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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE ARGUEZ PEREZ,)	Case No. CV 12-3973-CAS (JPR)
)	
Petitioner,)	
)	ORDER DENYING PETITIONER'S
vs.)	REQUEST TO FILE SECOND AMENDED
)	PETITION
JAMES D. HARTLEY, Warden,)	
)	
Respondent.)	
)	

On July 5, 2013, Petitioner filed a request for leave to amend the First Amended Petition, apparently to add back newly exhausted claims that he had previously dismissed. On July 23, 2013, Respondent filed opposition to Petitioner's request, arguing that the new claims were still unexhausted, were time barred, and did not relate back to the claims in the FAP. For the following reasons, Petitioner's request to amend the FAP is DENIED.

I. Background

On February 16, 2012, Petitioner constructively filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his convictions for selling, transporting, or offering to sell cocaine base, possession for sale of cocaine base, and related offenses. On November 29, 2012, the magistrate

1 judge found that the Petition was a "mixed" petition containing
2 both exhausted and unexhausted claims and ordered Petitioner to
3 do one of the following: (1) file a request to stay the Petition
4 pursuant to Rhines v. Weber, 544 U.S. 269, 277-78, 125 S. Ct.
5 1528, 1535, 161 L. Ed. 2d 440 (2005), if he could show good cause
6 for not having earlier exhausted his unexhausted claims; (2)
7 voluntarily dismiss this action without prejudice; (3)
8 voluntarily dismiss the unexhausted claims and proceed only on
9 the exhausted claims; or (4) voluntarily dismiss the unexhausted
10 claims and move for a stay of the remaining fully exhausted
11 claims pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003),
12 overruling on other grounds recognized by Robbins v. Carey, 481
13 F.3d 1143, 1149 (9th Cir. 2007), while he returned to state court
14 to exhaust the unexhausted claims. Petitioner subsequently filed
15 a motion to stay the proceedings and hold them in abeyance under
16 Rhines, acknowledging that grounds five through 10 of the FAP -
17 as the magistrate judge had characterized them in her November 29
18 Order - were not exhausted but claiming that he had good cause
19 for not earlier exhausting them because they were based on newly
20 discovered evidence, his counsel was ineffective, and he was
21 untrained in the law.

22 On January 7, 2013, the magistrate judge denied Petitioner's
23 stay request, finding that he had not shown good cause for not
24 earlier exhausting his remedies in state court. The magistrate
25 judge informed Petitioner that he had the following options for
26 how to proceed:

27 Option 1: Petitioner may request a voluntary dismissal of
28 this action without prejudice pursuant to Federal Rule of

1 Civil Procedure 41(a). Petitioner is advised, however,
2 that any dismissed claims may be later subject to the
3 one-year statute of limitations under 28 U.S.C.
4 § 2244(d)(1).

5 Option 2: Petitioner may request voluntary dismissal of
6 his unexhausted claims, numbers five through 10 of the
7 FAP (see Nov. 29, 2012 Order), and elect to proceed only
8 on his exhausted claims. Petitioner is advised, however,
9 that if he elects to proceed with the exhausted claims,
10 any future habeas petition containing the unexhausted
11 claims (presumably filed after they have been presented
12 to and ruled on by the state supreme court) may be
13 rejected as successive.

14 Option 3: After dismissing his unexhausted claims,
15 Petitioner may move for a stay of the remaining fully
16 exhausted claims, pursuant to [Kelly v. Small], while he
17 returns to state court to continue to exhaust the
18 unexhausted claims. Petitioner is warned, however, that

19 [a] petitioner seeking to use the Kelly
20 procedure will be able to amend his
21 unexhausted claims back into his federal
22 petition once he has exhausted them only if
23 those claims are determined to be timely. And
24 demonstrating timeliness will often be
25 problematic under the now-applicable legal
26 principles.

27 King v. Ryan, 564 F.3d 1133, 1140-41 (9th Cir. 2009).
28 Additionally, Petitioner may amend a new claim into a

1 pending federal habeas petition after the expiration of
2 the limitation period only if the new claim shares a
3 "common core of operative facts" with the claims in the
4 pending petition. Mayle v. Felix, 545 U.S. 644, 659, 125
5 S. Ct. 2562, 2572, 162 L. Ed. 2d 582 (2005).

6 On January 16, 2013, Petitioner filed a notice that he chose
7 "option one and option three." Because those options were
8 mutually exclusive, the magistrate judge ordered Petitioner to
9 clarify which option he selected, and on January 30, 2013,
10 Petitioner clarified that he wished to select option three. On
11 February 1, 2013, the magistrate judge granted Petitioner's
12 request to dismiss the unexhausted grounds, five through 10 of
13 the FAP, as outlined in her November 29, 2012 Order and stayed
14 the remaining claims pending Petitioner's exhaustion of his state
15 remedies.

16 On June 10, 2013, Petitioner attempted to file what appeared
17 to be a Second Amended Petition. On June 25, 2013, the
18 magistrate judge ordered Petitioner to file a motion seeking
19 leave to file the SAP. On July 5, 2013, Petitioner did so. On
20 July 23, 2013, Respondent filed opposition, arguing that leave to
21 amend should be denied because Petitioner's new claims were still
22 unexhausted, were time barred, and did not relate back to the
23 existing claims in the FAP.

24 Liberally construed, the proposed SAP appears to raise the
25 following claims:¹

- 26 1. The trial court erred in failing to give an

27
28 ¹ For clarity, the Court has rearranged the order in which
the claims are numbered from that used in the proposed SAP.

1 aiding-and-abetting instruction (SAP at 3, 6, 11-12, 22, 29-30);

2 2. The trial court's initial denial of Petitioner's
3 Pitchess² motion violated Petitioner's constitutional rights (SAP
4 at 3-4, 7-9, 12-13, 20);³

5 3. Petitioner was illegally restrained because no evidence
6 showed that he committed any element of the charged offenses (SAP
7 at 4, 28, 30);

8 4. The trial court's failure to give a unanimity
9 instruction violated Petitioner's constitutional right to a
10 unanimous jury verdict (SAP at 21-23, 28);

11 5. Petitioner's trial counsel was ineffective because he
12 failed to request an aiding-and-abetting instruction (SAP at 3,
13 11-12, 15);

14 6. Petitioner's constitutional right to confront his
15 accuser was violated in an unspecified way (SAP at 4, 28);

16 7. Petitioner's appellate counsel was ineffective in
17 failing to raise on appeal certain unspecified claims (FAP at 15,
18 28);

19 8. Petitioner's trial counsel was ineffective in failing
20 to present evidence and witnesses derived from discovery obtained

22 ² Pitchess v. Super. Ct., 11 Cal. 3d 531, 113 Cal. Rptr.
23 897 (1974) (allowing discovery of internal police files in certain
circumstances).

24 ³ As the magistrate judge noted in her November 29, 2012
25 Order interpreting the claims in the FAP, Petitioner repeatedly
26 references "evidence of prosecutorial misconduct" as part of his
27 Pitchess claim (see SAP at 7), but it appears from his allegations
28 that Petitioner is not referring to misconduct by the prosecutor
but rather misconduct by the arresting officers, which would be the
proper subject of a Pitchess motion. (See id. (alleging "false
arrest and fabrication of evidence").)

1 after the Pitchess hearing on remand (SAP at 20, 28);

2 9. Petitioner's trial counsel was ineffective in failing
3 to argue to the jury the "charge of possession for sale in double
4 jeopardy" (SAP at 3, 19, 28);

5 10. Extrinsic evidence was improperly admitted into the
6 jury room during jury deliberations (SAP at 23-24);

7 11. The court of appeal should have appointed a referee to
8 hold an evidentiary hearing on remand (SAP at 31).

9 Claims one through four appear to be the same as those
10 currently in the FAP.

11 **II. Petitioner may not have exhausted all the SAP's claims**

12 Under 28 U.S.C. § 2254(b), habeas relief may not be granted
13 unless a petitioner has exhausted the remedies available in state
14 court.⁴ Exhaustion requires that the petitioner's contentions
15 were fairly presented to the state courts, Ybarra v. McDaniel,
16 656 F.3d 984, 991 (9th Cir. 2011), cert. denied, 133 S. Ct. 424
17 (2012), and disposed of on the merits by the highest court of the
18 state, Greene v. Lambert, 288 F.3d 1081, 1086 (9th Cir. 2002).

19 As a matter of comity, a federal court will not entertain a
20 habeas petition unless the petitioner has exhausted the available
21 state judicial remedies on every ground presented in the
22 petition. See Rose v. Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198,
23 1203, 71 L. Ed. 2d 379 (1982).

24
25 ⁴ A habeas petition "shall not be granted unless it appears
26 that - (A) the applicant has exhausted the remedies available in
27 the courts of the State; or (B)(i) there is an absence of available
28 State corrective process; or (ii) circumstances exist that render
such process ineffective to protect the rights of the applicant."
28 U.S.C. § 2254(b)(1).

1 Respondent first argues that the new claims in the SAP are
2 unexhausted because they differ from those raised in Petitioner's
3 most recent supreme court habeas petition.⁵ (Opp'n at 6-7.) It
4 appears that pages 1 through 27 of the proposed SAP are identical
5 to pages 1 through 27 of Petitioner's supreme court petition.⁶
6 (Compare SAP at 1-27 with Lodgment 14 at 1-27.) The proposed SAP
7 contains an extra eight pages of argument not included in the
8 supreme court petition, however, and in those pages there appears
9 to be at least one potential new claim. (See Lodgment 14 at 28-
10 35.) But because of the garbled nature of Petitioner's claims,
11 it is difficult to ascertain whether the SAP actually seeks to
12 raise any new claims not raised in the supreme court petition or
13 whether Petitioner has used the extra pages simply to argue that
14 the state courts were wrong in denying his habeas petitions.
15 (See SAP at 28 (asserting that the superior court did not follow
16 "settle law" and its decision "is in error").) Because

17
18 ⁵ After his direct appeal, during which he raised grounds
19 one and two of the FAP, and before he filed his federal Petition,
20 Petitioner filed a round of state-court habeas petitions raising
21 claims corresponding to grounds three and four of the FAP.
22 (Lodgments 8, 10, 12.) In January 2013, when the FAP was pending
23 in this Court, Petitioner returned to state court and filed another
24 round of habeas petitions, apparently seeking to exhaust the claims
25 raised in grounds five through 10 of the FAP. (See Nov. 29, 2013
26 Order; Lodgments 14-16.)

27 ⁶ While this case was stayed, Petitioner first sought
28 relief from the California Supreme Court (Lodgment 14), and then,
after that court denied his claims, he filed petitions in the state
court of appeal (Lodgment 15) and superior court (Lodgment 16).
Petitioner's supreme court and superior court petitions appear
identical. (See Lodgments 14, 16.) Petitioner's court of appeal
petition appears identical to the proposed SAP, including eight
additional pages of argument not in the two other state petitions.
(See SAP at 28-35, Lodgment 15 at 28-35.)

1 Petitioner's claims must have been presented to the state's
2 highest court to be exhausted, see Greene, 288 F.3d at 1086, any
3 claims in those eight pages are necessarily not exhausted and
4 would render the SAP another mixed petition subject to
5 dismissal.⁷ The Court need not resolve this issue, however,
6 because Petitioner's new claims are untimely and thus leave to
7 amend must be denied in any event.

8 **III. Petitioner is not entitled to tolling of the statute of**
9 **limitations sufficient to render his new claims timely**

10 In presenting Petitioner with the option to dismiss his
11 unexhausted claims and stay the Petition's remaining claims under
12 Kelly, 315 F.3d at 1063, the magistrate judge expressly warned
13 him that he would be able to amend the claims back into his
14

15 ⁷ The supreme court denied Petitioner's petition with
16 citations to People v. Duvall, 9 Cal. 4th 464, 474, 37 Cal. Rptr.
17 2d 259, 265 (1995), In re Swain, 34 Cal. 2d 300, 304, 209 P.2d 793,
18 796 (1949), In re Waltreus, 62 Cal. 2d 218, 225, 42 Cal. Rptr. 9,
19 13 (1965), In re Robbins, 18 Cal. 4th 770, 780, 77 Cal. Rptr. 2d
20 153, 159 (1998), and In re Clark, 5 Cal. 4th 750, 767-69, 21 Cal.
21 Rptr. 2d 509, 519-21 (1993). (SAP at 48.) Denials based upon
22 Swain and Duvall indicate that a petitioner has failed to "allege
23 with sufficient particularity the facts warranting habeas relief."
24 King v. Roe, 340 F.3d 821, 823 (9th Cir. 2003) (per curiam).
25 Waltreus stands for the proposition that a state court will not
26 review habeas claims previously raised and rejected on appeal. See
27 62 Cal. 2d at 225. Robbins and Clark indicate that the petition
28 was untimely. See Thorson v. Palmer, 479 F.3d 643, 644-45 (9th
Cir. 2007). In general, however, a court may not find a procedural
bar when the state court cited numerous cases because it is not
possible to determine which citations were intended to apply to
which claims. See Washington v. Cambra, 208 F.3d 832, 834 (9th
Cir. 2000); Calderon v. Bean, 96 F.3d 1126, 1131 (9th Cir. 1996)
(finding no procedural default when state supreme court denial
cited several procedural bars but provided no basis to discern
their application to each claim). In any event, the Court need not
determine whether Petitioner's claims are exhausted because, as
discussed infra, they are untimely.

1 federal petition "only if those claims are determined to be
2 timely," and "demonstrating timeliness will often be problematic
3 under the now-applicable legal principles." (Nov. 29, 2012 Order
4 at 4 (quoting King, 564 F.3d at 1140-41).) Indeed, the Ninth
5 Circuit has explained the risks of the Kelly procedure in just
6 this type of situation:

7 Under Duncan v. Walker, 533 U.S. 167, 121 S. Ct. 2120,
8 150 L. Ed. 2d 251 (2001), the filing of a petition for
9 federal habeas corpus relief does not toll AEDPA's
10 statute of limitations (unlike an application for state
11 habeas corpus relief, which does). Id. at 172, 121 S.
12 Ct. 2120. Additionally, Mayle provides that a petitioner
13 may amend a new claim into a pending federal habeas
14 petition after the expiration of the limitations period
15 only if the new claim shares a "common core of operative
16 facts" with the claims in the pending petition, Mayle,
17 545 U.S. at 659, 125 S. Ct. 2562; a new claim does not
18 "relate back" to the filing of an exhausted petition
19 simply because it arises from "the same trial,
20 conviction, or sentence." Id. at 662-64, 125 S. Ct.
21 2562. Because the Kelly procedure requires petitioners
22 to dismiss their unexhausted claims and then attempt to
23 add them back into the federal complaint later, the Kelly
24 procedure, unlike the Rhines procedure, does nothing to
25 protect a petitioner's unexhausted claims from
26 untimeliness in the interim. And Duncan and Mayle, taken
27 together, make demonstrating timeliness of claims amended
28 into federal habeas petitions after exhaustion often

1 problematic.

2 King, 564 F.3d at 1141.

3 The Anti-Terrorism and Effective Death Penalty Act (“AEDPA”)
4 sets forth a one-year limitation period for filing a federal
5 habeas petition and specifies that the period runs from the
6 latest of the following dates:

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

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

15 (C) the date on which the constitutional right
16 asserted was initially recognized by the Supreme Court,
17 if the right has been newly recognized by the Supreme
18 Court and made retroactively applicable to cases on
19 collateral review; or

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

23 28 U.S.C. § 2244(d)(1). A court assesses each claim individually
24 to determine its timeliness. See Mardesich v. Cate, 668 F.3d
25 1164, 1171 (9th Cir. 2012).

26 Petitioner was convicted by a Los Angeles County jury of
27 selling, transporting, or offering to sell cocaine base (Cal.
28 Health & Safety Code § 11352(a)) and possession for sale of

1 cocaine base (id. § 11351.5); the jury also found true various
2 sentence enhancements. (Lodgment 1, Clerk's Tr. at 130-31, 135-
3 36.) On December 24, 2008, Petitioner was sentenced to 12 years
4 and four months in state prison. (Id. at 136-38, 141-42.) He
5 appealed his conviction and sentence, arguing that the trial
6 court erred in instructing the jury and in failing to conduct an
7 in camera review of evidence in connection with Petitioner's
8 Pitchess motion; on January 19, 2010, the court of appeal
9 affirmed the judgment in part, conditionally reversed it in part,
10 and remanded to the trial court to conduct the Pitchess in camera
11 hearing. (Lodgment 2.) Petitioner filed a petition for review
12 in the California Supreme Court as to his instructional-error
13 claims; on March 24, 2010, the supreme court denied review.
14 (Lodgments 3, 4.) On remand, the trial court conducted the in
15 camera hearing and ordered the production of several items of
16 evidence to the defense. (Lodgment 5, Rep.'s Tr. at 1202.)
17 Petitioner's trial counsel spent several months investigating the
18 new evidence but ultimately concluded that it would not have led
19 him to present any additional witnesses or evidence at trial.
20 (Id. at 1202-05.) On September 7, 2010, the trial court
21 reinstated Petitioner's sentence. (Lodgment 6, Clerk's Tr. at
22 12-15.) Petitioner thereafter appealed again, and on May 18,
23 2011, the court of appeal affirmed the judgment. (Lodgment 7.)
24 Petitioner did not file a petition for review in the proceedings
25 after remand.

26 Because he did not do so, his conviction became final on
27 June 27, 2011, 40 days after the California Court of Appeal filed
28 its opinion, on May 18, 2011. See (Lodgment 7); Cal. R. Ct.

1 8.500(e); Waldrip v. Hall, 548 F.3d 729, 735 (9th Cir. 2008).
2 The statute of limitations commenced running the next day, see
3 Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (under
4 Fed. R. Civ. P. 6(a), limitation period begins day after
5 triggering event), and, absent tolling, expired on June 26, 2012,
6 see § 2244(d)(1)(A).⁸

7 AEDPA includes a statutory tolling provision that suspends
8 the limitation period for the time during which a “properly
9 filed” application for postconviction or other collateral review
10 is pending in state court. § 2244(d)(2); see Waldrip, 548 F.3d
11 at 734. An application is “pending” until it has achieved final
12 resolution through the state’s postconviction procedures. Carey
13 v. Saffold, 536 U.S. 214, 220, 122 S. Ct. 2134, 2138, 153 L. Ed.
14 2d 260 (2002). In California, a state habeas petition remains
15 pending between a lower court’s denial of it and the filing of a
16 habeas petition in a higher state court, as long as that period
17 is “reasonable.” Evans v. Chavis, 546 U.S. 189, 191-92, 126 S.
18 Ct. 846, 849, 163 L. Ed. 2d 684 (2006). Periods of up to 60 days
19 are generally presumptively reasonable. Cf. id. at 201 (holding
20 that unexplained six-month delay is unreasonable compared to
21 “short[er] periods of time,” such as 30 to 60 days, “that most
22 States provide for filing an appeal to the state supreme court”
23 (internal quotation marks and alterations omitted)). Unlike the
24

25 ⁸ Petitioner is not entitled to a later trigger date under
26 § 2241(d)(1)(D). As the magistrate judge found in her January 7,
27 2013 Order denying Petitioner’s request to stay the Petition under
28 Rhines, Petitioner’s claims are based on facts Petitioner knew at
the time of his trial and direct appeal, and his assertions to the
contrary were conclusory and unfounded.

1 filing of a state habeas petition, the filing of a federal habeas
2 petition does not toll AEDPA's statute of limitations. Duncan v.
3 Walker, 533 U.S. 167, 172, 121 S. Ct. 2120, 2124, 150 L. Ed. 2d
4 251 (2001).

5 Petitioner constructively filed a petition in the Los
6 Angeles County Superior Court on May 26, 2011,⁹ raising claims
7 corresponding to grounds three and four of the FAP, and the court
8 denied it on June 17, 2011. (Lodgments 8, 9.) Petitioner then
9 constructively filed a habeas petition in the California Court of
10 Appeal on June 29, 2011, raising the same claims. (Lodgment 10.)
11 The court of appeal denied Petitioner's petition on July 21,
12 2011. (Lodgment 11.) On August 15, 2011, Petitioner
13 constructively filed a habeas petition raising the same claims in
14 the California Supreme Court, which denied it on January 4, 2012.
15 (Lodgments 12, 13.)

16 Respondent asserts that Petitioner's 2011 superior court
17 habeas petition did not toll the statute of limitations because
18 it was denied as untimely. (See Opp'n to Mot. at 10 n.5;
19 Lodgment 9.) Indeed, an untimely petition is not "properly
20 filed" and does not toll the statute of limitations. See Thorson
21 v. Palmer, 479 F.3d at 643, 645-46 (9th Cir. 2007). Because
22 Petitioner filed that petition before his judgment was final and
23

24 ⁹ Under the "mailbox rule," a pro se prisoner's habeas
25 petition is deemed filed on the date he delivers it to prison
26 authorities for mailing. See Houston v. Lack, 487 U.S. 266, 276,
27 108 S. Ct. 2379, 2385, 101 L. Ed. 2d 245 (1988); see also Roberts
28 v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) ("When a
prisoner gives prison authorities a habeas petition or other
pleading to mail to court, the court deems the petition
constructively 'filed' on the date it is signed.").

1 the statute had begun to run, it had little effect on the
2 limitation period, as explained below. Thus, even giving
3 Petitioner the benefit of the doubt and assuming that the
4 superior court petition did toll the statute, Petitioner's new
5 claims are nonetheless untimely.

6 Assuming his first set of state petitions were properly
7 filed, Petitioner is entitled to statutory tolling of the time
8 they were pending in state court and to gap tolling of the
9 periods between those petitions because the gaps were less than
10 60 days. See § 2244(d)(2); Waldrip, 548 F.3d at 734; Evans, 546
11 U.S. at 191-92. Applying all possible statutory tolling, the
12 statute of limitations ran for one day between the time his
13 judgment became final, on June 27, 2011, and when he filed his
14 first court of appeal petition, on June 29. It did not begin
15 running again until January 5, 2012, the day after the supreme
16 court denied Petitioner's first petition in that court. It
17 expired 364 days later, on January 3, 2013. The statute could
18 not have been further tolled during Petitioner's second round of
19 state habeas petitions because he did not constructively file the
20 first of those until January 11, 2013, a week after the statute
21 had already expired.¹⁰ State petitions filed after expiration of
22 the limitation period do not toll the statute. See Ferguson v.
23 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003). Petitioner did not

24
25 ¹⁰ Although ignorance of the law cannot in any event toll
26 the one-year AEDPA limitation period, see Rasberry v. Garcia, 448
27 F.3d 1150, 1154 (9th Cir. 2006), the magistrate judge's November
28 29, 2012 Order - issued more than a month before the expiration of
the limitation period - alerted Petitioner to the need to return to
state court as soon as possible.

1 seek to amend the FAP until at the earliest June 10, 2013, six
2 months after the limitation period had expired. Thus,
3 Petitioner's new claims are untimely unless some basis for
4 equitable tolling exists. See Holland v. Florida, 560 U.S. ___,
5 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010).

6 Determining whether equitable tolling is warranted is a
7 fact-specific inquiry. Frye v. Hickman, 273 F.3d 1144, 1146 (9th
8 Cir. 2001). The petitioner must show that (1) he has been
9 pursuing his rights diligently and (2) some extraordinary
10 circumstance stood in his way and prevented timely filing.
11 Holland, 130 S. Ct. at 2562. In addition, "[t]he petitioner must
12 show that 'the extraordinary circumstances were the cause of his
13 untimeliness and that the extraordinary circumstances made it
14 impossible to file a petition on time.'" Porter v. Ollison, 620
15 F.3d 952, 959 (9th Cir. 2010) (citation omitted). "Equitable
16 tolling is justified in few cases," and "the threshold necessary
17 to trigger equitable tolling under AEDPA is very high, lest the
18 exceptions swallow the rule." Spitsyn v. Moore, 345 F.3d 796,
19 799 (9th Cir. 2003) (alterations omitted).

20 Petitioner does not appear to be entitled to equitable
21 tolling for any reason. In his proposed SAP, Petitioner asserts
22 that "some extraordinary circumstance stood in his way" because
23 "Petitioner don't speak any English." (SAP at 5, 6.) Equitable
24 tolling may be justified if language barriers actually prevent
25 timely filing, but "a non-English-speaking petitioner seeking
26 equitable tolling must, at a minimum, demonstrate that during the
27 running of the AEDPA time limitation, he was unable, despite
28 diligent efforts, to procure either legal materials in his own

1 language or translation assistance from an inmate, library
2 personnel, or other source." Mendoza v. Carey, 449 F.3d 1065,
3 1069-70 (9th Cir. 2006); see also Diaz v. Kelly, 515 F.3d 149,
4 154 (2d Cir. 2008) ("[T]he diligence requirement of equitable
5 tolling imposes on the prisoner a substantial obligation to make
6 all reasonable efforts to obtain assistance to mitigate his
7 language difficulty."). Petitioner has not even attempted to
8 make this required showing. Indeed, he was able to file three
9 state-court habeas petitions in 2011 and the federal Petition and
10 First Amended Petition in 2012. Petitioner has not shown why he
11 could not have earlier raised his new claims in state court. To
12 the extent Petitioner argues that he only recently discovered
13 them, that argument is unavailing because, as the magistrate
14 judge found in her January 7, 2013 Order, they all involve either
15 ineffective assistance of trial or appellate counsel or other
16 alleged errors that occurred during Petitioner's trial or on
17 direct appeal. Thus, each of Petitioner's unexhausted claims is
18 based on information that was or should have been known to him
19 before his first round of state habeas petitions.

20 Petitioner's new claims are therefore untimely unless they
21 relate back to the claims in the pending FAP.

22 **IV. Petitioner's new claims do not "relate back" to the claims**
23 **in the FAP**

24 Petitioner may amend a new claim into a pending federal
25 habeas petition "after the statute of limitations has run" only
26 if the new claim shares a "common core of operative facts" with
27 the claims in the pending petition. Mayle, 545 U.S. at 655, 659;
28 see also id. at 662 ("A prisoner should not be able to assert a

1 claim otherwise barred by the statute of limitations merely
2 because he asserted a separate claim within the limitations
3 period." (quoting United States v. Duffus, 174 F.3d 333, 338 (3d
4 Cir. 1999)); Schneider v. McDaniel, 674 F.3d 1144, 1151-52 (9th
5 Cir.) (finding that because new claim did not relate back to any
6 pending claims, district court properly dismissed it as
7 untimely), cert. denied, 133 S. Ct. 579 (2012). Here,
8 Petitioner's new claims do not share a common core of operative
9 facts with any of the claims in the FAP, and the new claims are
10 therefore time barred.

11 As the Court construes them, see supra at 4-6, the pending
12 claims in the FAP allege that (1) the trial court erred in
13 failing to give an aiding-and-abetting instruction (FAP at 3,
14 10-12, 23); (2) the trial court's initial denial of Petitioner's
15 Pitchess motion violated Petitioner's constitutional rights (FAP
16 at 3-4, 8-9, 13, 20); (3) Petitioner was illegally restrained
17 because no evidence showed that he committed any element of the
18 charged offenses (FAP at 4, 8, 30); and (4) the trial court's
19 failure to give a unanimity instruction violated Petitioner's
20 constitutional right to a unanimous jury verdict (FAP at 12,
21 21-23). Petitioner's new claims allege that trial counsel was
22 ineffective in failing to (5) request an aiding and abetting
23 instruction, (8) present evidence derived from the Pitchess
24 discovery after remand, and (9) argue that Petitioner's
25 prosecution violated double jeopardy (SAP at 3, 11-12, 15, 19-20,
26 28); (6) Petitioner's constitutional right to confront his
27 accuser was violated in an unspecified way (SAP at 4, 28); (7)
28 appellate counsel was ineffective in unspecified ways (SAP at 15,

1 28); (10) extrinsic evidence was improperly admitted into the
2 jury room during jury deliberations (SAP at 23-24); and (11) the
3 court of appeal should have appointed a referee to hold an
4 evidentiary hearing on remand (SAP at 31).

5 None of the currently pending claims in the FAP allege
6 ineffective assistance of counsel, nor do they have anything to
7 do with prosecutorial misconduct, juror misconduct, Petitioner's
8 right to confront witnesses, or any alleged errors by the court
9 of appeal. Thus, the new claims cannot arise from a "common core
10 of operative facts" as the original claims. See Mayle, 545 U.S.
11 at 664; Schneider, 674 F.3d at 1151 (holding that claim that
12 trial court erred in denying motion to sever did not arise from
13 common core of operative facts as claim that trial counsel was
14 ineffective in failing to investigate or timely file motion to
15 sever). Petitioner's new claims are therefore untimely, and
16 Petitioner's motion to file the SAP must be denied.

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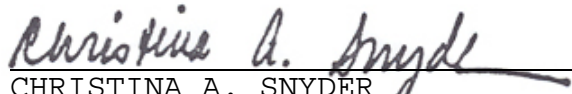
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1 **V. Conclusion**

2 For the foregoing reasons, Petitioner's request for leave to
3 amend the FAP is DENIED. Respondent is ordered to file an Answer
4 to the currently pending claims in the FAP, grounds one through
5 four as described herein and in the magistrate judge's November
6 29, 2012 Order, within 21 days of the date of this Order.
7 Petitioner shall have 30 days from the date of Respondent's
8 Answer to file a reply. The matter will stand submitted for
9 decision at that time.

10 DATED: August 14, 2013


CHRISTINA A. SNYDER
U.S. DISTRICT JUDGE

13 Presented by:

14 
15
16 JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE