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

WALTER JOHNSON,

Petitioner,

No. CIV S-05-1223 JAM DAD P

vs.

M.L. EVANS,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On May 22, 2006, respondent filed an answer and on May 20, 2006, petitioner filed his traverse. However, prior to a decision being rendered on the fully briefed petition, on September 5, 2008, petitioner sought “reinstatement” with respect to two newly exhausted claims.<sup>1</sup> (Doc. No. 35.) On May 4, 2009, the court issued an order construing petitioner’s filing as a motion for leave to file an amended petition and directed respondent to respond to the motion. (Doc. No. 39.) On June 30, 2009, respondent filed his opposition to the motion to amend. Below, the court addresses the pending motion.

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<sup>1</sup> Petitioner filed the same motion on October 7, 2008 (Doc. No. 36) and October 21, 2008 (Doc. No. 38). Those duplicative motions will be disregarded.

1 I. Petitioner's Original and Proposed New Claims

2 Petitioner filed his federal habeas petition on June 20, 2005, setting forth the  
3 following five grounds for relief:

4 Claim 1: Counsel rendered ineffective assistance when he does not  
5 seek suppression of evidence seized from a suspect who is  
6 apprehended by a police dog after he flees a home which police  
and dogs enter without a warrant, consent, exigent circumstances  
or probable cause

7 Claim 2: Counsel renders ineffective assistance when he fails to  
8 prevent destruction of evidence that would demolish the credibility  
of the state's key witness

9 Claim 3: Where a defendant is accused of trying to kill his wife  
10 after finding her in bed with another man, a court commits  
11 reversible error when it gives the jury no instructions on heat of  
passion or manslaughter

12 Claim 4: Where a court forces a defendant to testify before other  
defense witnesses, it commits reversible error

13 Claim 5: There is insufficient evidence of attempted murder where  
14 an assailant with the means and the opportunity to kill does not  
actually try to kill his victim

15 (Petition (Doc. No. 1) at 6.)<sup>2</sup>

16 In his motion now pending before the court, petitioner seeks to amend his habeas  
17 petition to add the following two claims:

18 Proposed Claim 1: Trial court violated clearly established federal  
19 law, violated petitioner's constitutional guarantee to due process of  
the law by the court knowingly disregarding the reasonable  
20 application of legislative mandate governing the special allegation  
attached to petitioners [sic] commitment offense of attempted  
murder

21 Proposed Claim 2: Petitioner contends the imposition of his upper  
22 term sentence on counts 2, 3 and 4 violated his right to jury trial,  
because the agravating [sic] factors used to justify the sentence  
23 were not found true by a jury beyond a reasonable doubt.

24 (Doc. No. 35 at 8 and 14.)

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26 <sup>2</sup> Neither the habeas petition nor the pending motion are numbered consecutively. The  
court has referred to all page numbers as they appear on the court's electronic filing system.

1           The court has construed petitioner's first proposed new claim as alleging that the  
2 life sentence imposed in his case is unconstitutional because the element of premeditation was  
3 not properly alleged in the charging documents as required under California law. (Doc. No. 39 at  
4 3.) In his second proposed new claim plaintiff contends that his constitutional rights, as  
5 recognized by the U.S. Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000), Blake v.  
6 Washington, 542 U.S. 296 (2004), and Cunningham v. California, 549 U.S. 270 (2007), were  
7 violated when he was sentenced to the upper term on several of the counts of conviction. (Id.)

## 8 II. Respondent's Opposition to the Motion

9           Respondent argues that petitioner should not be granted leave to amend because  
10 neither of his proposed new claims relate back to his federal habeas petition filed in this court on  
11 June 20, 2005. (Opp'n at 2.) Respondent notes that on appeal from his conviction the California  
12 Supreme Court denied petitioner's petition for review on May 18, 2005, and the one-year statute  
13 of limitations for the filing of a federal habeas petition began to run on August 17, 2006. (Opp'n  
14 at 3.) Although petitioner filed his timely habeas petition with this court on June 20, 2005, it did  
15 not contain the two proposed sentencing claims. Moreover, petitioner did not file his first state  
16 habeas petition raising those two proposed new sentencing claims until January of 2007, more  
17 than four months after the statute of limitations for filing a federal petition had expired. (Id. at 3-  
18 4.) Thus, respondent argues, the proposed new claims are time-barred unless they relate back to  
19 the timely claims set forth in the 2005 petition filed with this court.

20           In this regard, respondent argues that petitioner has not carried his burden of  
21 demonstrating that the proposed new claims share a common core of operative facts with those  
22 set forth in his timely filed petition. (Id.) Respondent notes that the five grounds for relief set  
23 forth in the original petition are all based on alleged constitutional violations occurring during the  
24 guilt phase of petitioner's state court trial. (Id. at 4.) On the other hand, the two proposed new  
25 grounds for habeas relief allege constitutional violations solely in connection with petitioner's  
26 sentencing. (Id.) Respondent contends that the facts challenging petitioner's sentence are

1 unrelated to petitioner's original guilty-phase claims of ineffective assistance of counsel. (Id.) In  
2 addition, respondent contends, the proposed amendment would be futile because petitioner's  
3 Apprendi claim lacks merit. (Id. at 5 n.2.)

4 III. Analysis

5 A. Statute of Limitations

6 Because this action was filed after April 26, 1996, the provisions of the AEDPA  
7 are applicable. See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062,  
8 1067 (9th Cir. 2003). The AEDPA imposes a one-year statute of limitations on the filing of  
9 federal habeas petitions. Title 28 U.S.C. § 2244 provides as follows:

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

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

15 (B) the date on which the impediment to filing an  
16 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;

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

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

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

24 Here, petitioner challenges his 2002 conviction on charges of attempted murder  
25 (Cal. Penal Code §§ 664/187), home burglary (§ 459), and assault with a deadly weapon (§§ 245  
26 (a)(1)). Petitioner appealed from the judgment of conviction. After the judgement of conviction

1 was affirmed by the California Court of Appeal, petitioner filed a petition for review with the  
2 California Supreme Court. That petition for review was denied on May 18, 2005. (Lod. Doc.  
3 No. 8, lodged May 22, 2006.) Petitioner did not file a petition for a writ of certiorari with the  
4 U.S. Supreme Court. Accordingly, the judgment of conviction became final on August 17, 2005,  
5 when the time for filing a petition for writ of certiorari expired. See Bowen v. Roe, 188 F.3d  
6 1157, 1159 (9th Cir. 1999). The one-year statute of limitations for the filing of a federal habeas  
7 petition expired on August 17, 2006. Only petitioner's June 20, 2005, petition (containing his  
8 original five guilt-phase claims) was filed with this court prior to the expiration of the AEDPA  
9 statute of limitations. Petitioner did not file any state habeas petitions before filing his federal  
10 habeas petition with this court on.<sup>3</sup> (Answer at 10.) Therefore, to be considered any new claims  
11 petitioner seeks to now present to this court must relate back to the claims set forth in his petition  
12 that was before the court when the AEDPA statute of limitations expired.

13 B. Relations Back Under Federal Rule of Civil Procedure 15(c)

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

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24 <sup>3</sup> Petitioner filed a petition for a writ of habeas corpus with the Sacramento County  
25 Superior Court on January 31, 2007. (Doc. No. 27, Ex. A.) However, he is not entitled to  
26 statutory tolling of the federal statute of limitations based upon that state petition because it was  
filed after the statute of limitations for the filing of a federal petition had already expired.

1 Mayle v. Felix, 545 U.S. at 655 (citing Fed. R. Civ. P. 15(c)(2)); Hebner v. McGrath, 543 F.3d  
2 1133, 1137-38 (9th Cir. 2008).<sup>4</sup>

3 In Mayle v. Felix, the Supreme Court explained that “[t]he ‘original pleading’ to  
4 which Rule 15 refers is the complaint in an ordinary civil case, and the petition in a habeas  
5 proceeding.” Id. at 655. The Court observed that the complaint in an ordinary civil case need  
6 only provide fair notice of the plaintiff’s claim and the grounds on which the claim rests, while a  
7 habeas petition is required to specify all grounds for relief available to the petitioner and state the  
8 facts supporting each ground. Id. Because of this difference between civil complaints and  
9 habeas petitions, the relation back of new habeas claims “depends on the existence of a common  
10 ‘core of operative facts’ uniting the original and newly asserted claims.” Id. at 658.<sup>5</sup> The  
11 common core of operative facts must not be viewed at too high a level of generality, and an  
12 “occurrence” will consist of each separate set of facts that supports a ground for relief. Id. at 661.  
13 See also Hebner, 543 F.3d at 1138-39 (jury instruction claim did not relate back to claim in  
14 original petition that testimony was erroneously admitted at trial because the claims arose from  
15 discrete occurrences and did not share a common core of operative facts); United States v.  
16 Ciampi, 419 F.3d 20, 24 (1st Cir. 2005) (“[A] petitioner does not satisfy the Rule 15 “relation  
17 back” standard merely by raising some type of ineffective assistance in the original petition, and  
18 then amending the petition to assert another ineffective assistance claim based upon an entirely  
19 distinct type of attorney misfeasance.”), cert. denied 547 U.S. 1217 (2006). Applying these  
20 principles in Mayle, the Supreme Court ruled in that case that the petitioner’s new claim did not

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22 <sup>4</sup> The rationale for permitting relation back under Federal Rule 15(c) is that the  
23 defendants, because of the original complaint or petition, are on notice of the subject matter of  
24 the dispute and will not be unduly surprised or prejudiced by the later complaint or petition. See  
25 Anthony v. Cambra, 236 F.3d 568, 576 (9th Cir. 2000) (stating that one of the central policies of  
26 Rule 15(c) is to “ensur[e] that the non-moving party has sufficient notice of the facts and claims  
giving rise to the proposed amendment”).

25 <sup>5</sup> See Jackson v. Roe, 425 F.3d 654, 660 n.8 (9th Cir. 2005) (“Instead, held the Court, an  
26 amended claim in a habeas petition relates back for statute of limitations purposes only if it  
shares a ‘common core of operative facts’ with the original claim.”).

1 relate back to his original claim because the new claim arose from the petitioner's own pretrial  
2 interrogation and was different in time and place from his original claim, which arose from the  
3 police interrogation of a witness. 545 U.S. at 660-61.

4 Finally, it is petitioner's burden to establish that the requirements for relation back  
5 under Rule 15(c) have been met. In re Alstom S.A., 406 F. Supp. 2d 402, 430 (S.D.N.Y. 2005)  
6 (citing Cornwell v. Robinson, 23 F.3d 694, 705 (2d Cir. 1994)); Cabrera v. Lawlor, 252 F.R.D.  
7 120, 123 (D. Conn. 2008) (plaintiff's burden to establish requirements for relation back); Estate  
8 of Grier ex rel. Grier v. University of Pennsylvania Health System, No. 07-4224, 2009 WL  
9 1652168, at \*4 (E.D. Pa. June 11, 2009) ("Rule 15 places the burden of establishing the relation  
10 back of a proposed amended complaint upon the plaintiff").

11 Here, the court agrees with respondent that petitioner's two proposed new grounds  
12 for relief do not relate back to the claims in petitioner's timely habeas petition filed with this  
13 court. The claims in the original petition allege ineffective assistance of counsel in failing to  
14 make a motion to suppress and in failing to preserve evidence for presentation at trial, jury  
15 instruction error, insufficiency of the evidence to support the attempted murder conviction, and  
16 trial court error as to the order of witnesses testifying at trial. On the other hand, petitioner's  
17 proposed new claims allege a defective charging document and sentencing error. Petitioner's  
18 original claims and his new claims are not tied to a common core of operative facts. See Kirk v.  
19 Burge, \_\_\_ F. Supp.2d \_\_\_, 2009 WL 438054, at \*13 (S.D.N.Y. Aug. 6, 2009) (new ineffective  
20 assistance of counsel claims found to differ in "time and type" for relation back purposes from  
21 petitioner's original claims of trial court and sentencing error); Jorge v. Phillips, No. 05 Civ.  
22 6091 (LAP) (.00MHD), 2008 WL 344718, at \*3 (S.D.N.Y. Jan. 31, 2008) (ineffective assistance  
23 claims found not to relate back to trial ruling and sentencing error claims). Rather, the proposed  
24 new claims are "separated in time and type" because they occurred at the preliminary and

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1 sentencing stages of the criminal proceeding, whereas the original claims concern matters  
 2 occurring during the trial. Mayle, 545 U.S. at 657.<sup>6</sup>

3           The undersigned finds that the proposed amendment would be futile because  
 4 petitioner’s new claims are barred by the statute of limitations and the new claims do not relate  
 5 back to the claims alleged in the original federal habeas petition.

6                                                           CONCLUSION

7           In accordance with the above, IT IS HEREBY RECOMMENDED that  
 8 petitioner’s September 5, 2008 “Motion For: Reinstatement of Writ of Habeas Corpus” (Doc.  
 9 No. 35), construed as a motion for leave to file an amended petition, be denied. The habeas  
 10 petition filed June 20, 2005, is submitted for decision.

11           These findings and recommendations are submitted to the United States District  
 12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen  
 13 days after being served with these findings and recommendations, any party may file written  
 14 objections with the court and serve a copy on all parties. Such a document should be captioned

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20           <sup>6</sup> The undersigned notes that in 2007, petitioner sought the issuance of a stay in this case  
 21 to exhaust his unexhausted claims and that the court denied his motion, finding that it did not  
 22 meet the requirements for stay and abeyance announced by the Supreme Court in Rhines v.  
 23 Weber, 544 U.S. 269, 277 (2005). (See Doc. Nos. 28-31.) Even if petitioner had met those  
 24 requirements and obtained a stay pending exhaustion of his new claims, it would have been of no  
 25 import. The one-year statute of limitations for the filing of a federal habeas petition expired in  
 26 this case on August 17, 2006, prior to petitioner seeking a stay. Moreover, it has been recognized  
 that staying and holding in abeyance a habeas petition containing only exhausted claims does  
 nothing to protect a petitioner’s unexhausted claims from untimeliness in the interim. See King  
v. Ryan, 564 F.3d 1133, 1140 (9th Cir. 2009) (“And Duncan [v. Walker], 533 U.S. 167, 172  
 (2001)] and Mayle [v. Felix], 545 U.S. 644 (2005)], taken together, make demonstrating  
 timeliness of claims amended into a federal habeas petitions after exhaustion often  
 problematic.”).



1 “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that  
2 failure to file objections within the specified time may waive the right to appeal the District.

3 DATED: September 17, 2009.

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7 DALE A. DROZD  
8 UNITED STATES MAGISTRATE JUDGE

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