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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 WILLIAM VINCENT ROMERO,  
12 Plaintiff,  
13 v.  
14 DANIEL PARAMO,  
15 Defendant.

Case No.: 3:14-CV-1284-GPC-BLM

**AMENDED ORDER GRANTING  
PETITIONER’S MOTION FOR  
LEAVE TO FILE AMENDED  
PETITION**

[Dkt. No. 55]

16  
17 **INTRODUCTION**

18 Petitioner William Vincent Romero, proceeding *pro se*, filed a motion for leave to  
19 file an Amended Petition for Writ of Habeas Corpus. In it, he asks the Court to add five  
20 newly-exhausted claims to his original petition which contained a single habeas claim.  
21 Based on the reasoning below, the Court **GRANTS** the motion for leave to file an  
22 amended petition.

23 **PROCEDURAL BACKGROUND**

24 On May 20, 2014, Petitioner William Vincent Romero (“Petitioner”), proceeding  
25 *pro se* and *in forma pauperis*, filed his Petition for Writ of Habeas Corpus (“Petition”) in  
26 federal court. Dkt. No. 1. The original Petition challenges Petitioner’s second degree  
27 murder conviction as being based upon “insufficient evidence to support implied malice.”  
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1 *Id.* at 6. There has never been any dispute that this original habeas claim was exhausted  
2 in state courts. *See* Dkt. No. 45 at 1.

3 On June 14, 2014, Petitioner filed a motion to stay and abey the federal  
4 proceedings while Petitioner exhausted new claims in state court. Dkt. No. 14. While  
5 that motion was still pending before the district court, but after U.S. Magistrate Judge  
6 Barbara Major issued a Report and Recommendation denying Petitioner’s request for  
7 stay, Petitioner filed a request for an extension of time to object to the Report and  
8 Recommendation. Dkt. No. 40. In the request, Petitioner explained that he was currently  
9 litigating his habeas case in state court and that he had an evidentiary hearing scheduled  
10 in the near future. *Id.* at 3. Upon consideration of the new information provided by  
11 Petitioner, the Magistrate Judge altered her Report and Recommendation and concluded  
12 that Petitioner’s request for stay should be granted under *Kelly v. Small*, 315 F.3d 1063  
13 (9th Cir. 2003).

14 On August 5, 2015, this Court stayed Petitioner’s case pursuant to *Kelly v. Small*.  
15 Dkt. No. 45. A stay under *Kelly* requires a Petitioner to comply with a three-step  
16 procedure. Under *Kelly*, a district court may allow a petitioner to: (1) delete unexhausted  
17 claims from a mixed habeas petition — that is a habeas petition with exhausted and  
18 unexhausted claims; (2) seek state court remedies for the unexhausted claims while the  
19 district court stays the fully exhausted petition; and (3) add newly exhausted claims back  
20 onto the federal petition once state courts have had a chance to rule on them. *King v.*  
21 *Ryan*, 564 F.3d 1133, 1135 (9th Cir. 2009). In the August 5, 2015 order, the Court  
22 indicated that Petitioner could continue to litigate his claims pending in state court and  
23 that he could move to amend the claims after he exhausted them. The Court warned  
24 Petitioner, however, that any amended claim must “relate back” to the exhausted claims  
25 in the original habeas petition. *Id.* at 1140-41.

26 On February 2, 2017, this Court issued an order to show because why Petitioner’s  
27 case should not be dismissed for failure to amend. Dkt. No. 53. In it, the Court observed  
28 that publicly available information indicated that the California Supreme Court had

1 denied Petitioner a habeas petition on February 18, 2016 and on August 10, 2016. *Id.*  
2 Accordingly, and since Petitioner had yet to file an amended petition, the Court ordered  
3 Petitioner to show cause, by March 2, 2017, why he had yet to amend his habeas petition.  
4 *Id.*

5 On March 9, 2017, *nunc pro tunc* March 3, 2017, Petitioner filed a motion to  
6 amend his habeas petition. Dkt. No. 55. In it, he moved to add five grounds to his  
7 original exhausted habeas petition. Specifically, he moved to amend the following  
8 claims: (a) Ineffective assistance of counsel, “failure to investigate”; (b) Procedural error,  
9 “speedy trial rights”; (c) Structural error, “due process rights”; (d) Ineffective assistance  
10 of counsel, “right to testify” and “failure to inform”; and (e) actual innocence. *Id.* at 17.

11 Respondent filed an opposition on April 12, 2017. Respondent argues that the  
12 Court should not grant Petitioner leave to amend because his five new claims do not  
13 relate back under AEDPA or, in the alternative, that they are procedurally barred. *Id.*  
14 Petitioner filed a reply on May 1, 2017. Dkt. No. 60.

### 15 **LEGAL STANDARD**

16 A petition for a writ of habeas corpus “may be amended or supplemented as  
17 provided in the rules of procedure applicable to civil actions.” 28 U.S.C. § 2242. Under  
18 Fed. R. Civ. P. 15, courts should give leave to amend freely “when justice so requires.”  
19 When ruling on a motion to amend, the Ninth Circuit has “repeatedly stressed that the  
20 court must remain guided by the underlying purpose of rule 15,” that is, “to facilitate  
21 decisions on the merits, rather than on the pleadings.” *Nunes v. Ashcroft*, 375 F.3d 805,  
22 808 (9th Cir. 2003) (internal quotation omitted). However, a court may deny a motion to  
23 amend if it is made in bad faith, there was undue delay, prejudice would result to the  
24 opposing party, amendment would be futile, or amendment would delay the proceeding.  
25 *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Nunes*, 375 F.3d at 808. Futility alone is  
26 a sufficient basis for denying a motion to amend. *Novak v. United States*, 795 F.3d 1012,  
27 1020 (9th Cir. 2015). “Absent prejudice, or a strong showing of any of the remaining  
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1 *Foman* factors[,]” however, “there exists a *presumption* under Rule 15(a) in favor of  
2 granting leave to amend.”) (emphasis in original).

### 3 DISCUSSION

4 Respondent argues that amendment is inappropriate because Petitioner’s amended  
5 claims are futile. Dkt. No. 58. Specifically, Respondent argues that amendment would  
6 be futile because Petitioner’s amended claims do not relate back to the original exhausted  
7 claim and because, timeliness notwithstanding, the five new claims are procedurally  
8 barred under California law.

9 A habeas petitioner may amend a new claim into a pending federal habeas petition  
10 after the expiration of the limitations period only if the new claim shares a “common core  
11 of operative facts” with the claims in the pending petition. *Mayle v. Felix*, 545 U.S. 644,  
12 646 (2005). “[A] new claim,” however “does not ‘relate back’ to the filing of an  
13 exhausted petition simply because it arises from ‘the same trial, conviction, or sentence.’”  
14 *King*, 564 F.3d at 114. Stated differently, a claim does not relate back “when it asserts a  
15 new ground for relief supported by facts that differ in both time and type from those the  
16 original pleading set forth.” *Hebner v. McGrath*, 543 F.3d 1133, 1138 (9th Cir. 2008).

17 Respondent contends in conclusory fashion that “Romero’s proposed new claims  
18 of alleged ineffective assistance of counsel, speedy trial violation, delay of filing of the  
19 information, and actual innocence do not share a ‘common core of operative facts’ with  
20 the sufficiency-of-the-evidence claim set forth in the original pleading.” Dkt. No. 58 at  
21 12. Accordingly, Respondent avers, “the new claims differ in both time and type from  
22 the previously advanced timely claim.” *Id.* Petitioner, in turn, rebuts this by arguing, in  
23 his reply brief, that the amended claims assert constitutional violations that arise out of  
24 the same facts underlying the “sufficiency-of-the evidence” claim. *See* Dkt. No. 60 at 8.

25 Given that Respondent bears the burden of demonstrating futility under Fed. R.  
26 Civ. P. 15(a), *see DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987),  
27 and the Ninth Circuit’s recognition that pro se-plaintiff claims should be dismissed “only  
28 where it appears beyond a doubt that the plaintiff can prove not set of facts in support of

1 his claim which would entitled him to relief,” *see Franklin v. Murphy*, 745 F.2d 1221,  
2 1228 (9th Cir. 1984), the Court concludes that Respondent has failed to demonstrate that  
3 Petitioner’s putative amended claims do not relate back to the original claims. The bare  
4 assertion that Petitioner’s additional claims do not share a “common core of operative  
5 facts” is not enough to show futility under the liberal Fed. R. Civ. P 15(a) standard or  
6 under the relation-back doctrine. Accordingly, the Court rejects without prejudice  
7 Respondent’s argument that these claims do not relate back. To the extent Respondent  
8 wishes to challenge the “common core of operative facts” in a future filing, Respondent  
9 must explain why the facts underlying each of the newly added claims differ in “time and  
10 type” from the facts underlying Petitioner’s “sufficiency of the evidence” claim.

11 As to Respondent’s second argument — that is, that Petitioner’s putative amended  
12 claims are futile because they are procedurally barred — the Court finds it premature to  
13 resolve this issue at this time. In the Court’s August 5, 2015 order staying the case  
14 pursuant to *Kelly v. Small*, the Court stated that Petitioner could amend his stayed habeas  
15 petition if the claims he sought to amend “relate back” to the original claim. Petitioner  
16 has since followed the procedure outlined by the Court pursuant to *Kelly v. Small*. He  
17 exhausted his state court remedies and has since sought to amend those exhausted claims  
18 to his stayed petition. As such, and in light of the fact that Respondent has failed to  
19 effectively argue that Petitioner’s amended claims do not “relate back” to the original  
20 claim, the Court concludes that the interests of justice are best served by allowing  
21 Petitioner to amend his newly exhausted claims. *See Day v. McDonough*, 547 U.S. 198,  
22 209 (2006) (recognizing that district courts may, in certain cases, exercise discretion to  
23 decide whether justice is better served by dismissing the case on procedural grounds or  
24 by reaching the merits of the petition). Respondent is free to reassert the argument that  
25 Petitioner’s claims are procedurally barred in briefing dedicated to that issue. *See*  
26 *Velasco v. SEI Pharms, Inc.*, 2013 U.S. Dist. LEXIS 10505, at \*4-5 (S.D. Cal. Jan. 25,  
27 2013) (deferring consideration of respondent’s argument that the amended habeas claims  
28 were “futile” until after the amended pleading is filed). Once such a motion has been

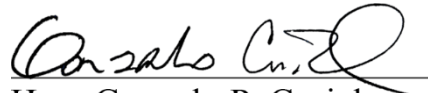
1 filed and briefing submitted, the Court will be in a position to fully evaluate the parties'  
2 positions. *See Day*, 547 U.S. at 210 (“a court must accord the parties fair notice and an  
3 opportunity to present their positions” before “acting on its own initiative” as to  
4 timeliness).

5 **CONCLUSION**

6 Petitioner’s motion to amend his habeas petition pursuant to the Court’s August 15,  
7 2015 Order granting a stay pursuant to *Kelly v. Small* is **GRANTED**. The motion is  
8 granted without prejudice as to any argument that the amended claims are barred on  
9 timeliness or other procedural grounds. **Petitioner may file an amended habeas**  
10 **petition no later than October 13, 2017.**

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12 **IT IS SO ORDERED.**

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14 Dated: September 13, 2017

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16 Hon. Gonzalo P. Curiel  
17 United States District Judge  
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