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

PHANHAHA XABANDITH,

Petitioner,

No. CIV S-09-2550 LKK DAD P

vs.

FRANCISCO JACQUEZ,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On May 18, 2011, respondent filed an answer to the petition. Pending before the court is petitioner’s motion to amend his petition. Respondent has filed an opposition to the motion.

**PETITIONER’S MOTION TO AMEND**

In his motion to amend, petitioner argues that he forgot to include one other ground for relief in his petition for habeas relief. Specifically, in his proposed “Ground 7”, petitioner claims that the trial court admitted impermissible hearsay evidence at trial in violation of petitioner’s rights under the Sixth Amendment.

Respondent has opposed petitioner’s motion to amend and argues, inter alia, that any amendment would be untimely.

1 **DISCUSSION**

2 As both parties are aware, on January 31, 2011, the undersigned issued findings  
3 and recommendations, recommending that respondent’s motion to dismiss the petition as  
4 untimely be denied. On March 28, 2011, the assigned district judge adopted the findings and  
5 recommendations in full. In those findings and recommendations, the undersigned found that  
6 petitioner’s judgment of conviction became final on October 9, 2007. The AEDPA statute of  
7 limitations for the filing of a federal habeas petition began to run on October 10, 2007, and  
8 continued to run for 265 days until petitioner filed his first state petition for habeas relief. The  
9 statute of limitations then tolled for 408 days, from his filing of his first state habeas petition on  
10 June 30, 2008, to the denial of his third and final state habeas petition on August 12, 2009.  
11 Under these circumstances, petitioner timely filed his original habeas petition on August 29,  
12 2009.

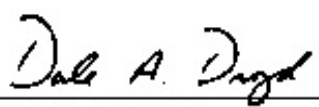
13 However, the statute of limitations continued running during the pendency of this  
14 action, rendering petitioner’s proposed “Ground 7”, filed May 28, 2011, untimely because more  
15 than the 100 days remaining on the statute of limitations have long since passed. See Duncan v.  
16 Walker, 533 U.S. 167, 172-75 (2001) (unlike the filing of a state habeas petition, the filing of a  
17 federal habeas petition does not toll the statute of limitations).

18 A petitioner’s amendments made after the statute of limitations has run will relate  
19 back to the date of his original pleading only if the new claims arose out of the conduct,  
20 transaction, or occurrence set forth or attempted to be set forth in the original pleading. See  
21 Mayle v. Felix, 545 U.S. 644 (2005). See also Rule 11, Fed. R. Governing § 2254 Cases  
22 (providing that the Federal Rules of Civil Procedure may be applied in habeas corpus  
23 proceedings to the extent that the rules of civil procedure are not inconsistent with any statutory  
24 provision or with the rules governing habeas cases). In Mayle, the Supreme Court explained that  
25 “[t]he ‘original pleading’ to which Rule 15 refers is the complaint in an ordinary civil case, and  
26 the petition in a habeas proceeding.” Id. at 655. The Court observed that the complaint in an



1 that failure to file objections within the specified time may waive the right to appeal the District  
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: August 11, 2011.

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7 DALE A. DROZD  
8 UNITED STATES MAGISTRATE JUDGE

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