 Respondent argues that Perea's Petition is both untimely and
25 unexhausted. (Mot. Dismiss Attach. #1 Mem. P. & A. 2-9, ECF No.
26 12.) For the reasons set forth below, the Court concludes the
27 Petition is timely under 28 U.S.C. § 2244(d)(1) and is exhausted.
28 Accordingly, the Motion to Dismiss is **DENIED**.

A. Timeliness

Under 28 U.S.C. § 2244(d), a petitioner has one year from the
date his or her conviction is final to file a petition for writ of
habeas corpus in federal court pursuant to 28 U.S.C. § 2254. See
28 U.S.C. § 2244(d) (West 2006). The statute of limitations,

1 however, is subject to both statutory and equitable tolling. See
2 28 U.S.C. § 2244(d)(1); Holland v. Florida, __ U.S. __, 130 S.Ct.
3 2549, 2560 (2010).

4 1. Effective Filing Date of the Petition in Federal
5 Court

6 Respondent contends that the effective filing date for
7 purposes of AEDPA's statute of limitations is December 6, 2010,
8 when Petitioner constructively filed his Second Amended Petition.
9 (See Mot. Dismiss Attach #1 Mem. P. & A. 5-6, ECF No. 12.) When a
10 district court has expressly or impliedly retained jurisdiction
11 over an action, however, the amended petition relates back to the
12 filing date of the original petition. See Henry v. Lungren, 164
13 F.3d 1240, 1241 (9th Cir. 1999) (citing former Fed. R. Civ. P.
14 15(c)(2); Ramirez-Salgado v. Scribner, No. 08cv562 WQH (WMc), 2009
15 WL 211117, at *7 (S.D. Cal. Jan. 22, 2009).

16 Petitioner submitted his original federal habeas Petition on
17 July 22, 2010. (See Pet., ECF No. 1.) Although Perea used a 28
18 U.S.C. § 2241 form, the Petition challenged the validity of Perea's
19 state court conviction and was construed as one filed pursuant to
20 28 U.S.C. § 2254. (See Order Construing Petition 1-2, Sept. 21,
21 2010, ECF No. 4.) The case was dismissed without prejudice and
22 with leave to file a First Amended Petition. (Id. at 2.)

23 Petitioner filed a First Amended Petition. (See Notice Doc.
24 Discrepancy 1, ECF No. 5; First Am. Pet., ECF No. 5.) It was also
25 dismissed without prejudice and with leave to amend; Perea was
26 given until December 6, 2010, to file a Second Amended Petition.
27 (See Order Dismissing Case 4, ECF No. 7.) On December 6, 2010,
28 Petitioner mailed his Second Amended Petition to the Court, which

1 was filed nunc pro tunc to the date received, December 7, 2010.
2 (See Second Am. Pet., ECF No. 9.)

3 Each time Perea's habeas petition was dismissed, the Court
4 expressly retained jurisdiction. In addition, the claims Perea
5 raises in his Second Amended Petition were included in the original
6 Petition filed on July 22, 2010. (Compare Pet., ECF No. 1, with
7 Second Am. Pet., ECF No. 9.) Accordingly, the Second Amended
8 Petition relates back to the Petition Perea filed on July 22, 2010,
9 and that is the operative filing date in federal court.

10 2. Commencement of the Statute of Limitations

11 This Court must determine when AEDPA's statute of limitations
12 began running. When a defendant does not appeal his conviction,
13 the statute of limitations begins to run sixty days after the time
14 for seeking review of the conviction has expired. Roberts v.
15 Marshall, 627 F.3d 768, 771 (9th Cir. 2010) (citing 28 U.S.C.
16 § 2244(d)(1)(A) and Cal. R. Ct. 8.308(a)). Respondent argues that
17 Perea's conviction became final on January 18, 2009, sixty days
18 after he was sentenced on November 19, 2008. (Mot. Dismiss Attach.
19 #1 Mem. P. & A. 3-4, ECF No. 12.) Perea contends that the state
20 trial court resolved the amount of restitution and the withdrawal
21 of his no-contest plea on June 10, 2009, so his conviction did not
22 become final until sixty days later. (Notice Traverse Mot. Dismiss
23 2-5, ECF No. 15.) Under Perea's calculation, the statute of
24 limitations did not begin running until August 10, 2009.²

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27 ² Petitioner states his conviction became final on August 9, 2009, a
28 Sunday. Therefore, under Perea's calculation, the actual date the conviction
became final is August 10, 2009, the following Monday. See Fed. R. Civ. Pro.
6(a)(1)(C).

1 In California, "an order granting probation is deemed to be a
2 final judgment for the limited purpose of taking an appeal
3 therefrom." People v. Vournazos, 198 Cal. App. 948, 952, 244 Cal.
4 Rptr. 82, 84 (1988). The determination of restitution can also
5 affect when a conviction is final. In Vournazos, the defendant was
6 granted probation on March 5, 1986, and, as a condition thereof,
7 ordered to pay restitution "through the probation officer in such
8 amount and manner as the latter prescribed." Id. at 952, 244 Cal.
9 Rptr. at 84. A supplemental hearing regarding restitution was set
10 for October 24, 1986. Id. At the hearing, the trial court fixed
11 the amount of restitution and ordered Vournazos to pay the amount
12 through his probation officer. The appellate court stated, "[T]he
13 judgment in effect was not a final judgment until the details of
14 the restitution were supplied by the order of October 24, 1986."
15 Id. at 953, 244 Cal. Rptr. at 85. An appeal before that order
16 would have been premature. Id.

17 Perea's case is similar to Vournazos. Although the judge set
18 restitution in the amount of \$3,000.00 at the November 19, 2008
19 sentencing hearing, the matter was also set for a restitution
20 hearing on December 17, 2008. (Lodgment No. 1, People v. Perea,
21 No. JCF22575 (superior court minutes, Nov. 19, 2008).) The hearing
22 was continued. (Id. (superior court minutes, Dec. 17, 2008).) The
23 restitution hearing was continued additional times, at least twice
24 because witnesses were unavailable. (Id. (superior court minutes,
25 May 13, 2009).)

26 On June 10, 2009, the amount of restitution and whether to
27 permit Perea to withdraw his no-contest plea were resolved. The
28 prosecutor and defendant counsel stipulated to restitution in the

1 amount of \$300.00, reduced from \$3,000.00. The court accepted the
2 stipulation and modified the restitution amount. (Id. (superior
3 court minutes, June 10, 2009).) The amount of restitution Perea
4 would pay was at issue from November 19, 2008, until June 10, 2009.

5 On January 15, 2009, while awaiting his restitution hearing,
6 Perea filed a state habeas corpus petition seeking to withdraw the
7 no-contest plea he entered on October 20, 2008. (See Second Am.
8 Pet. Attach. #1, Ex. C (order denying petition at 1-2), ECF No. 9.)
9 The superior court denied Perea's petition and referred the matter
10 back to the trial judge to determine "whether the petition may be
11 treated as a motion pursuant to Penal Code section 1118 [sic]."
12 (Id. at 11.) Penal Code § 1118, however, does not apply to motions
13 to withdraw a plea. The section is titled, "Trial by court without
14 jury; entry of judgment of acquittal upon not guilty finding."
15 Cal. Penal Code § 1118 (West 2004). It provides as follows:

16 In a case tried by the court without a jury, a jury
17 having been waived, the court on motion of the defendant
18 or on its own motion shall order the entry of a judgment
19 of acquittal of one or more of the offenses charged in
20 the accusatory pleading after the evidence of the
21 prosecution has been closed if the court, upon weighing
22 the evidence then before it, finds the defendant not
23 guilty of such offense or offenses. If such a motion for
24 judgment of acquittal at the close of the evidence
25 offered by the prosecution is not granted, the defendant
26 may offer evidence without first having reserved that
27 right.

23 Id.

24 The citation to section 1118 appears to be in error. First,
25 the section applies to court trials, not to pleas of no contest.
26 Perea filed his state habeas petition to withdraw a no-contest
27 plea. It is clear that the state court intended to refer to Penal
28 Code section 1018, which applies to motions made by a defendant to

1 withdraw a plea. That statute reads, in pertinent part, as
2 follows:

3 On application of the defendant at any time before
4 judgment or within six months after an order granting
5 probation is made if entry of judgment is suspended, the
6 court may, and in case of a defendant who appeared
without counsel at the time of the plea the court shall,
for a good cause shown, permit the plea of guilty to be
withdrawn and a plea of not guilty substituted.

7 Cal. Penal Code § 1018 (West 2008); see also People v. Ramirez, 141
8 Cal. App. 4th 1501, 1505-06, 47 Cal. Rptr. 3d 272, 275 (2006)
9 (applying Penal Code section 1018 to pleas of no contest).

10 The trial judge understood his task was to determine whether
11 Petitioner should be able to withdraw his plea. (See Lodgment No.
12 1, People v. Perea, No. JCF22575 (superior court minutes, Mar. 5,
13 2009).) "Pursuant to the court order filed 3/2/09 [denying Perea's
14 petition], . . . this matter is calendared for Review of
15 Defendant's Plea on March 11, 2009 in Dept. 5 at 8:30 a.m." (Id.)
16 Thus, this Court concludes that the Imperial Superior Court
17 intended to cite California Penal Code § 1018, and not § 1118, in
18 its order.

19 The trial judge's reference to a review of the defendant's
20 plea indicates that the superior court believed judgment had not
21 been entered or, at least, was suspended. As noted, a motion
22 pursuant to Penal Code section 1018 may be made either before
23 judgment or within six months of an order granting probation if
24 entry of judgment is suspended. Cal. Penal Code § 1018. In
25 California, "[p]robation is the 'suspension of the imposition or
26 execution of a sentence and the order of conditional and revocable
27 release in the community under the supervision of a probation
28 officer.'" People v. Minor, 189 Cal. App. 4th 1, 9, 116 Cal. Rptr.

1 3d 228, 232 (2010) (quoting California Penal Code section 1203(a).)
2 "When the trial court suspends imposition of sentence, no judgment
3 is then pending against the probationer" People v. Howard,
4 16 Cal. 4th 1081, 1087, 946 P. 2d 828, 832, 68 Cal. Rptr. 2d 870,
5 874 (1997). The judge in Perea's case did not suspend imposition
6 of sentence, but he imposed a sentence of two years in prison and
7 suspended execution of that sentence. (See Lodgment No. 1, People
8 v. Perea, 16-17, No. JCF22575 (superior court minutes, Nov. 19,
9 2008).)

10 Even if judgment in Perea's case for purposes of AEDPA was
11 entered on November 19, 2008, the date Perea was sentenced, on June
12 10, 2009, the court modified the restitution amount and accepted
13 Perea's counsel's conclusion that there was no constitutional basis
14 to withdraw Perea's no-contest plea. (Id. (superior court minutes,
15 June 10, 2009).) Thus, June 10, 2009, is the date Perea's request
16 to withdraw his no-contest plea was denied. In his supplemental
17 brief, Respondent overlooks the trial court's review of Perea's
18 plea and contends the modification of the restitution amount did
19 not change the date final judgment was entered because the court
20 simply modified the minutes of the November 19, 2008 sentencing.
21 (See Resp't's Supplemental Br. 4, ECF No. 19.) Nonetheless, until
22 June 10, 2009, Perea's request to withdraw his no-contest plea,
23 originally filed as a petition for writ of habeas corpus, was
24 pending. Petitioner did not appeal his November 19, 2008
25 sentencing or the June 10, 2009 modification of restitution and
26 denial of Perea's request to withdraw his plea. Instead, on
27 December 11, 2009, he filed a petition for writ of habeas corpus
28 with the California Court of Appeal. (Lodgment No. 2, Perea v.

1 County of Imperial, No. D056411 (filed Dec. 11, 2009) (habeas
2 corpus petition).)

3 The cases cited by Respondent in support of his argument are
4 not compelling. They concern situations where a petitioner argued
5 the statute of limitations was restarted or tolled by various post-
6 judgment actions or motions. See Caldwell v. Dretke, 429 F.3d 521,
7 529 (5th Cir. 2005) (holding a grant of probation is final when
8 pronounced, not when it is revoked and an appeal from that
9 revocation is dismissed); Lozano v. Frank, 424 F.3d 554, 555-56
10 (7th Cir. 2005) (concluding that a motion for modification of
11 sentence filed almost eight years after the state supreme court
12 denied Lozano's petition for review did not "reset" AEDPA's statute
13 of limitations and was not part of the direct review process);
14 Bethea v. Girdich, 293 F.3d 577, 578 (2d Cir. 2002) (holding that a
15 motion to extend time to file state appeal does not "restart"
16 AEDPA's statute of limitations); Gibson v. Klinger, 232 F.3d 799,
17 804 (10th Cir. 2000) (finding that no statutory tolling applies for
18 the gap period between when the time for appeal has expired and
19 when the state appellate court granted a motion to file a late
20 appeal because nothing was "pending" before a state court).

21 Considering all the evidence in the record, the Court
22 concludes that the June 10, 2009 order denying Perea's motion to
23 withdraw his no-contest plea and reducing his restitution amount
24 was a final judgment for purposes of 28 U.S.C. § 2244(d)(1).
25 Perea's conviction became final sixty days after June 10, 2009, or
26 on August 10, 2009.³ Absent any statutory or equitable tolling,

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28 ³ As previously noted, sixty days from June 10, 2009, is August 9, 2009,
which is a Sunday. Thus, pursuant to Fed. R. Civ. Pro. 6(a)(1)(C), the sixty
days ran out on August 10, 2009, the following Monday.

1 Perea had until August 10, 2010, to file his federal habeas
2 petition. 28 U.S.C. § 2244(d); Patterson v. Stewart, 251 F.3d
3 1243, 1246 (9th Cir. 2001) (applying Federal Rule of Civil
4 Procedure 6(a), which states “[i]n computing any period of time
5 prescribed . . . by any applicable statute, the day of the act,
6 event, or default from which the designated period of time begins
7 to run shall not be included” to AEDPA). Perea filed his Petition
8 in this Court on July 22, 2010. Accordingly, it was timely.
9 Respondent’s Motion to Dismiss on the ground that the Petition is
10 untimely is **DENIED**.

11 B. Exhaustion

12 Habeas petitioners who wish to challenge either their state
13 court conviction or the length of their confinement in state
14 prison, must first exhaust state judicial remedies. 28 U.S.C.A.
15 § 2254(b), (c) (West 2006); Granberry v. Greer, 481 U.S. 129, 133-
16 34 (1987). Ordinarily, to satisfy the exhaustion requirement, a
17 petitioner must “‘fairly present[]’ his federal claim to the
18 highest state court with jurisdiction to consider it, or . . .
19 demonstrate[] that no state remedy remains available.” Johnson v.
20 Zenon, 88 F.3d 828, 829 (9th Cir. 1996) (citations omitted).
21 Moreover, to properly exhaust state court remedies a petitioner
22 must allege, in state court, how one or more federal rights have
23 been violated. For example, “[i]f a habeas petitioner wishes to
24 claim that an evidentiary ruling at a state court trial denied him
25 the due process of law guaranteed by the Fourteenth Amendment, he
26 must say so, not only in federal court, but in state court.” See
27 Duncan v. Henry, 513 U.S. 364, 365-66 (1995).

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1 Respondent argues the Petition must be dismissed because the
2 claims it contains are unexhausted. (Mot. Dismiss Attach. #1 Mem.
3 P. & A. 12-14, ECF No. 12.) On January 22, 2010, Perea attempted
4 to file a petition for review of the order denying the habeas
5 corpus petition he filed in the California appellate court. (See
6 Second Am. Pet. 15, ECF No. 9.) The California Supreme Court
7 rejected the petition as untimely. (Id.)

8 A claim is considered to be exhausted "if it is clear that the
9 claims are now procedurally barred under [state] law." Gray v.
10 Netherland, 518 U.S. 152, 162 (1996); Valerio v. Crawford, 306 F.3d
11 742, 770 (9th Cir. 2002) (stating that a claim may be considered
12 exhausted if it is obviously procedurally barred). Here, no state
13 remedy is available to Petitioner because were he to return to
14 state court, his claims would be procedurally barred as untimely.
15 See In re Robbins, 18 Cal. 4th 770, 784, 959 P.2d 311, 320, 77 Cal.
16 Rptr. 153, 162 (1998); In re Clark, 5 Cal. 4th 750, 759, 855 P.2d
17 729, 734, 21 Cal. Rptr. 2d 509, 514 (1993); see also Walker v.
18 Martin, ___ U.S. ___, 131 S. Ct. 1120, 1131 (2011) (holding that
19 California's timeliness rule is clearly established and
20 consistently applied). Accordingly, the Court **DENIES** Respondent's
21 Motion to Dismiss on the ground that Perea's claims are
22 unexhausted.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court concludes Perea's
3 petition is both timely and technically exhausted. Respondent's
4 Motion to Dismiss is hereby **DENIED**.

5 **DATED:** June 13, 2011

6 
7 Hon. Ruben B. Brooks
8 **UNITED STATES MAGISTRATE JUDGE**

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