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

AARON AUGUSTINE HEREDIA, No. CIV S-10-0693-CMK-P

Petitioner,

vs.

ORDER

MICHAEL MARTEL,

Respondent.

_____ /

Petitioner, a state prisoner proceeding with retained counsel, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court are petitioner’s motion for leave to amend (Doc. 38) and petitioner’s motion for an extension of time to file a traverse (Doc. 37).

Turning first to petitioner’s motion for leave to amend, petitioner seeks to file an amended petitioner asserting two claims not raised in the original petition. Both parties agree that the new claims are exhausted. Respondent, however, argues that petitioner seeks to assert sub-claims which are unexhausted and untimely because they do not relate back to the date of the filing of the original, timely, petition.

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1 Under Federal Rule of Civil Procedure 15(c), which is applicable in habeas
2 proceedings, amendments made after the statute of limitations has run relate back to the date the
3 original pleading was filed if the original and amended pleadings arise out of the same conduct,
4 transaction, or occurrence. See Mayle v. Felix, 125 S.Ct. 2565, 2570 (2005). An amended
5 habeas petition does not relate back when it asserts a new ground for relief supported by facts
6 that differ in both time and type from those the original petition set forth. See id. at 2566.
7 Relation back requires a common core of operative facts uniting the original and new claims.
8 See id. at 2572. In the habeas context, the Ninth Circuit held that the words “same conduct,
9 transaction, or occurrence” meant that an amended habeas petition would relate back so long as
10 any new claims stems from the petitioner’s trial, conviction, or sentence. See id. The Supreme
11 Court noted that, under this formulation, “. . . virtually any new claim introduced in an amended
12 petition will relate back, for federal habeas claims, by their very nature, challenge the
13 constitutionality of a conviction or sentence. . . .” Id. The majority of circuits have adopted a
14 narrower rule in light of AEDPA’s one-year statute of limitations. See id. The narrow rule
15 allows relation back only when “. . . the claims added by amendment arise from the same core
16 facts as the timely claims and not when the new claims depend upon events separate in ‘both
17 time and type’” from the originally raised claims. Id. In determining whether the amended claim
18 and original claim arose from a common core of operative facts, the Supreme Court in Mayle
19 compared the facts required to answer the dispositive questions presented as to each claim. See
20 id. at 2573.

21 In this case, petitioner asserts as follows in his original pro se petition: (1) he
22 would not have been convicted had the jury known that the bruises on the victim’s body were
23 due to her anemia and not abuse by petitioner; (2) he is entitled to “constitutional reversal”
24 because the victim’s death may have been caused by medication given to her at the hospital;
25 (3) petitioner’s trial counsel was ineffective for failing to ensure that the victim’s body was
26 preserved for further testing; and (4) the state court erred by not admitting petitioner’s

1 declaration. Respondent argues that the state court’s determination that the first two claims did
2 not raise a prima facie case was not objectively unreasonable, that the state court’s denial of the
3 ineffective assistance of counsel claim on the merits was not objectively unreasonable, and that
4 petitioner’s fourth assertion does not state a cognizable federal habeas claim. In the proposed
5 amended petition, petitioner seeks to the raise the following claims: (1) the state court
6 unreasonably applied California v. Trombetta, 467 U.S. 479 (1984), and Arizona v. Youngblood,
7 488 U.S. 51 (1988), with respect to the trial court’s denial of defense motions seeking dismissal
8 or exclusion of evidence due to the prosecution’s failure to preserve the victim’s body until it
9 could be examined by a defense expert; and (2) trial counsel rendered ineffective assistance by
10 failing to seek a formal order to preserve the victim’s body.¹ Respondent concedes that the
11 Trombetta-Youngblood claim relates back to the original petition such that it can be considered
12 timely.

13 Respondent objects to allowing the amendment, however, to the extent petitioner
14 is attempting to raise distinct claims relating to jury instructions. Specifically, respondent
15 contends that petitioner is raising two distinct and separate sub-claims as follows: (1) the trial
16 court erred by failing to give an instruction permitting the jury to consider the prosecutions’
17 failure to preserve the victim’s body; and (2) trial counsel was ineffective for failing to request
18 such an instruction. Respondent submits that these two sub-claims do not relate back to the
19 original petition because these new claims concern jury instructions given at the end of the trial
20 whereas the original ineffective assistance of counsel claim concerns counsel’s conduct prior to
21 trial. As such, respondent concludes, the new claims are separate in both time and type.

22 In reply, petitioner argues simply that the “sub-claims” identified by respondent
23 are not separate and distinct claims but, rather, are “logically subsumed” in his other claims.
24 Petitioner argues that the issue of a curative instruction is relevant to analyzing whether the trial

25 ¹ It thus appears that petitioner is abandoning the first, second, and fourth claims
26 asserted in the original pro se petition.

1 court violated petitioner's due process rights by not ordering a curative instruction as an
2 appropriate remedy in response to defense motions regarding preservation of the victim's body.
3 Petitioner also argues that the issue of counsel's failure to request a curative instruction is
4 relevant to analyzing whether trial counsel was ineffective in more general terms concerning
5 preservation of the victim's body. The court finds these arguments to be somewhat attenuated
6 and that accepting them would in essence allow petitioner's jury instruction arguments to slip
7 through the back door. Far from being "logically subsumed," the jury instruction claims are
8 distinct arguments factually. For example, petitioner claims that trial counsel was ineffective for
9 failing to seek an order to preserve the victim's body. This necessarily involves factual questions
10 as to what counsel did and did not do before the presentation of evidence which are unrelated to
11 questions as to whether counsel should have sought a curative instruction after the presentation
12 of evidence.

13 The court will grant petitioner's motion for leave to amend in order to raise the
14 following claims: (1) whether the state court unreasonably applied California v. Trombetta, 467
15 U.S. 479 (1984), and Arizona v. Youngblood, 488 U.S. 51 (1988), with respect to the trial
16 court's denial of defense motions seeking dismissal or exclusion of evidence due to the
17 prosecution's failure to preserve the victim's body until it could be examined by a defense
18 expert; and (2) whether trial counsel rendered ineffective assistance by failing to seek a formal
19 order to preserve the victim's body. Any assertion that petitioner is entitled to federal habeas
20 relief due to the failure of the trial court to give a curative instruction, or counsel's failure to
21 request the same, do not relate back to the original petition and are, therefore, untimely.

22 Accordingly, IT IS HEREBY ORDERED that:

- 23 1. Petitioner's motion for leave to amend (Doc. 38) is granted;
- 24 2. Any claims relating to jury instructions relating to preservation of the
25 victim's body are untimely as they do not relate back to the date the original petition was filed;
- 26 3. The Clerk of the Court is directed to file the proposed amended petition;

1 4. Petitioner's motion for an extension of time to file a traverse (Doc. 37) is
2 denied as moot;

3 5. Respondent shall file a response to petitioner's amended petition within 30
4 days from the date of service of this order; and

5 6. Petitioner's traverse or reply (if an answer to the petition is filed), if any,
6 or opposition or statement of non-opposition (if a motion in response to the petition is filed) shall
7 be filed and served within 30 days of service of respondent's response.

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9 DATED: March 12, 2012

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11 **CRAIG M. KELLISON**
12 UNITED STATES MAGISTRATE JUDGE
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