

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BLUFFORD HAYES, Jr.,
Petitioner,
v.
ROBERT NEUSCHMID,
Respondent.

No. 2:19-cv-1279-TLN-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner is a state prisoner proceeding through counsel seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed a motion to dismiss claims 1, 2, 3, 4, 6, 7, and 8 of the amended petition (ECF No. 18) as untimely. ECF No. 19. On February 5, 2020, the court held a hearing on the matter. Attorney Richard Such appeared on behalf of petitioner; Attorney David Eldridge appeared on behalf of respondent. For the reasons stated on the record and summarized below, respondent’s motion to dismiss must be denied.¹

////

¹ At the hearing, the court also addressed Mr. Such’s request (ECF No. 20) to be formally appointed by the court as counsel for petitioner. That request is denied. The court may appoint counsel at any stage of the proceedings “if the interests of justice so require.” See 18 U.S.C. § 3006A; see also, Rule 8(c), Rules Governing § 2254 Cases. However, there is no absolute right to appointment of counsel in habeas proceedings. See *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996). The court does not find that the interests of justice warrant appointment of counsel at this time.

1 As a threshold matter, two defects in the original petition must be addressed. First, the
2 original petition was neither signed under penalty of perjury by petitioner himself nor by a person
3 designated as authorized to sign for him. *See* 28 U.S.C. § 2242; Rule 2(c)(5), Rules Governing
4 Section 2254 Cases. Petitioner has since cured this defect through a declaration, filed on
5 February 7, 2020, confirming that he authorized the filing of the original petition on his behalf.
6 ECF No. 29. The second defect is that the original petition repeatedly refers to a document –
7 Appendix B - that was inadvertently omitted from the original filing. *See* ECF No. 21-1.
8 Petitioner’s counsel cured this defect by subsequently filing Appendix B with the court, along
9 with an explanatory declaration. *See id.* The court considers Appendix B, which was
10 incorporated by reference, as part of the original petition.

11 Turning to the motion to dismiss, respondent argues that the claims added by the amended
12 petition are time-barred. Respondent concedes that the original petition was filed before the July
13 11, 2019 expiration of the limitation period, ECF No. 19 at 1, but contends that new claims were
14 added in the amended petition filed on September 30, 2019, and that those claims are untimely.
15 A claim asserted in an amended pleading but after the expiration of the statute of limitations is
16 timely if it relates back to a claim(s) asserted in a timely filed petition. The new claim will relate
17 back to an existing, timely-filed claim if the two claims share a “common core of operative facts.”
18 *Mayle v. Felix*, 545 U.S. 644, 659 (2005). “An amended habeas petition does not relate back (and
19 thereby escape AEDPA’s one-year time limit) when it asserts a new ground for relief supported
20 by facts that differ in both time and type from those the original pleading set forth.” *Id.* at 650.
21 A new claim also does not relate back to an existing claim simply because it arises from “the
22 same trial, conviction or sentence.” *Id.* at 663-64.

23 Having compared claims 1, 2, 3, 4, 6, 7, and 8 of the amended petition to those asserted in
24 the original petition, the court finds that they relate back to the claims of the original petition. As
25 to claims 1, 3, and 4 of the amended petition, respondent concedes that their “factual bases . . .
26 more or less appear to be the same as those [] in the original petition . . .” ECF No. 19 at 4, 6, 7.
27 Respondent’s core argument that the claims nevertheless fail to relate back because they rely on
28 additional facts distorts the applicable standard. To relate back, the claims need only share a

1 “common core” of facts. *Mayle*, 545 U.S. at 659. Respondent concedes as much with respect to
2 claims 1, 3, and 4. Indeed, claim 1 of the amended petition was alleged in the original petition by
3 way of “Ground One” (ECF No. 1 at 5); claim 3 of the amended petition was alleged in the
4 original petition by way of “Ground 2” (*id.* at 7); and claim 4 of the amended petition was alleged
5 in the original petition by way of “Ground 3” (*id.* at 8). Similarly, claims 6, 7, and 8 of the
6 amended petition were alleged in the original petition by way of “Grounds 5-7” and paragraphs
7 (5)-(7) of Appendix B (*id.* at 10; ECF No. 21-1).

8 Further, claim 2 of the amended petition was alleged in the original petition by way of
9 “Ground 1” and paragraph (1) of Appendix B (ECF No. 1 at 6; ECF No. 21-1). The original
10 petition alleged that appellate counsel failed to perfect the appeal and failed to file an ancillary
11 petition to show that, but for the denial of the right to counsel, petitioner would have been able to
12 present a compelling defense. *Id.* Claim 2 in the amended petition expands upon this by adding
13 that appellate counsel also failed to read the complete record, to accept assistance from former
14 counsel, and to rely on evidence showing that petitioner was prejudiced. ECF No. 18 at 6-7.
15 These more specific allegations lend support and background as to how and why appellate
16 counsel was ineffective in presenting and perfecting petitioner’s appeal. They are based on the
17 same core set of facts alleged in the original petition and thus, relate back.

18 For the reasons stated above, respondent’s motion to dismiss must be denied.

19 Accordingly, IT IS ORDERED that petitioner’s motion for appointment of counsel (ECF
20 No. 20) is denied.

21 Further, IT IS RECOMMENDED that respondent’s motion to dismiss (ECF No. 19) be
22 denied.

23 These findings and recommendations are submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
25 after being served with these findings and recommendations, any party may file written
26 objections with the court and serve a copy on all parties. Such a document should be captioned
27 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

28 ////

1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: March 4, 2020.

4 
5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28