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

10 MACK A. WEST, JR.,

11 Petitioner,

No. 2: 09-cv-3147 KJM DAD P

12 vs.

13 KATHLEEN DICKINSON, Warden,

14 Respondent.

ORDER

15 \_\_\_\_\_/  
16 Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas  
17 corpus pursuant to 28 U.S.C. § 2254. On November 27, 2006, petitioner pleaded no contest in  
18 the Solano County Superior Court to second degree murder and second degree robbery and  
19 admitted the use of a deadly weapon in connection with those offenses. Pursuant to that plea, he  
20 was sentenced to sixteen years to life in state prison. Presently before the court is petitioner's  
21 motion for leave to file a third amended federal habeas petition. For the following reasons,  
22 petitioner's motion will be granted.

23 I. BACKGROUND

24 On August 12, 2008, the California Court of Appeal for the First Appellate  
25 District affirmed petitioner's judgment of conviction on appeal. On November 19, 2008, the  
26 California Supreme Court denied the petition for review filed on behalf of petitioner.

1           Petitioner then filed a state habeas petition in the California Court of Appeal for  
2 the First Appellate District on August 20, 2009. That court denied petitioner's state habeas  
3 petition on September 3, 2009. Petitioner then filed a state habeas petition in the California  
4 Supreme Court on September 5, 2009.<sup>1</sup> (See Resp't's Lodged Doc. Ex. D.) The California  
5 Supreme Court denied that state habeas petition on March 24, 2010. (See id.)

6           On November 1, 2010, petitioner filed another state habeas petition in the  
7 California Supreme Court. On May 18, 2011, the state high court denied that habeas petition  
8 stating as follows, "The petition for writ of habeas corpus is denied. (See In re Robbins (1998)  
9 18 Cal.4th 770, 780; In re Clark (1993) 5 Cal.4th 750, 767-769; People v. Duvall (1995) 9  
10 Cal.4th 464, 474; In re Swain (1949) 34 Cal.2d 300, 304; In re Miller (1941) 17 Cal.2d 734,  
11 735.)" (Resp't's Lodged Doc. Ex. E.)

12           In November 2009, petitioner filed a petition for writ of habeas corpus pursuant to  
13 28 U.S.C. § 2254 in this court. That original federal habeas petition presented five claims;  
14 specifically: (1) the trial court abused its discretion and violated petitioner's constitutional rights  
15 by not ordering a competency evaluation based on both changed circumstances and previously  
16 unassessed psychological features involving brain injury and retardation; (2) trial counsel's  
17 failure to seek a certificate of probable cause and to develop an adequate record for appellate  
18 review deprived petitioner of effective assistance in perfecting his appeal and obtaining judicial  
19 review; (3) trial counsel rendered ineffective assistance in negotiating an illusory plea bargain  
20 that provided no tangible or meaningful benefit to petitioner in exchange for his no contest plea  
21 and in failing to explain this to petitioner prior to his entry of the no contest plea which violated  
22 his due process rights; (4) the plea bargain failed to establish an adequate factual basis for  
23 petitioner's plea and is statutorily and constitutionally flawed; and (5) the underlying error is  
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25           <sup>1</sup> The filing dates for the petitions filed by petitioner have been determined applying the  
26 prisoner mailbox rule where applicable and determinable. See Houston v. Lack, 487 U.S. 266,  
276 (1988).

1 structural in that the manner in which the trial court induced petitioner to waive his right to jury  
2 trial rendered his waiver in that regard involuntary. (See Dkt. No. 1.) Approximately one week  
3 after filing his original federal habeas petition, petitioner filed his first amended federal habeas  
4 petition which raised the same five claims.<sup>2</sup> (See Dkt. No. 5.)

5 On July 18, 2010, petitioner filed a second amended federal habeas petition after  
6 receiving permission from the court to do so. In his second amended federal habeas petition,  
7 petitioner raised the following claims for relief:

- 8 1. Conviction obtained by no contest plea which was unlawfully  
9 induced and not made voluntarily with understanding the nature of  
10 the charges, plea agreement, and the consequences of the no  
11 contest plea, through trial counsel's misrepresentation rendering  
12 trial counsel ineffective.
- 13 2. Trial counsel ineffective assistance by misrepresenting  
14 petitioner in his request for withdrawal of the plea.
- 15 3. Failure of the trial court to record the proceedings constituted a  
16 violation of petitioner's due process rights.
- 17 4. Prosecutorial misconduct by concealing evidence.
- 18 5. The California Supreme Court abused its discretion by failing to  
19 give petitioner his presentence credits.
- 20 6. Trial court abused its discretion and violated petitioner's  
21 constitutional rights by not ordering a competency evaluation based  
22 on a change of circumstances and previously unassessed  
23 psychological features involving brain injury and retardation.
- 24 7. Ineffective assistance of counsel in negotiating an illusory plea  
25 bargain and failing to explain the plea bargain to petitioner.
- 26 8. The plea bargain failed to establish an adequate factual basis.

(Dkt. No. 25.)

On August 2, 2011, respondent filed an answer to the second amended federal  
habeas petition. Petitioner subsequently requested and received six extensions of time to file a

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<sup>2</sup> It appears that petitioner's first amended habeas petition is identical to his original  
habeas petition. Both are dated November 1, 2009.

1 traverse.<sup>3</sup> Finally, on April 2, 2012, instead of filing his traverse, petitioner filed a motion  
2 seeking leave to file a third amended federal habeas petition. Therein, petitioner requests leave  
3 of court to file a third amended federal habeas petition so that he can add two claims that were  
4 not included in his second amended petition, but were included in his original and first amended  
5 federal habeas petitions filed in November 2009. More specifically, petitioner seeks to add the  
6 following two claims in his proposed third amended federal habeas petition:

7 1. Trial counsel's failure to seek a certificate of probable cause and  
8 to develop an adequate record for appellate review deprived  
9 petitioner of effective assistance in perfecting his appeal and  
10 obtaining judicial review; and

11 2. Structural error from the manner in which the trial court induced  
12 defendant to waive his right to jury trial which rendered his waiver  
13 involuntary.

14 (Dkt. No. 82 at p. 3; Dkt. No. 83 at p. 34-39, 74-77.) Petitioner asserts that his motion for leave  
15 to amend is controlled by Federal Rule of Civil Procedure 15(c)<sup>4</sup> in that these two proposed  
16 additional claims relate back to the original federal habeas corpus petition filed with this court in  
17 November of 2009.

18 Respondent has filed an opposition to the motion for leave to amend after being  
19 ordered to respond to the motion or state her non-opposition. Respondent's sole argument in  
20 opposition is that the motion to amend should be denied because petitioner's proposed third  
21 amended petition is untimely. In this regard, respondent asserts that the two proposed new  
22 claims that petitioner seeks to add in a third amended federal habeas petition do not relate back to

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23 <sup>3</sup> In his fifth request for an extension of time to file a traverse, petitioner mentioned the  
24 possibility of seeking leave to file a third amended petition. (See Dkt. No. 78 at p. 2 ("Petitioner  
25 is requesting that he be given thirty days (30) of extended time to prepare and file his traverse  
26 and leave to amend petition.").)

<sup>4</sup> Federal Rule of Civil Procedure 15(c) states in relevant part that "An amendment to a  
pleading relates back to the date of the original pleading when . . . the amendment asserts a claim  
or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be  
set out – in the original pleading."

petitioner's original, timely filed petition.

## II. MOTION FOR LEAVE TO AMEND STANDARD

Under Federal Rule of Civil Procedure 15(a), a habeas petitioner may amend his pleadings once as a matter of course before a responsive pleading is served and may seek leave of court to amend his pleading at any time during the proceeding. See Mayle v. Felix, 545 U.S. 644, 654 (2005); see also In re Morris, 363 F.3d 891, 893 (9th Cir. 2004) (Rule 15(a) applies to habeas actions with the same force that it applies to other civil cases). Although leave of court should be given freely, a court may deny a motion to amend if the motion is made in bad faith, there would be prejudice to the opposing party, the amendment would be futile or would delay the action, or if the party acted in a dilatory fashion in seeking leave to amend. See Foman v. Davis, 371 U.S. 178, 182 (1962); Waldrip v. Hall, 548 F.3d 729, 732 (9th Cir. 2008); Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004) (applying these factors with respect to a motion to amend in a habeas case); Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995) (same). Prejudice to the opposing party is the most important factor in assessing a motion to amend. See Jackson v. Bank of Haw., 902 F.2d 1385, 1387 (9th Cir. 1990).

Bad faith may be shown when a party seeks to amend late in the litigation process with claims which were, or should have been, apparent early. See Bonin, 59 F.3d at 846.<sup>5</sup> A motion to amend a pleading is addressed to the sound discretion of the court and must be decided upon the facts and circumstances of each particular case. See Sackett v. Beaman, 399 F.2d 884, 889 (9th Cir. 1968).

## III. DISCUSSION

Respondent's sole argument in opposition to petitioner's motion for leave to file a third amended federal habeas petition is that the proposed third amended petition is untimely

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<sup>5</sup> These facts might also support a finding that the moving party acted in a dilatory fashion when seeking leave to amend. Duggins v. Steak 'N Shake, Inc., 195 F.3d 828, 834 (6th Cir. 1999).

1 because the two claims which petitioner proposes to add by way of amendment do not relate back  
2 to the original petition. "Relation back" would be required in this case because the two claims  
3 petitioner raises in his proposed third amended federal petition would otherwise be untimely for  
4 the reasons explained below.

5 Petitioner filed his federal habeas petition after April 24, 1996, therefore, the  
6 Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to the petition. See  
7 Lindh v. Murphy, 521 U.S. 320, 326 (1997). The AEDPA imposes a one-year statute of  
8 limitations on the filing of federal habeas petitions. More specifically, 28 U.S.C. § 2244(d) states  
9 as follows:

10 (1) A 1-year period of limitation shall apply to an application for a  
11 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  
14 the 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  
18 asserted was initially recognized by the Supreme  
Court, if the right has been newly recognized by the  
19 Supreme Court and made retroactively applicable to  
cases on collateral review; or

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

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

25 Thus, pursuant to 28 U.S.C. § 2244(d)(2), the AEDPA statute of limitations is statutorily tolled  
26 during the time a properly filed application for post-conviction relief is pending in state court.

1 The statute of limitations is not tolled during the interval between the date on which a decision  
2 becomes final and the date on which the petitioner files his first state collateral challenge. See  
3 Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010) (“The period between when direct review  
4 becomes final and the filing of a state habeas petition is not tolled[.]”). Once state collateral  
5 proceedings are commenced, a state habeas petition is “pending” during one full round of review  
6 in the state courts, including the time between a lower court decision and the filing of a new  
7 petition in a higher court, as long as the intervals between the petitions are “reasonable.” Evans  
8 v. Chavis, 546 U.S. 189, 192-93 (2006) (citing Carey v. Saffold, 536 U.S. 214, 222-23 (2002)).

9 As described above, the California Supreme Court denied the petition for review  
10 filed on petitioner’s behalf on November 19, 2008. The ninety-day period during which  
11 petitioner could have filed a petition for writ of certiorari in the United States Supreme Court  
12 expired on February 17, 2009. See Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999) (stating  
13 that when a petitioner fails to seek a writ of certiorari from the United States Supreme Court,  
14 AEDPA’s one-year limitations period begins to run ninety days thereafter). Subsequently,  
15 petitioner filed a state habeas petition in the California Court of Appeal on August 20, 2009, or  
16 six months after the AEDPA’s limitations period had began to run. That petition was denied on  
17 September 3, 2009 and the subsequent state habeas petition in the California Supreme Court was  
18 denied on March 24, 2010.

19 As petitioner was proceeding with these state habeas petitions, he timely filed his  
20 original federal habeas petition on November 1, 2009. However, the filing of that federal habeas  
21 petition does not toll the AEDPA statute of limitations. See Duncan v. Walker, 533 U.S. 167,  
22 180 (2001) (the tolling provision of section 2244(d)(2) applies only to state post-conviction  
23 review but not during the pendency of applications for federal review). Accordingly, when the  
24 California Supreme Court denied petitioner’s state habeas petition on March 24, 2010, the  
25 AEDPA statute of limitations clock (which had already run for six months from February 17,  
26 2009 to August 20, 2009), began to run again. Petitioner filed another state habeas petition in the

1 California Supreme Court on November 1, 2010. However, by the time petitioner filed that  
2 petition, the AEDPA statute of limitations for seeking federal habeas relief had already expired in  
3 light of the six month period from February 17, 2009 to August 20, 2009 added to the seven  
4 month gap between March 24, 2010 and November 1, 2010. Accordingly, petitioner's  
5 November 1, 2010 state habeas petition filed with the California Supreme Court did not serve to  
6 statutorily toll the AEDPA statute of limitations for the seeking of federal habeas relief.<sup>6</sup> See  
7 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding that the filing of a state  
8 petition after the federal limitations period has expired has no effect). Thus, for petitioner's  
9 proposed two new claims to be considered timely, they must relate back to his original, timely  
10 filed November 1, 2009, federal petition.

11 A petitioner's proposed amendments after the AEDPA statute of limitations has  
12 expired will relate back to the date of a timely filed petition only if the new claim arose out of the  
13 conduct, transaction, or occurrence set forth or attempted to be set forth in the pleading. See  
14 Mayle, 545 U.S. at 655; FED. R. CIV. P. 15(c). One of the primary concerns in applying the  
15 relation back doctrine under Rule 15(c) is to "ensur[e] that the non-moving party has sufficient  
16 notice of the facts and claims giving rise to the proposed amendment." Anthony v. Cambra, 236  
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18 <sup>6</sup> It is also worth noting that the AEDPA tolls the statute of limitations during the period  
19 in which a "properly filed" application for post-conviction relief is pending. See 28 U.S.C. §  
20 2244(d)(2). However, a petition cannot be considered "properly filed" for purposes of the  
21 AEDPA statutory tolling when the state court denies a habeas petition as untimely. See  
22 Trigueros v. Adams, 658 F.3d 983, 988-89 (9th Cir. 2011); Lakey v. Hickman, 633 F.3d 782, 786  
23 (9th Cir.), cert. denied, Lakey v. Cate, \_\_\_ U.S. \_\_\_, 131 S. Ct. 3039 (2011); Thorson v. Palmer,  
24 479 F.3d 643, 645 (9th Cir. 2007) (citing Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005)  
25 (citing Pace, 544 U.S. at 417)). In this case, the California Supreme Court denied petitioner's  
26 November 1, 2010 habeas petition citing to the decisions in In re Robbins, 18 Cal. 4th 770 (1998)  
and In re Clark, 5 Cal. 4th 750 (1993). The state court's reliance on Robbins and Clark was a  
clear ruling that the petition was denied as untimely. See Miles v. Martel, No. 10-15633,  
\_\_\_ F.3d \_\_\_, \_\_\_, 2012 WL 4490756, at \*4 (9th Cir. Sept. 28, 2012) ("A summary denial citing  
[Clark and Robbins] means that the petition is rejected as untimely."); Lakey, 633 F.3d at 786;  
Thorson, 479 F.3d at 645. Accordingly, the AEDPA statute of limitations was not statutorily  
tolled by petitioner's filing of his November 1, 2010 habeas petition with the California Supreme  
Court since that petition was not "properly filed," even assuming that the AEDPA statute of  
limitations period had not already expired.



1 F.3d 568, 576 (9th Cir. 2000).

2 In Mayle, the Supreme Court explained that “[t]he ‘original pleading’ to which  
3 Rule 15 refers is the complaint in an ordinary civil case and the petition in a habeas proceeding.”  
4 545 U.S. at 655. The complaint in a civil case need only provide fair notice of the plaintiff’s  
5 claim and the grounds on which the claim rests, while a habeas petition is required to specify all  
6 grounds for relief available to the petitioner and state the facts supporting each ground. See id.  
7 Because of this difference between civil complaints and habeas petitions, the relation back of  
8 new habeas claims “depends on the existence of a common ‘core of operative facts’ uniting the  
9 original and newly asserted claims.” Id. at 659. See also Schneider v. McDaniel, 674 F.3d 1144,  
10 1151 (9th Cir. 2012).

11 Petitioner argues that his proposed two new claims relate back to his original  
12 November 2009 federal habeas petition. Petitioner’s original federal habeas petition filed with  
13 this court in November of 2009 did, in fact, raise these two claims and thus they would clearly  
14 seem to relate back to that original petition. Nevertheless, respondent argues that “relation back”  
15 is inappropriate here since petitioner abandoned these two claims by not including them in his  
16 second amended federal habeas petition. Petitioner argues that the second amended federal  
17 habeas petition is the applicable petition to examine for purposes of relation back.

18 This court finds respondent’s argument in this regard to be unpersuasive.  
19 Abandonment has a specific meaning in the law: “The relinquishing of a right or interest with  
20 the intention of never again reclaiming it.” Black’s Law Dictionary 2 (8th Ed. 2004). In this  
21 case, the court finds that it is not clear that the *pro se* petitioner intended to abandon two of the  
22 claims for relief raised in his original and first amended federal habeas petitions when he filed his  
23 second amended federal habeas petition with the court. Cf. Cole v. Allison, Civ. No. 09-2549  
24 LKK DAD P, 2011 WL 703665, at \*5 (E.D. Cal. Feb. 18, 2011) (finding that it is not clear that a  
25 *pro se* petitioner intended to abandon claims in his original petition when he filed an amended  
26 petition), report and recommendation adopted by, 2011 WL 1118516 (E.D. Cal. Mar. 28, 2011).

1           The cases respondent relies upon in arguing that it is improper to relate  
2 petitioner's two proposed renewed claims to his original November 2009 federal habeas petition,  
3 are distinguishable. For example, respondent cites to Raspberry v. Garcia, 448 F.3d 1150, 1155  
4 (9th Cir. 2006) in which the Ninth Circuit determined that "a habeas petition filed after the  
5 district court dismisses a previous petition without prejudice for failure to exhaust state remedies  
6 cannot relate back to the original habeas petition." Unlike the situation posed in Raspberry,  
7 however, petitioner's federal habeas petition has never been dismissed without prejudice.  
8 Rather, he has since the time of the original filing maintained an active federal habeas action in  
9 this court. For similar reasons, the other decisions relied upon by respondent are distinguishable  
10 with respect to the issue before this court. See Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001)  
11 ("Dils argues that his third petition relates back to his first petition. Our decisional law  
12 forecloses that contention if the first petition was no longer pending. Dils argues, however, that  
13 his first petition was in fact still pending on April 30, 1998. But our order disposing of that case  
14 had been entered on the docket of the district court by February 12, 1997. The life of the first  
15 federal petition had come to an end.") (internal citation omitted); Green v. White, 223 F.3d 1003,  
16 1003 (9th Cir. 2000) ("Green obtained a voluntary dismissal of his earlier habeas petition in  
17 order to exhaust his state remedies. A second habeas petition does not relate back to a first  
18 habeas petition when the first habeas petition was dismissed for failure to exhaust state  
19 remedies."); Henry v. Lungren, 164 F.3d 1240, 1241 (9th Cir. 1999) ("Because Henry's original  
20 habeas action was dismissed in 1995, there was no pending petition to which Henry's new 1997  
21 petition could relate back or amend.")

22           Unlike the cases relied upon by respondent, petitioner's original habeas petition  
23 was never dismissed (with or without prejudice) and this case has remained active. Thus, the  
24 court finds that petitioner's two proposed renewed claims relate back to his original November  
25 2009 federal habeas petition and will be considered timely as "the life" of his original, timely  
26 filed federal petition has not come to an end.

The timeliness finding does not end the inquiry. As previously stated, a court may deny a motion to amend if the motion is made in bad faith, there would be prejudice to the opposing party, the amendment would be futile or would delay the action, or if the party acted in a dilatory fashion in seeking leave to amend. See Foman, 371 U.S. at 182; Nunes, 375 F.3d at 808; Bonin, 59 F.3d at 845. Respondent does not argue in opposing petitioner’s motion that she would be prejudiced in anyway by the proposed amendment. Rather respondent relies solely on the untimeliness argument. Nonetheless, the court notes that granting the motion to amend would require respondent to file another response to petitioner’s third amended petition which presumably does prejudice the respondent.

Next, the court must examine the futility of the proposed amendments. The court does not find at this stage that amending to assert the proposed two renewed claims would be necessarily futile. Cf. Hill v. Lockhart, 474 U.S. 52, 56-57 (“The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.”) (internal quotation marks and citations omitted). Finally, the court notes that leave to amend should be freely given when justice so requires. See Foman, 371 U.S. at 182.

Upon considering the requisite factors in deciding a motion for leave to file an amended complaint, along with the long-standing preference for deciding cases on the merits, the court will grant petitioner's motion to amend.

## IV. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's motion for leave to file a third amended petition for writ of habeas corpus (Dkt. No. 82.) is granted;

2. Respondent shall have thirty (30) days to file and serve a response to petitioner's third amended petition for writ of habeas corpus; and

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1           3. Petitioner's traverse, if any, shall be filed and served within thirty (30) days of  
2 service of the answer to the third amended petition for writ of habeas corpus. In light of the  
3 many extensions of time already granted to petitioner with respect to the preparation of his  
4 travers and the fact that only two renewed claims are being added by the amendment, no further  
5 extensions of time for the filing of petitioner's traverse will be granted absent extraordinary  
6 circumstances.

7 DATED: October 26, 2012.

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10 DALE A. DROZD  
11 UNITED STATES MAGISTRATE JUDGE

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