



1 that the defendant should be sentenced to life, the defendant will not be sentenced to  
2 death, and the Court will sentence the defendant to either life without the possibility of  
3 release until 25 calendar years in prison are served or natural life which means the  
4 defendant will never be released from prison.” RT 11/14/06 at 106.<sup>1</sup> In proposed Claim  
5 Nineteen, Petitioner contends that the Arizona Supreme Court, recognizing the Supreme  
6 Court’s recent decision in *Lynch v. Arizona*, 136 S.Ct. 1818 (2016) (per curium), found  
7 this precise instruction to be unconstitutional and seeks amendment of his petition to add  
8 this claim. (*See* Doc. 59) (citing *State v. Escalante-Orozco*, 396 P.3d 798, 828–30 (Ariz.  
9 Jan. 12, 2017)).

### 10 APPLICABLE LAW

#### 11 **1. Motion to Amend**

12 As a preliminary matter, Petitioner labeled his motion as a request for leave to  
13 supplement, although he makes clear that he seeks to amend the petition to add a claim.  
14 Petitioner explains he requested leave to supplement so that he might be relieved of this  
15 Court’s local rule which requires the attachment of the entire proposed amended pleading  
16 to a motion to amend. *See* LRCiv 15.1(a). Accordingly, the Court will construe the  
17 motion as one to amend.

18 A petition for habeas corpus may be amended pursuant to the Federal Rules of  
19 Civil Procedure. 28 U.S.C. § 2242; *see also* Rule 12, Rules Governing § 2254 Cases, 28  
20 U.S.C. foll. § 2254 (providing that the Federal Rules of Civil Procedure may be applied  
21 to habeas petitions to the extent they are not inconsistent with the habeas rules). A court  
22 looks to Rule 15 of the Federal Rules of Civil Procedure to address a party’s motion to  
23 amend a pleading in a habeas corpus action. *See James v. Pliker*, 269 F.3d 1124, 1126  
24 (9th Cir. 2001).

25 Under Rule 15(a), leave to amend shall be freely given “when justice so requires.”  
26 Fed. R. Civ. P. 15(a). Courts must review motions to amend in light of the strong policy  
27 permitting amendment. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th

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28 <sup>1</sup> “RT” refers to the reporter’s transcripts from Petitioner’s state court proceedings.

1 Cir. 1986). Factors that may justify denying a motion to amend are undue delay, bad faith  
2 or dilatory motive, futility of amendment, undue prejudice to the opposing party, and  
3 whether petitioner has previously amended. *Foman v. Davis*, 371 U.S. 178, 182 (1962);  
4 *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

5 Leave to amend may be denied based upon the futility of amendment alone. *See*  
6 *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). To assess futility, a court  
7 necessarily evaluates whether relief may be available on the merits of the proposed claim.  
8 *See Caswell v. Calderon*, 363 F.3d 832, 837–39 (9th Cir. 2004) (conducting a two-part  
9 futility analysis reviewing both exhaustion of state court remedies and the merits of the  
10 proposed claim). If the proposed claims are untimely, unexhausted, or otherwise fail as a  
11 matter of law, amendment should be denied as futile.

## 12 DISCUSSION

13 Petitioner seeks to supplement his Petition with a new claim that the jury  
14 instruction given in his case was unconstitutional. Petitioner asserts the basis for this  
15 claim is the Supreme Court’s recent decision in *Lynch v. Arizona*, 136 S.Ct. 1818 (2016),  
16 as recently recognized by the Arizona Supreme Court in *State v. Escalante-Orozco*, 386  
17 P.3d 798 (Ariz. January 12, 2017). Respondents assert the motion should be denied as  
18 futile, because the proposed amendment is untimely. The Court agrees.

19 Petitioner’s habeas petition is subject to a one-year limitations period under §  
20 2244(d)(1). Typically, this period begins running from the date judgment becomes final.  
21 28 U.S.C. § 2244(d)(1)(A). For purposes of this motion Respondents concede that  
22 Petitioner is correct in stating this period expired on July 5, 2016. (*See* Doc. 16 at 1; Doc.  
23 61 at 5-6.) Application of this period of limitations to Petitioner’s proposed claim, filed  
24 on May 24, 2017, results in a finding that the claim is untimely by a period of over ten  
25 months.

26 Petitioner argues that the claim is timely because it was filed less than a year after  
27 the Supreme Court issued its decision in *Lynch*. The Court therefore considers whether  
28 the Supreme Court’s decision in *Lynch*, decided on May 31, 2016, is a triggering event

1 under any of the possible alternative start dates for the limitations period, including: (1)  
2 the date on which a State-created impediment to filing an application is removed; (2) the  
3 date on which a constitutional right asserted by petitioner was initially recognized, and  
4 made retroactive to cases on collateral review; or (3) the date on which the factual  
5 predicate of the claim could have been discovered through the exercise of due diligence.  
6 28 U.S.C. § 2244(d)(1)(B)–(D).

7 In *Lynch*, 136 S. Ct. 1818, the Supreme Court applied *Simmons v. South Carolina*,  
8 512 U.S. 154 (1994), to a capital sentencing in Arizona. *Simmons* held that when future  
9 dangerousness is an issue in a capital sentencing determination, the defendant has a due  
10 process right to require that his sentencing jury be informed of his ineligibility for parole.  
11 512 U.S. at 171. The Supreme Court’s decision in *Lynch* is not a triggering event under  
12 28 U.S.C. § 2244(d)(1)(C), because it did not announce a new rule, and does not apply  
13 retroactively.<sup>2</sup> In *O’Dell v. Netherland*, 521 U.S. 151, 167 (1997), the Supreme Court  
14 rejected the argument that *Simmons* represented a watershed rule of criminal procedure  
15 that would apply retroactively. Like *Simmons*, *Lynch* is procedural and non-retroactive,  
16 and does not serve to initiate a new limitations period for Petitioner’s *Simmons* claim.  
17 Petitioner lends supports to this conclusion by arguing in proposed Claim Nineteen that  
18 “Simmons and its progeny all clearly established prior to Armstrong’s re-trial in 2006  
19 that the instruction was unconstitutional.” (Doc. 59 at 4.)

20 Petitioner contends that, under the Supreme Court’s holding in *Griffith v.*  
21 *Kentucky*, 479 U.S. 314 (1987), he is entitled to the application of *Simmons*, which was  
22 decided several years before Petitioner’s conviction became final. In *Griffith*, the  
23 Supreme Court held that “a new rule for the conduct of criminal prosecutions is to be  
24 applied retroactively to all cases, state or federal, pending on direct review or not yet  
25 final, with no exception for cases in which the new rule constitutes a ‘clear break’ with

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27 <sup>2</sup> Contrary to Petitioner’s assertion, these are not contradictory claims. The Court  
28 finds that *Lynch* did not announce a new constitutional rule, but even if the Court were to  
assume for the sake of argument that *Lynch* did announce a new constitutional rule, it has  
not been made retroactive to cases on collateral review.

1 the past.” *Id.* at 328. Petitioner’s argument, however, strays from the issue presently  
2 before the Court. The State does not argue, and the Court does not find, that *Simmons* is  
3 inapplicable to Petitioner. The crucial consideration is whether Petitioner’s claim is  
4 timely. Petitioner cannot rely on the date of the Supreme Court’s decision in *Lynch* as an  
5 alternative trigger date for the limitations period because *Lynch* does not announce a new  
6 constitutional right, and, even if it had, does not apply retroactively.

7 Petitioner states that “it was not necessarily the legal unavailability but the factual  
8 unavailability of Armstrong’s claim that was the impediment to raising it during prior  
9 state proceedings.” (Doc. 63 at 7.) He also asserts, though in the context of his procedural  
10 default argument, that his claim was “factually unavailable” until the Arizona Supreme  
11 Court’s decision in *Escalante-Orozco* because prior state court decisions had held that the  
12 jury instruction at issue was correct because release into the community was possible. (*Id.*  
13 at 8-9.) The Court construes these assertions liberally as arguments in support of an  
14 alternative limitations period start date under either 28 U.S.C. § 2244(d)(1)(B) (“the date  
15 on which the impediment to filing an application created by State action in violation of  
16 the United States is removed”) or (d)(1)(D) (“the date on which the factual predicate of  
17 the claim or claims presented could have been discovered through the exercise of  
18 reasonable diligence”), but finds no support for either alternative limitations period in this  
19 case.

20 A “state’s determination of its own substantive law in a way that leaves a convict  
21 with no meritorious federal claim” does not constitute an “impediment” to filing a habeas  
22 petition under § 2244(d)(1)(B), nor is “a change in (or clarification of) state law, by a  
23 state court. . . a ‘factual predicate’” under § 2244(d)(1)(D). *See Shannon v. Newland*,  
24 410 F.3d 1083, 1087–1088 (9th Cir. 2005). Thus, Petitioner cannot rely on the Arizona  
25 Supreme Court’s decision in *Escalante-Orozco* as a triggering date under either  
26 alternative start date. The reasoning in *Shannon* applies with equal force to Petitioner’s  
27 suggestion that the decision in *Lynch*—as a change in or clarification of federal law—  
28 could qualify as a “factual predicate,” because such an interpretation would render the

1 term “factual” meaningless. *See id.* at 1088. The circumstances under which a state-court  
2 decision may serve as a “factual predicate,” such as instances in which “the state-court  
3 decision in question is a decision in the petitioner’s own case,” are not present here. *See*  
4 *id.* at 1088 (citing *Johnson v. United States*, 544 U.S. 295 (2005)).

5 The Court finds the claim untimely under the limitations period described in  
6 section 2244(d)(1). Petitioner is permitted to amend his petition now only if the new  
7 claim “relates back” to the original petition. *See Mayle v. Felix*, 545 U.S. 644, 650  
8 (2005). A claim does not relate back “when it asserts a new ground for relief supported  
9 by facts that differ in both time and type from those the original pleading set forth.” *Id.*  
10 Petitioner does not advance any argument that Claim Nineteen relates to any properly  
11 filed and currently pending claim in his petition, and a review of the petition reveals that  
12 Petitioner’s new claim differs in both time and type from any claim in his petition. (*See*  
13 Doc. 20.)

14 **CONCLUSION**

15 Because Petitioner’s claim is untimely and does not relate back to a properly filed  
16 and currently pending claim, any attempt to amend the habeas petition to include the  
17 claim would be futile. Because the Court finds it would be “nothing more than an  
18 exercise in futility,” to allow amendment of the petition, the Court does not reach the  
19 merits or procedural status of the claim, and does not consider the other factors that might  
20 justify denial of the motion to amend, such as undue delay, bad faith or dilatory motive,  
21 and undue prejudice. *See Bonin*, 59 F.3d at 845.

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Accordingly,

**IT IS HEREBY ORDERED** Petitioner's Motion for Leave to Supplement the  
Petition for Writ of Habeas Corpus (Doc. 58) is **DENIED**.

Dated this 7th day of September, 2017.



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Honorable Rosemary Márquez  
United States District Judge