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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

THOMAS OUIA HAITHCOCK,

Petitioner,

v.

M VEAL, Warden,

Respondent.

Case No. 06cv0100-J (JMA)

**ORDER:**

**(1) ADOPTING R&R; and**

**(2) DENYING PETITIONER'S  
MOTION FOR LEAVE TO AMEND**

Presently before this Court is Magistrate Judge Jan M. Adler’s Report and Recommendation (“R&R”) recommending that the Court deny Petitioner Thomas Haithcock’s (“Petitioner” or “Haithcock”) motion for leave to amend petition. [Doc. No. 51]. This Court has considered Haithcock’s Petition, Haithcock’s motion for leave to amend, Respondent M Veal’s (“Respondent” or “Veal”) Response to the motion, and all supporting documentation submitted by the parties. Having considered these documents, this Court **ADOPTS** the R&R and **DENIES** Petitioner’s motion for leave to amend Petition because it would be futile.

***Procedural Background***

On May 4, 2004, Petitioner was convicted in San Diego County Superior Court of selling and possessing cocaine. Petitioner was sentenced to ten years in state prison. On January 19, 2005, Petitioner filed an appeal in the California Court of Appeal raising two

1 issues: (1) that the trial court violated his Sixth Amendment right to effective assistance of  
2 counsel when it denied his pretrial motions to substitute defense counsel, and (2) that the trial  
3 court denied him due process when it improperly sentenced him based on aggravating factors  
4 that were not found by a jury or admitted by Petitioner. On August 10, 2005, the California  
5 Court of Appeal affirmed Petitioner's conviction. Petitioner thereafter filed a petition for  
6 review by the California Supreme Court. On October 19, 2005, the California Supreme Court  
7 summarily denied review.

8 On January 17, 2006, Haithcock filed a petition for writ of habeas corpus in this Court  
9 [Doc. No. 1], raising the same two claims as in his direct appeals in state court. (*See* Petition  
10 at 7-9). On February 24, 2006, Petitioner filed a motion for a stay and abeyance on the grounds  
11 he discovered new issues related to his case that he wanted to exhaust in state court. [Doc. No.  
12 6].

13 On February 28, 2006, Petitioner began exhausting two new claims by filing state  
14 habeas petitions in the state Superior, Appellate, and Supreme Courts. The writ filed in the San  
15 Diego Superior Court raised the same two claims alleged in Haithcock's Federal Petition, as  
16 well as two additional claims: (1) that his Sixth Amendment right to effective assistance of  
17 counsel was violated because his trial and appellate counsel were ineffective, and (2)  
18 admission of the arresting officer's testimony at trial violated the confrontation clause  
19 (Haithcock alleged it was hearsay). Haithcock's petition was ultimately denied by the  
20 California Supreme Court on March 21, 2007.

21 On August 30, 2006, the magistrate judge issued an R&R recommending that  
22 Petitioner's motion for a stay and abeyance be denied. [Doc. No. 33]. The Court issued an  
23 order adopting the R&R on November 7, 2006. [Doc. No. 38].

24 On February 10, 2009, Haithcock moved to amend his federal Petition to add the two  
25 newly exhausted claims involving ineffective assistance of counsel and confrontation clause  
26 issues arising during trial. [Doc. No. 51].

### 27 ***Legal Standard***

28 Motions for leave to amend a petition for writ of habeas corpus are governed by the  
same standards as motions to amend a complaint in other civil actions. A party may amend a

1 pleading once as a matter of course at any time before a responsive pleading is served. Fed.  
2 R. Civ. P. 15(a). Once a responsive pleading has been served, however, a party may amend the  
3 pleading only by leave of court or by written consent of the adverse party. *Id.*

4 Leave is freely given when justice so requires. *Morris v. U.S. Dist. Court*, 363 F.3d 891,  
5 894 (9th Cir. 2004). However, it is appropriate to deny leave to amend where amendment  
6 would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A district court may deny leave  
7 to amend based on “the presence of any of four factors: bad faith, undue delay, prejudice to  
8 the opposing party, and/or futility.” *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th  
9 Cir. 1999). “Futility of amendment can, by itself, justify the denial of a motion for leave to  
10 amend.” *United States v. Smithkline Beecham Clinical Labs.*, 245 F.3d 1048, 1052 (9th Cir.  
11 2001); *see also Bonin v. Calderon*, 59 F.3d 815, 845-46 (9th Cir. 1995) (futility of amendment  
12 justifies denial of a motion for leave to amend).

### 13 *Discussion*

#### 14 **I. Statute of Limitations**

15 Haithcock’s Petition is governed by the Antiterrorism and Effective Death Penalty Act  
16 of 1996 (“AEDPA”), which places a one-year statute of limitations on the filing of petitions  
17 for writ of habeas corpus following final judgment from a state conviction. 28 U.S.C. §  
18 2244(d). Here, the statute of limitations period began to run from the date Haithcock’s  
19 judgment of conviction became final on January 17, 2006 - 90 days after the California  
20 Supreme Court summarily denied his petition for review. *See Bowen v. Roe*, 188 F.3d 1157,  
21 1159-60 (9th Cir. 1999). Absent tolling, the one-year statute of limitations would have expired  
22 January 17, 2007. However, Haithcock is entitled to statutory tolling for the period of time he  
23 diligently sought post-conviction relief in state court. 28 U.S.C. § 2244(d)(2); *Harris v. Carter*,  
24 515 F.3d 1051 (2008)(“AEDPA tolls the one-year limitations period while a ‘properly filed  
25 application’ for post-conviction review is pending in state court.”) State collateral review only  
26 tolls the one-year period; it does not delay its commencement. *See Laws v. Lamarque*, 351  
27 F.3d 919 (9th Cir. 2003).

28 Here, Haithcock’s limitations period began to run until he filed his first collateral state  
petition on February 28, 2006, 42 days into the one-year limitations period. Haithcock’s final

1 state collateral petition was denied March 21, 2007, and the limitations period resumed the  
2 following day. Accordingly, taking into account the statutory tolling Haithcock was entitled  
3 to, the limitations period expired for Haithcock on February 7, 2008. Haithcock's request for  
4 leave to amend was filed more than a year following that date on February 10, 2009. [Doc. No.  
5 51]. Unless Haithcock's amended petition relates back to the date of the original petition, it is  
6 untimely, and thus leave to amend would be futile.

## 7 **II. Relation Back**

8 In certain instances, a petition amended after the statute of limitations has expired can  
9 relate back to the original filing date, making the amended petition timely. However,  
10 amendments made after the statute of limitations expires relate back to the date of the original  
11 pleading only if the amended pleading arises out of the same "conduct, transaction or  
12 occurrence." Fed. R. Civ. P. 15(c)(2). In habeas cases, the Supreme Court held that the phrase  
13 "conduct, transaction or occurrence" should not be defined so broadly as to allow relation back  
14 of a new claim that stems from the petitioner's "trial, conviction or sentence." *Mayle v. Felix*,  
15 545 U.S. 644, 656 (2005). Rather than allow relation back for any new claim, the Court will  
16 "allow relation back only when the claims added by amendment arise from the same core facts  
17 as the timely filed claims, and not when the new claims depend upon events separate in 'both  
18 time and type' from the originally raised episodes." *Id.* at 657.

19 Here, Haithcock's original habeas petition asserted two grounds for relief: (1) that the  
20 State Superior Court's denial of his two pretrial motions to substitute defense counsel violated  
21 his Sixth Amendment right to counsel, and (2) that his prison sentence violated his federal  
22 constitutional right to a jury trial. [Doc. No. 1]. The amended petition seeks to add two  
23 additional claims: (1) that counsel was ineffective for not telling him about a proceeding where  
24 accomplice Grace Cartwright, who Haithcock hoped to call as a witness, pled the Fifth  
25 Amendment, and (2) that counsel was ineffective for not objecting to the arresting officer's  
26 testimony at trial which Haithcock claims was hearsay. [Doc. No. 51].

27 Haithcock's additional claims differ in both time and type from the original claims  
28 because they require proof from outside the core facts needed to prove the original claims. *See*  
*Mayle*, 545 U.S. 644. The first additional claim, ineffective assistance of counsel during the

1 trial, does not relate back to the original ineffective assistance claim. “A petitioner does not  
2 satisfy the Rule 15 ‘relation back’ standard merely by raising some type of ineffective  
3 assistance in the original petition, and then amending the petition to assert another ineffective  
4 assistance claim based upon an entirely distinct type of attorney malfeasance.” *United States*  
5 *v. Ciampi*, 419 F.3d 20, 24 (1st Cir. 2005). The two ineffective assistance claims deal with  
6 entirely different fact scenarios. Additionally, the original ineffective assistance claim arose  
7 pre-trial, while Petitioner’s amended ineffective assistance claim involves events that occurred  
8 at trial. Thus, the amended ineffective assistance of counsel claim does not relate back to the  
9 original petition.

10 Haithcock’s second amended claim, ineffective assistance of counsel for failure to  
11 object to the arresting officer’s testimony, also fails to relate back to the original petition.  
12 Again, there is not an automatic relation back for an additional ineffective assistance claim  
13 when proving the two separate claims requires proof from a different set of core facts. *See*  
14 *Mayle*; 545 U.S. 644; *see also Ciampi*, 419 F.3d at 24. This new claim also deals with an error  
15 that occurred at trial, not pre-trial as the original petition.

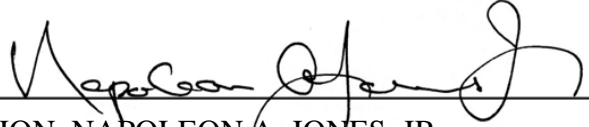
16 ***Conclusion***

17 Therefore, because neither of the two new claims “relate back” to the original petition  
18 for statute of limitations purposes, they are time barred. As a result, granting Haithcock leave  
19 to amend the petition to add time-barred claims would be futile.

20 Accordingly, this Court **ADOPTS** the R&R and **DENIES** Haithcock’s motion for leave  
21 to amend his petition.

22 **IT IS SO ORDERED.**

23  
24 DATED: September 24, 2009

25   
26 HON. NAPOLEON A. JONES, JR.  
27 United States District Judge

28 cc: Magistrate Judge Jan M. Adler  
All Parties