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United States District Court
Eastern District of California

Carl Lee Callegari,
Petitioner,

No. Civ. S 99-1686 MCE PAN P
Findings and Recommendations

vs.

Anthony Lamarque, Warden,
Respondent.

-oOo-

August 30, 1999, petitioner filed a petition for a writ of habeas corpus claiming the trial court's reasonable doubt instruction diluted the state's burden of proof. October 7, 1999, a different magistrate judge appointed counsel. April 25, 2000, respondent answered the petition.

October 14, 2003, petitioner moved to amend his petition to add a claim his sentence violates the Eighth Amendment. September 2, 2004, I found the new claim time-barred but found that pursuant to Ninth Circuit precedent, the claim related

1 back to the date of the original petition and granted the
2 request. See Felix v. Mayle, 379 F.3d 612 (9th Cir. 2004).

3 September 7, 2004, respondent requested this action be
4 stayed pending the United States Supreme Court's decision in
5 Mayle v. Felix, 73 USLW 3286 (Oct. 25, 2004) (No. 04-563).

6 October 12, 2004, petitioner filed a first-amended petition.

7 November 22, 2004, the court stayed this action and directed
8 petitioner to notify the court when the Supreme Court resolved
9 Mayle v. Felix.

10 September 20, 2005, petitioner notified this court that the
11 Supreme Court decided Felix.

12 In Felix, the Supreme Court held that an amended habeas
13 petition does not relate back to the original when it "asserts a
14 new ground for relief supported by facts that differ in both time
15 and type from those the original pleading set forth." Felix, 125
16 S.Ct. at 2566.

17 In this case, the core facts of the initial petition relate
18 to how the judge instructed the jury on the state's burden of
19 proof. The core facts of the new claim relate to the length of
20 petitioner's sentence. The claims have no factual allegations in
21 common and so are not "tied to a common core of operative facts."

22 Felix, 125 S.Ct. at 2574. Therefore, petitioner's Eighth
23 Amendment challenge to his sentence does not relate back to the
24 date of the original petition.

25 For these reasons, I hereby vacate the November 22, 2004,
26 stay, vacate the September 2, 2004, order granting leave to file

1 a first-amended complaint and recommend that petitioner's October
2 14, 2003, motion be denied and that this matter proceed on
3 petitioner's August 30, 1999, petition.

4 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
5 findings and recommendations are submitted to the United States
6 District Judge assigned to this case. Written objections may be
7 filed within 20 days of service of these findings and
8 recommendations. The document should be captioned "Objections to
9 Magistrate Judge's Findings and Recommendations." The district
10 judge may accept, reject, or modify these findings and
11 recommendations in whole or in part.

12 Dated: November 29, 2005.

13 /s/ Peter A. Nowinski

14 PETER A. NOWINSKI
15 Magistrate Judge
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