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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS HAITHCOCK,

Petitioner,

v.

M. VEAL, Acting Warden

Respondent.

Case No. 06-CV-0100-J (JMA)

**REPORT AND RECOMMENDATION
RECOMMENDING DENIAL OF
PETITIONER'S MOTION FOR LEAVE
TO AMEND PETITION [Doc. 51]**

I. INTRODUCTION

On February 10, 2009, Petitioner Thomas Haithcock filed a motion for leave to amend his Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 to add two exhausted claims. [Doc. 51] The Court issued an Order requiring Respondent to file a response to the motion for leave to amend by March 18, 2009. [Doc. 52] On March 18, 2009, Respondent filed an opposition to Petitioner's motion for leave to amend. [Doc. 54] After requesting and receiving an extension, Petitioner filed a reply in support of his motion for leave to amend on May 6, 2009. [Doc. 62] The Court finds that the two grounds Petitioner seeks to add (involving ineffective assistance of counsel/ confrontation clause issues arising during trial) do not arise from a common core of operative facts as the grounds raised in the original Petition (trial court error in denying Peti-

1 tioner's pretrial motions to substitute counsel and an unconstitutional prison sentence)
2 because they differ in both time and type. Therefore, the two new claims would not
3 "relate back" for statute of limitations purposes and are time-barred. Accordingly,
4 amendment would be futile, and Petitioner's motion for leave to amend is denied.

5 **II. FACTUAL AND PROCEDURAL SUMMARY**

6 On May 4, 2004, Petitioner was convicted in San Diego County Superior Court of
7 selling and possessing cocaine. On June 4, 2004, the court sentenced Petitioner to ten
8 years in state prison. On January 19, 2005, Petitioner filed an appeal in the California
9 Court of Appeal raising two issues: (1) that the trial court violated his Sixth Amendment
10 right to effective assistance of counsel when it denied his pretrial motions to substitute
11 defense counsel, and (2) that the trial court denied him due process when it improperly
12 sentenced him based on aggravating factors that were not found by a jury or admitted
13 by Petitioner. On August 10, 2005, the California Court of Appeal affirmed Petitioner's
14 conviction. Petitioner thereafter filed a petition for review by the California Supreme
15 Court. On October 19, 2005, the California Supreme Court summarily denied review.

16 On January 17, 2006, Petitioner filed a petition for writ of habeas corpus in this
17 Court [Doc. No. 1] raising the same two claims as in his direct appeals in state court,
18 arguing that: (1) the trial court denied his Sixth Amendment right to effective assistance
19 of counsel when it denied his two motions to substitute counsel, and (2) the trial court
20 denied his Fourteenth Amendment right to due process when it used aggravating
21 factors not found by a jury in Petitioner's sentencing. (See Petition at 7-9) On February
22 24, 2006, Petitioner filed a Motion for a Stay and Abeyance on the grounds that he had
23 discovered new issues related to his case and that he wanted to exhaust them in state
24 court. [Doc. No. 6]

25 On February 28, 2006, Petitioner began exhausting two new claims by filing
26 habeas petitions in the state superior, appellate and supreme courts. The writ filed by
27 Haithcock in San Diego County Superior Court on February 28, 2006 raised the same
28 two claims alleged in his federal Petition, as well as two additional claims: (1) that his

1 Sixth Amendment right to effective assistance of counsel was violated because his trial
2 and appellate counsel were ineffective, and (2) admission of the arresting officer's
3 testimony at trial (which Haithcock alleged was hearsay) violated the confrontation
4 clause. The California Supreme Court ultimately denied Haithcock's petition on March
5 21, 2007. On August 30, 2006, the undersigned magistrate judge issued a report
6 and recommendation recommending that Petitioner's Motion for Stay and Abeyance be
7 denied. [Doc. No. 33] The Court issued an order adopting the report and
8 recommendation on November 7, 2006. [Doc. No. 38] On February 10, 2009,
9 Haithcock moved to amend his federal petition to add these two newly exhausted claims
10 involving ineffective assistance of counsel/confrontation clause issues arising during
11 trial. [Doc. No. 51]

12 **III. LEGAL STANDARD ON MOTIONS FOR LEAVE TO AMEND**

13 Motions to amend a petition for writ of habeas corpus are governed by the same
14 standards as motions to amend a complaint in other civil actions. A party may amend a
15 pleading under Rule 15(a) of the Federal Rules of Civil Procedure once as a matter of
16 course at any time before a responsive pleading is served. Once a responsive pleading
17 is served, a party may amend the pleading only by leave of court or by written consent
18 of the adverse party; leave shall be freely given when justice so requires. Fed.R.Civ.P.
19 15(a); *Morris v. United States District Court*, 363 F.3d 891, 894 (9th Cir. 2004). Here, a
20 responsive pleading has been filed and Respondent does not consent, so Petitioner can
21 only amend with leave of court.

22 It is appropriate to deny leave to amend where amendment would be futile.
23 *Foman v. Davis*, 371 U.S. 178, 182 (1962). A district court may deny leave to amend
24 based on "the presence of any of four factors: bad faith, undue delay, prejudice to the
25 opposing party, and/or futility." *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th
26 Cir. 1999). "Futility of amendment can, by itself, justify the denial of a motion for leave
27 to amend." *United States v. Smithkline Beecham Clinical Labs.*, 245 F.3d 1048, 1052
28 (9th Cir. 2001); see also *Bonin v. Calderon*, 59 F.3d 815, 845-46 (9th Cir. 1995) (futility

1 of amendment justifies the denial of a motion for leave to amend).

2 **IV. STATUTE OF LIMITATIONS**

3 Haithcock's Petition is governed by the Antiterrorism and Effective Death Penalty
4 Act of 1996 ("AEDPA") which places a one-year statute of limitations on the filing of
5 petitions for writs of habeas corpus. 28 U.S.C. § 2244(d). Here, the statute of
6 limitations period began to run from the date Haithcock's judgment of conviction
7 became final. See 28 U.S.C. § 2244(d)(1)(A). Thus, Haithcock's conviction became
8 final on January 17, 2006 -- 90 days after the California Supreme Court summarily
9 denied his petition for review. See *Bowen v. Roe*, 188 F.3d 1157, 1159-60 (9th Cir.
10 1999). Absent tolling, the one-year statute of limitations period would have expired on
11 January 17, 2007. However, Haithcock is entitled to statutory tolling for the period of
12 time he diligently sought post-conviction relief in state court. 28 U.S.C. § 2244(d)(2);
13 *Harris v. Carter*, 515 F.3d 1051 (2008) ("AEDPA tolls the one-year limitations period
14 while a 'properly filed application' for postconviction review is pending in state court.")
15 State collateral review only tolls the one-year period; it does not delay its
16 commencement. See *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003).

17 Here, according to Haithcock's March 21, 2006 Motion for Stay and Abeyance,
18 he filed his first collateral state petition on February 28, 2006, 42 days after the statute
19 of limitations period began. His final state collateral petition was denied on March 21,
20 2007, and the limitations period resumed the following day. Thus, taking into account
21 the statutory tolling to which Haithcock was entitled while his state collateral petitions
22 were pending, the statute of limitations period expired on February 7, 2008.

23 Accordingly, unless the amendment sought by Petitioner relates back to the date of the
24 filing of the original habeas petition, it is untimely by over a year.

25 Amendments made after the statute of limitations has run relate back to the date
26 of the original pleading only if the amended pleading arises out of the same "conduct,
27 transaction or occurrence." Fed. R. Civ. P. 15(c)(2). In *Mayle v. Felix*, 545 U.S. 644
28 (2005), the Supreme Court held that in habeas cases, the phrase "conduct, transaction

1 or occurrence” should not be defined so broadly as to allow relation back of a new claim
2 that stems from the petitioner’s “trial conviction or sentence.” *Id.* at 656. The Court
3 reasoned that “[u]nder that comprehensive definition, virtually any new claim introduced
4 in an amended petition will relate back.” *Id.* at 656-57. Instead, it held that “conduct,
5 transaction or occurrence” in federal habeas cases should be defined less broadly, and
6 “allow relation back only when the claims added by amendment arise from the same
7 core facts as the timely filed claims, and not when the new claims depend upon events
8 separate in ‘both time and type’ from the originally raised episodes.” *Id.* at 657.

9 **IV. PETITIONER’S MOTION TO AMEND IS DENIED AS FUTILE BECAUSE THE**
10 **AMENDMENTS DO NOT “RELATE BACK” TO THE ORIGINAL PETITION**

11 In *Mayle*, 545 US. 644, Petitioner filed a timely petition for habeas corpus
12 alleging Sixth Amendment confrontation clause issues arising from admission at trial of
13 a videotape of statements made at a jailhouse interview by a witness for the
14 prosecution. *Id.* at 648. After the statute of limitations had run, Petitioner filed an
15 amended petition alleging Fifth Amendment issues, asserting that admission at trial of a
16 confession he made during pretrial interrogation by police violated his right against self-
17 incrimination. *Id.* at 649. The Petitioner argued, and the Court of Appeals held, that the
18 amended petition qualified for relation back because both the original petition and the
19 amended petition arose from the same trial and conviction. The Supreme Court
20 reversed, holding that an “amended habeas petition . . . does not relate back (and
21 thereby escape AEDPA’s one-year time limit) when it asserts a new ground for relief
22 supported by facts that differ in both time and type from those the original pleading set
23 forth.” *Id.* at 650. The Supreme Court rejected Petitioner’s contention that the trial itself
24 was the “transaction” or “occurrence” at issue. *Id.* at 660. It reasoned that although
25 Felix’s Fifth Amendment claim did not ripen until the statements were admitted against
26 him at trial, the dispositive question in adjudicating that claim was not Felix’s conduct in
27 court, but at his out-of-court police interrogation, and specifically, whether he answered
28 voluntarily or whether his statements were coerced. *Id.* at 661. The Court accordingly
held that Felix’s Sixth Amendment confrontation clause claim was a separate, discrete

1 claim, supported by separate facts, such that it did not constitute the same
2 “occurrence.” *Id.*

3 Likewise, here, Haithcock timely filed a petition for habeas corpus asserting two
4 grounds -- (1) that the state superior court’s denial of his two pretrial motions to
5 substitute defense counsel violated his Sixth Amendment right to counsel, and (2) that
6 his prison sentence violated his federal constitutional right to a jury trial. After the
7 statute of limitations ran, Haithcock filed the present motion for leave to amend his
8 petition, seeking to add two newly exhausted claims involving ineffective assistance of
9 counsel/confrontation clause issues arising during the trial - - (1) that counsel was
10 ineffective for not telling him about a proceeding where accomplice Grace Cartwright,
11 who Haithcock hoped to call as a witness, pled the Fifth Amendment, and (2) that
12 counsel was ineffective for not objecting to the arresting officer’s testimony at trial which
13 Haithcock claims was hearsay.

14 Based of the particularity-in-pleading requirement under Habeas Corpus Rule
15 2(c), Haithcock’s new claims would need to be pled discretely from one another, and
16 from those alleged in his original petition. See *Mayle*, 545 US at 661 (under Habeas
17 Corpus Rule 2(c), “Felix’s Confrontation Clause claim would be pleaded discretely, as
18 would his self-incrimination claim”); see also *United States v. Ciampi*, 419 F.3d 20, 24
19 (1st Cir. 2005) (“a petitioner does not satisfy the Rule 15 ‘relation back’ standard merely
20 by raising some type of ineffective assistance in the original petition, and then amending
21 the petition to assert another ineffective assistance claim based upon an entirely distinct
22 type of attorney misfeasance”). As Haithcock’s new claims differ in both time and type
23 from the claims Haithcock originally pled and would need to be supported by separate
24 facts, they do not constitute the same “occurrence.” Therefore, these new ineffective
25 assistance of counsel/confrontation clause claims do not “relate back” for statute of
26 limitations purposes, and are time-barred. As the claims are time-barred, granting
27 Haithcock leave to amend his petition would be futile.

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1 **VI. CONCLUSION AND RECOMMENDATION**

2 Because the claims Haithcock seeks to add are untimely under the AEDPA
3 statute of limitations and do not relate back to the grounds raised in his original petition,
4 allowing Haithcock to amend his petition would be futile. Accordingly, the undersigned
5 magistrate judge recommends that Petitioner's motion for leave to amend his petition
6 [Doc. 51] be **DENIED**.


7 This Report and Recommendation is submitted to the Honorable Napoleon A.
8 Jones Jr., United States District Judge, pursuant to the provisions of 28 U.S.C. §
9 636(b)(1).

10 **IT IS ORDERED** that no later than **June 22, 2009** any party to this action may file
11 written objections with the Court and serve a copy on all parties. The document should
12 be captioned "Objections to Report and Recommendation."

13 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the
14 Court and served on all parties within **10 days** of being served with the objections.

15 **IT IS SO ORDERED**

16 DATED: May 22, 2009

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19 Jan M. Adler
20 U.S. Magistrate Judge
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