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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SHABONDY LAMAR SIMPSON,

Petitioner,

No. CIV S-05-0640 JAM DAD P

vs.

M. EVANS, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On April 6, 2005, the undersigned ordered respondent to file a response to the petition. On July 29, 2005, respondent filed a timely answer, and on September 29, 2005, petitioner filed a timely traverse. This case is now submitted for decision and in due course, the court will issue its findings and recommendations.

Pending before the court is petitioner’s motion to amend his petition to add ten new claims along with his proposed amended petition. Respondent has filed a timely opposition to the motion to amend. Petitioner has not filed a reply.

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1 **PETITIONER’S ORIGINAL PETITION**

2 Petitioner raises six grounds for relief in his original petition:

3 **GROUND ONE:** Petitioner’s conviction is unlawful, based upon  
4 perjured testimony triggering a miscarriage of justice within the  
5 trial court.

6 \* \* \*

7 **GROUND TWO:** The trial court abused its discretion by denying  
8 petitioner’s new trial violating his 6th and 14th U.S. Const.  
9 Amend. Rights.

10 \* \* \*

11 **GROUND THREE:** Petitioner was deprived of effective  
12 assistance of counsel who failed to conduct an adequate  
13 investigation and subpoena witnesses in support of an acquittal to  
14 the false kidnap/assault allegations violating petitioner’s 6th and  
15 14th U.S. Const. Amendment Rights.

16 \* \* \*

17 **GROUND FOUR:** The prosecution committed misconduct by  
18 intentionally allowing his witness to give perjured testimony  
19 during the trial violating petitioner’s 6th and 14th Const. Amend.  
20 Rights to a fair and just trial.

21 \* \* \*

22 **GROUND FIVE:** The prosecution team failed to disclose detailed  
23 statements taken by investigating police that could have cleared  
24 petitioner of kidnapping charges violating the Due Process Clause  
25 of the 14th Amendment of the United States Constitution.

26 \* \* \*

**GROUND SIX:** Petitioner was denied effective assistance of  
counsel on his direct appeal in violation of the due process clause  
and petitioner’s Sixth Amendment rights.

(Pet. at 25-74.)

As noted above, respondent has filed a timely answer to the petition and petitioner  
has filed a traverse.

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1 prison. Petitioner appealed his conviction and, on November 19, 2002, the California Court of  
2 Appeal affirmed the trial court's judgment of conviction. Petitioner then filed a petition for  
3 review, and on January 22, 2003, the California Supreme Court denied the petition. Petitioner  
4 filed three up-the-ladder petitions for writ of habeas corpus in state court, all of which were  
5 denied. Petitioner filed his original federal petition on April 1, 2005. Respondent filed a timely  
6 answer, and petitioner filed a traverse. (Resp't's Answer at 1-2, Exs. A-F & Resp't's Opp'n to  
7 Pet'r's Mot. to Am. at 1-2.)

8           On September 11, 2007, nearly two years after filing his traverse in this action,  
9 petitioner commenced a second round of state habeas review by filing a petition for writ of  
10 habeas corpus in the Sacramento County Superior Court. On September 28, 2007, the Superior  
11 Court denied the petition. (Resp't's Opp'n to Pet'r's Mot. to Am., Ex. G.) On November 26,  
12 2007, petitioner filed a second petition for writ of habeas corpus in the Sacramento County  
13 Superior Court. On January 7, 2008, the Superior Court denied that petition. (Id., Ex. H.) On  
14 March 25, 2008, petitioner filed a petition for writ of habeas corpus in the California Court of  
15 Appeal which was denied on March 27, 2008. (Id., Ex. J.) On February 8, 2008, petitioner filed  
16 a petition for writ of habeas corpus in the California Supreme Court. On June 27, 2008,  
17 petitioner filed a second petition for writ of habeas corpus in the California Supreme Court. On  
18 July 16, 2008, the California Supreme Court denied both petitions. (Id., Exs. K & L.) (Resp't's  
19 Opp'n to Pet'r's Mot. to Am. at 2-3.)

20           Respondent argues that the ten new claims proposed in petitioner's amended  
21 petition are untimely. In this regard, respondent argues that petitioner's conviction became final  
22 on April 22, 2003, ninety days after the California Supreme Court denied his petition for review.  
23 Absent any tolling, respondent argues that petitioner had until April 22, 2004 to file a timely  
24 federal habeas petition. (Resp't's Opp'n to Pet'r's Mot. to Am. at 3-4.) In respondent's view,  
25 the one-year statute of limitations under the AEDPA was tolled for thirteen months from August  
26 22, 2003, when petitioner filed his first state habeas petition in Superior Court to September 22,

1 2004, when the California Supreme Court denied his habeas petition. Thus, petitioner had until  
2 May 22, 2005 to file a federal habeas petition. Because petitioner filed his original petition on  
3 April 1, 2005, the claims therein are timely. However, respondent argues that the statute of  
4 limitations ran more than three additional years on any other claims before petitioner filed his  
5 proposed amended petition. In fact, according to respondent, the statute of limitations expired  
6 more than two years before petitioner first sought to exhaust any of the new claims proposed in  
7 his amended petition. Accordingly, respondent contends that the claims in petitioner's amended  
8 petition are untimely, unless they relate back to the claims in petitioner's original federal petition.  
9 (Resp't's Answer, Exs. D, F & Resp't's Opp'n to Pet'r's Mot. to Am. at 3-4.)

10           In this latter regard, respondent argues that although some of the claims in  
11 petitioner's amended petition are of the same general type of claim as those in petitioner's  
12 original petition, they do not involve the same core operative facts. For example, respondent  
13 contends, both petitions contain claims of prosecutorial misconduct. However, respondent points  
14 out that the claim in the original petition is based on a violation of Brady v. Maryland, 373 U.S.  
15 83 (1963) and suborning perjury, while the new claim in the amended petition is based on the  
16 prosecutor's closing argument. Respondent notes that both petitions contain claims of  
17 ineffective assistance of counsel. However, respondent argues, the claim in the original petition  
18 is based on defense counsel's alleged failure to present exculpatory evidence, while the new  
19 claim in the amended petition is based on counsel's alleged failure to request certain jury  
20 instructions. Finally, respondent asserts, while both petitions contain claims regarding admission  
21 of evidence, the claim in the original petition concerns alleged false testimony elicited by the  
22 prosecutor, while the new claim in the amended petition alleges trial court error in allowing  
23 testimony regarding uncharged offenses. (Resp't's Opp'n to Pet'r's Mot. to Am. at 6-7.)

24           Respondent maintains that none of the ten new claims in petitioner's amended  
25 petition are based on the same core of operative facts that form the basis of the six claims in the

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1 original petition. Accordingly, respondent concludes that none of the new claims can properly  
2 relate back to the original petition. (Resp't's Opp'n to Pet'r's Mot. to Am. at 7.)

### 3 ANALYSIS

#### 4 I. The AEDPA Statute of Limitations

5 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death  
6 Penalty Act ("AEDPA"). AEDPA amended 28 U.S.C. § 2244 by adding the following provision:

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

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

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

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

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

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

21 The AEDPA's one-year statute of limitations applies to all federal habeas corpus petitions filed  
22 after the statute was enacted and therefore applies in this case. See Lindh v. Murphy, 521 U.S.  
23 320, 322-23 (1997).

#### 24 II. Application of § 2244(d)(1)(A) & (d)(2)

25 The California Supreme Court denied petitioner's petition for review on January  
26 22, 2003. Accordingly, for purposes of federal habeas review, petitioner's conviction became

1 final ninety days later on April 22, 2003, and the AEDPA one-year statute of limitation period  
2 began to run the following day, on April 23, 2003 and ran until it expired on April 22, 2004.

3 “The time during which a properly filed application for State post-conviction or  
4 other collateral review with respect to the pertinent judgment or claim is pending shall not be  
5 counted” toward the AEDPA statute of limitations. 28 U.S.C. § 2244(d)(2). The statute of  
6 limitations is not tolled during the interval between the date on which a judgment becomes final  
7 and the date on which the petitioner files his first state collateral challenge because there is no  
8 case “pending.” Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Once a petitioner  
9 commences state collateral proceedings, a state habeas petition is “pending” during a full round  
10 of review in the state courts, including the time between a lower court decision and the filing of a  
11 new petition in a higher court, as long as the intervals between petitions are “reasonable.” Carey  
12 v. Saffold, 536 U.S. 214, 222-24 (2002).

13 It is undisputed that petitioner is entitled to statutory tolling from August 22,  
14 2003, when he filed his first state habeas petition in Superior Court, to September 22, 2004,  
15 when the California Supreme Court denied his state habeas petition filed with that court. Thus,  
16 petitioner had until May 22, 2005 to file a federal habeas petition. Because petitioner filed his  
17 original petition on April 1, 2005, that petition, and the claims therein, are timely.

18 However, petitioner did not file his amended petition until July 28, 2008, more  
19 than three years after the statute of limitations had expired. In this regard, even if petitioner had  
20 exhausted his claims on direct appeal in 2003, his amended petition is still time-barred.

21 Moreover, even if petitioner were entitled to additional statutory tolling with respect to his  
22 second round of state habeas review from September 11, 2007 to July 16, 2008, petitioner’s  
23 amended petition is still untimely. As respondent accurately observes, petitioner did not  
24 commence his second round of habeas review in state court until more than two years after the  
25 statute of limitations for the filing of a federal petition had expired. Accordingly, the claims in

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1 petitioner's amended petition are untimely, unless they relate back to the claims in petitioner's  
2 original federal petition.

### 3 III. Relation Back of New Claims

4 An application for a writ of habeas corpus "may be amended or supplemented as  
5 provided in the rules of civil procedure applicable to civil actions." 28 U.S.C. § 2242. See also  
6 Rule 11, Fed. R. Governing § 2254 Cases (providing that the Federal Rules of Civil Procedure  
7 may be applied in habeas corpus proceedings to the extent that the rules of civil procedure are not  
8 inconsistent with any statutory provision or with the rules governing habeas cases); Fed. R. Civ.  
9 P. 81(a)(4) (providing that the Federal Rules of Civil Procedure are applicable to habeas corpus  
10 proceedings to the extent that the practice in the proceedings is not governed by federal statute,  
11 the Rules Governing Section 2254 Cases, and the Rules Governing Section 2255 Cases).

12 Under Federal Rule of Civil Procedure 15(a), a habeas petitioner may amend his  
13 pleadings once as a matter of course before a responsive pleading is served and may seek leave of  
14 court to amend his pleading at any time during the proceeding. Mayle v. Felix, 545 U.S. 644,  
15 655 (2005). Under Rule 15(c), a petitioner's amendments made after the statute of limitations  
16 has run will relate back to the date of his original pleading if the new claims arose out of the  
17 conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

18 Id.

19 In Mayle, the Supreme Court explained that "[t]he 'original pleading' to which  
20 Rule 15 refers is the complaint in an ordinary civil case, and the petition in a habeas proceeding."  
21 Mayle, 545 U.S. at 655. The Court observed that the complaint in an ordinary civil case need  
22 only provide fair notice of the plaintiff's claim and the grounds on which the claim rests, while a  
23 habeas petition is required to specify all grounds for relief available to the petitioner and state the  
24 facts supporting each ground. Id. Because of this difference between civil complaints and  
25 habeas petitions, the relation back of new habeas claims "depends on the existence of a common  
26 'core of operative facts' uniting the original and newly asserted claims." Id. at 659. Applying

1 these principles, the Court in Mayle held that the petitioner’s new claim did not relate back to his  
2 original claim because the new claim arose from the petitioner’s own pretrial interrogation and  
3 was different in time and place from his original claim, which arose from the pretrial police  
4 interrogation of a witness. Id. at 660-64. See also Hebner v. McGrath, 543 F.3d 1133, 1138 (9th  
5 Cir. 2008) (admission of evidence during a trial and the instructions given to the jury after the  
6 close of evidence are two discrete occurrences that do not share a common core of operative  
7 fact).

8           In this case, none of the new claims proposed in petitioner’s amended petition  
9 relate back to the claims in his original petition. For example, although petitioner’s ineffective  
10 assistance of counsel claims in his amended petition and original petition rely on the same legal  
11 theory, they do not arise from the same “core of operative facts.” Mayle, 545 U.S. at 664. In  
12 Ground Sixteen of petitioner’s amended petition, he claims that his counsel was ineffective for  
13 failing to request a specific jury instruction during trial. In contrast, in Ground Three of his  
14 original petition, petitioner claims that his counsel was ineffective because he did not adequately  
15 investigate and subpoena certain witnesses to testify in support of petitioner’s version of events.  
16 In this regard, petitioner’s amended claim does not arise from the same “conduct, transaction, or  
17 occurrence” as petitioner’s original claim. Id. at 656. See also United States v. Ciampi, 419 F.3d  
18 20, 24 (1st Cir. 2005) (“[A] petitioner does not satisfy the Rule 15 “relation back” standard  
19 merely by raising some type of ineffective assistance in the original petition, and then amending  
20 the petition to assert another ineffective assistance claim based upon an entirely distinct type of  
21 attorney misfeasance.”).

22           Similarly, petitioner’s prosecutorial misconduct claims in his amended petition  
23 and original petition rely on the same legal theory, but they do not arise from the same “core of  
24 operative facts.” Mayle, 545 U.S. at 664. In Ground Nine of petitioner’s amended petition,  
25 petitioner claims that the prosecutor improperly drew attention to his decision not to testify and  
26 improperly shifted the burden of proof beyond a reasonable doubt to petitioner. In contrast, in

1 Grounds Four and Five of his original petition, petitioner claimed that the prosecutor allowed the  
2 victim to give perjured testimony and that the “entire prosecution team,” including an  
3 investigating officer, failed to disclose the victim’s alleged exculpatory statements that could  
4 have cleared petitioner of the charges. Again, the new claims in petitioner’s amended petition  
5 relate to events separate in both “time and type” from his original claims. Id. at 657.

6 Finally, petitioner’s remaining claims in his amended petition and original petition  
7 do not arise from the same “core of operative facts.” Mayle, 545 U.S. at 664. In Grounds Seven  
8 and Ten of petitioner’s amended petition, he claims that the trial court erred in admitting  
9 evidence concerning battered women’s syndrome and his own prior acts of domestic violence. In  
10 Grounds Eight, Fourteen, and Fifteen of his amended petition, petitioner claims that the trial  
11 court erred in providing the jury with certain instructions. Finally, in Grounds Eleven, Twelve,  
12 and Thirteen of his amended petition, petitioner claims that the trial court erred in denying his  
13 motion to continue the trial date so he could secure another witness, there was insufficient  
14 evidence to convict him of aggravated assault, and his sentence constitutes cruel and unusual  
15 punishment. However, nowhere in his original petition, either in connection with Grounds One,  
16 Two, and Six or in connection with any of the aforementioned original claims, does petitioner  
17 allege the essential factual predicate for these new claims. It is not enough that petitioner’s new  
18 claims relate to the same “trial, conviction, or sentence.” Id. at 656. See also Jackson v. Roe,  
19 425 F.3d 654, 660 n.8 (9th Cir. 2005) (“In Mayle, the Court held that our former understanding  
20 of the relation-back standard under Federal Rule of Civil Procedure 15(c), which allowed an  
21 amendment to a habeas petition to ‘relate back’ to the date of the original petition ‘so long as the  
22 new claim stems from the habeas petitioner’s trial, conviction, or sentence,’ was too broad”).  
23 Where these remaining new claims are concerned, there are simply no facts “uniting the original  
24 and newly asserted claims.” Id. at 659. See also Jones v. Woodford, No. CIV 03-1463 J (RBB),  
25 2008 WL 505230 \*42 (S.D. Cal. Feb. 25, 2008) (new claims that involve different errors and

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1 different times from those previously alleged do not relate back to the filing of the earlier federal  
2 petition).

3 In sum, petitioner's amended petition is untimely, and the new claims presented  
4 therein do not relate back to his original petition. Accordingly, petitioner's motion to amend  
5 should be denied.<sup>1</sup>

6 **CONCLUSION**

7 For the reasons discussed above, IT IS HEREBY RECOMMENDED that  
8 petitioner's July 28, 2008 motion to amend (Doc. No. 27) be denied.

9 These findings and recommendations are submitted to the United States District  
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen  
11 days after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
14 shall be served and filed within ten days after service of the objections. The parties are advised  
15 that failure to file objections within the specified time may waive the right to appeal the District  
16 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: February 13, 2009.

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21 DALE A. DROZD  
22 UNITED STATES MAGISTRATE JUDGE

21 DAD:9  
22 simp0640.mta

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26 <sup>1</sup> In due course the undersigned will issue findings and recommendations addressing the merits of petitioner's original petition.