

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
SOUTHERN DISTRICT OF CALIFORNIA**

MARCOS ANTONIO ORTIZ, Petitioner, v. JAMES E. TILTON, Secretary, et al., Respondents.

Civil No. 06cv1752-L (CAB)

**REPORT AND RECOMMENDATION
DENYING MOTION FOR LEAVE TO
FILE FIRST AMENDED PETITION
FOR WRIT OF HABEAS CORPUS
[Doc. No. 18]**

I. INTRODUCTION AND PROCEDURAL HISTORY

On August 25, 2006, Petitioner Marcos Antonio Ortiz ("Petitioner") filed his original Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. [Doc. No. 1.] In the original Petition, Petitioner challenges his San Diego County Superior Court conviction in case number SCN 148098 for one count of assault, two counts of assault with a deadly weapon and two counts of felony vandalism. [Lodgment No. 1 at 171-175.] In the original Petition, Petitioner contends his federal constitutional rights were violated because: (1) the evidence was legally insufficient to prove co-defendant had the intent and the present ability to apply the physical force to Cortes and Laura Garcia, a necessary element of assault (and therefore Petitioner's convictions as an aider and abettor must be reversed); and (2) Petitioner's Sixth and Fourteenth Amendment rights to confrontation were violated by the admission of testimonial statements by witnesses not subject to cross-examination by Petitioner. [See Doc. No. 1 at 20 - 39; Lodgment No. 7 at 5 - 42.]

1 Respondent filed his Answer [Doc. No. 7] and Memorandum of Points and Authorities in
2 Support of Answer to Petition for Writ of Habeas Corpus [Doc. No. 7-2] on December 22, 2006.
3 Petitioner did not file a Traverse.

4 On May 5, 2008, this Court issued a Report and Recommendation to United States District
5 Judge M. James Lorenz under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States
6 District Court for the Southern District of California. [Doc. No. 14.] In the Report and
7 Recommendation, this Court recommended that District Judge Lorenz issue an Order: (1) approving
8 and adopting the Report and Recommendation, and (2) directing that Judgment be entered denying
9 the Petition in its entirety.

10 On June 4, 2008, Petitioner filed his Objections to the Report and Recommendation. [Doc.
11 No. 15.] On the same date, Petitioner also filed (erroneously and without required court approval) a
12 First Amended Petition. [Doc. No. 16.] The First Amended Petition purports to set forth the same
13 two exhausted claims set forth in the original petition, as well as one additional unexhausted claim
14 having to do with whether a prior juvenile conviction could be relied upon to enhance his sentence.
15 [Doc. No. 16 at 8.]

16 On June 12, 2008, this Court issued a discrepancy order [Doc. No. 17] accepting for filing
17 Petitioner's Motion to Hold Proceedings in Abeyance Pending Exhaustion of State Remedies. [Doc.
18 No. 18.] On June 23, 2008, this Court issued an order (1) striking the First Amended Petition [Doc.
19 16], (2) directing the Clerk of the Court to attach the First Amended Petition as an exhibit to the
20 Motion to Hold Proceedings in Abeyance, (3) deeming the Motion to Hold Proceedings in Abeyance
21 Pending Exhaustion of State Remedies to be a Motion for Leave to File the First Amended Petition
22 AND a Motion to Hold Proceedings in Abeyance Pending Exhaustion of State Remedies (hereinafter
23 collectively the "motion to amend"), (4) setting a briefing schedule for the motion to amend and (5)
24 staying the Report and Recommendation issued by this Court on May 5, 2008 [Doc. No. 14] pending
25 resolution of the motion to amend. [Doc. No. 19.]

26 On July 8, 2008, Respondent filed an opposition to the motion to amend. [Doc. No. 20.] On
27 August 12, 2008, petitioner filed a reply to respondent's opposition to the motion to amend. [Doc.
28 No. 21.] On August 14, 2008, District Judge M. James Lorenz issued an order referring the motion

1 to amend to this court for a report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(B).
2 [Doc. No. 22].

3 After reviewing the motion to amend, the opposition, and the reply, this Court recommends
4 that the motion to amend be **DENIED**.

5 II. MOTION TO HOLD PROCEEDINGS IN ABEYANCE

6 On February 8, 2008, Petitioner filed a petition for writ of habeas corpus in the California
7 Supreme Court with regard to whether a prior juvenile conviction could be relied upon to enhance
8 his sentence. [Doc. No. 18 at 4, ¶ 3.] On June 4, 2008, petitioner filed a motion to hold these
9 proceedings in abeyance pending a decision by the California Supreme Court. [Doc. No. 18 at 1- 4.]
10 On July 9, 2008, the California Supreme Court denied the petition for writ of habeas corpus
11 regarding whether a prior juvenile conviction could be relied upon to enhance petitioner’s sentence.
12 [Doc. No. 21 at 15.] Therefore, Petitioner’s motion to hold these proceedings in abeyance is now
13 moot.¹

14 III. MOTION TO AMEND

15 The original Petition stated the following claims for relief: (1) the evidence was legally
16 insufficient to prove co-defendant had the intent and the present ability to apply the physical force to
17 Cortes and Laura Garcia, a necessary element of assault (and therefore Petitioner's convictions as an
18 aider and abettor must be reversed); and (2) Petitioner's Sixth and Fourteenth Amendment rights to
19 confrontation were violated by the admission of testimonial statements by witnesses not subject to
20 cross-examination by Petitioner. [See Doc. No. 1 at 20 - 39; Lodgment No. 7 at 5 - 42.]

21 The claim Petitioner wishes to add is as follows: “The judge relied on my juvenile prior
22 obtained without a jury trial to impose a Three Strikes sentence.” [Doc. No. 18-2 at 8.] Petitioner
23 provides the following supporting facts to support the new claim: “My date of birth is June 26, 1974.
24 On August 19, 1991, when I was 17, the juvenile court made a true finding I committed kidnaping
25 with a firearm with a gang enhancement. This is Case No. J73729. I did not have a jury trial, and
26 this prior conviction is now being used to qualify me for a Three Strikes sentence. The United States
27

28 ¹ Petitioner agrees that the motion to hold these proceedings in abeyance is now moot. See Doc.
No. 21 at 2.

1 Constitution prohibits using a non-jury juvenile adjudication to increase the maximum sentence.
2 Without this prior, I would have only one strike.” [Id.]

3 Respondent argues that Petitioner should not be granted leave to amend the Petition because
4 the new claim is being filed after the expiration of the statute of limitations and does not relate back
5 to the claims in the original Petition, and because there is no basis for equitable tolling of the statute
6 of limitations. [Doc. No. 20 at 2-4.]

7 IV. DISCUSSION

8 An application for a writ of habeas corpus “may be amended or supplemented as provided in
9 the rules of civil procedure applicable to civil actions.” 28 U.S.C. § 2242; *see also* Rule 11, Fed. R.
10 Governing § 2254 Cases (providing that the Federal Rules of Civil Procedure may be applied in
11 habeas corpus proceedings to the extent that the rules of civil procedure are not inconsistent with any
12 statutory provision or with the rules governing habeas cases); Fed. R. Civ. P. 81(a)(2) (providing that
13 the Federal Rules of Civil Procedure are applicable to proceedings for habeas corpus “to the extent
14 that the practice in such proceedings is not set forth in statutes of the United States, the Rules
15 Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings”).

16 Under Federal Rule of Civil Procedure 15(a), a habeas petitioner may amend his pleadings
17 once as a matter of course before a responsive pleading is served and may seek leave of court to
18 amend his pleading at any time during the proceeding. *Mayle v. Felix*, 545 U.S. 644, 125 S. Ct.
19 2562, 2569 (2005). In this case, Respondent has filed an answer to the Petition and this court has
20 issued a report and recommendation with regard to the Petition. Therefore, Petitioner must have
21 leave of court to amend his Petition.

22 A. Statute of Limitations

23 Pursuant to 28 U.S.C. § 2244(d)(1), a one-year period of limitation applies to an application
24 for a writ of habeas corpus filed “by a person in custody pursuant to the judgment of a State court.”
25 The limitation period runs from the latest of:

- 26 (A) the date on which the judgment became final by the conclusion of
27 direct review or the expiration of the time for seeking such review;
28 (B) the date on which the impediment to filing an 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;

1 (C) the date on which the constitutional right asserted was initially
2 recognized by the Supreme Court, if the right has been newly
3 recognized by the Supreme Court and made retroactively applicable to
4 cases on collateral review; or
5 (D) the date on which the factual predicate of the claim or claims
6 presented could have been discovered through the exercise of due
7 diligence.

8 28 U.S.C. § 2244(d)(1).

9 The “conclusion of direct review” is not the denial of review by the California Supreme
10 Court, but 90 days thereafter, upon the expiration of the time in which to file a petition for a writ of
11 certiorari in the United States Supreme Court. *Tillema v. Long*, 253 F.3d 494, 498 (9th Cir. 2001);
12 *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). In this case, the California Supreme Court
13 denied Petitioner’s petition for review on July 13, 2005. (Lodgment 7, 8.) The ninety day period
14 expired October 13, 2005. Thus, the statute of limitations (absent any tolling) expired on October 13,
15 2006.

16 Petitioner filed his original Petition on August 25, 2006, well within the limitations period.
17 The filing of this federal petition did not toll the statute of limitations. *Duncan v. Walker*, 533 U.S.
18 167, 181-82 (2001). Petitioner filed his motion to amend on June 4, 2008, almost two years after the
19 expiration of the statute of limitations. Accordingly, the new claim Petitioner seeks to add in his
20 amended petition is outside the statute of limitations unless it relates back to the original claims,
21 Fed. R. Civ. P. 15(c)(2), or unless the statute of limitations is equitably tolled. *Spitsyn v. Moore*, 345
22 F.3d 796, 799 (9th Cir.2003)

23 **B. Relation Back**

24 Under Rule 15(c), a petitioner’s amendments made after the statute of limitations has run will
25 relate back to the date of his original pleading if the new claims arose out of the conduct, transaction,
26 or occurrence set forth or attempted to be set forth in the original pleading. *Id.* (citing Fed. R. Civ. P.
27 15(c)(2)). In *Mayle v. Felix*, 545 U.S. 644, 125 S. Ct. 2562 (2005), the Supreme Court examined the
28 interaction between the AEDPA statute of limitations and the relation back provisions of Rule
15(c)(2). The original petition in that case contained a single Sixth Amendment claim based on the
admission of a witness’s videotaped out-of-court statement. After the statute of limitations had run,
the petitioner filed an amended petition, which added a Fifth Amendment claim stemming from the

1 admission of his pre-trial statements to the police and a Sixth Amendment claim of appellate
2 counsel's ineffectiveness for failing to challenge the use of his statements on appeal. *Id.* at 2567-68.

3 To determine whether the petitioner's amended claims related back to the original petition,
4 the Court focused on the "key words" of Rule 15(c)(2): "conduct, transaction, or occurrence," and
5 found that "relation back depends on the existence of a common 'core of operative facts' uniting the
6 original and newly asserted claims." *Id.* at 2571-72. The petitioner's amended petition did not meet
7 this standard because it "targeted separate episodes, the pretrial police interrogation of witness
8 Williams in [the] original petition, [the petitioner's] own interrogation at a different time and place
9 in [the] amended petition." *Id.* at 2572. Even though the petitioner had no actionable claim until the
10 evidence was introduced at trial, the Court looked to the essential predicate of the two claims. *Id.* at
11 2572-73. The dispositive question in the new claim, alleging a Fifth Amendment violation, was the
12 character of the petitioner's conduct at the police interrogation, not in court. *Id.* at 2573.

13 The Court also relied on Rule 2 of the Rules Governing § 2254 Proceedings, which instructs
14 a petitioner to specify all grounds for relief and state the facts supporting each ground. "Under that
15 Rule, Felix's Confrontation Clause claim would be pleaded discretely, as would his
16 self-incrimination claim. Each separate congeries of facts supporting the grounds for relief, the Rule
17 suggests, would delineate an 'occurrence.'" *Mayle*, 125 S. Ct. at 2573. In a footnote, the Court cited
18 two proper examples of "relating back." The first involved an original challenge to the prosecution's
19 failure to comply with its obligation to provide exculpatory materials to the defense and an amended
20 petition raising the failure to provide a particular report. The Court noted that both pleadings
21 "related to evidence obtained at the same time by the same police department." *Id.* at 2575 n.7. The
22 second involved an original petition challenging the trial court's admission of a witness's recanted
23 statements, while the amended petition challenged the court's refusal to allow the defendant to show
24 the statements had been recanted. *Id.* The Court cited with approval the recognition that relation
25 back would be appropriate if the new claim was based on the same facts as the original pleading but
26 only changed the legal theory. *Id.*

27 The Ninth Circuit has not addressed the question of relation back of habeas claims in a
28 published decision since *Mayle*. The First Circuit has examined the question and, consistent with its

1 reading of *Mayle*, strictly construed the relation back doctrine when considering an amended motion
2 to vacate sentence under 28 U.S.C. § 2255. In *United States v. Ciampi*, 419 F.3d 20 (1st Cir. 2005),
3 *cert. denied*, --- U.S. ----, 126 S. Ct. 2906 (2006), the original petition challenged, among other
4 things, the district court’s failure to adequately inquire into the petitioner’s understanding of the
5 provision for the waiver of appellate rights included in his plea agreement and ineffective assistance
6 of counsel based on his attorney’s failure to investigate misstatements in the indictment. *Id.* at 24.
7 The petitioner then filed an amended petition raising counsel’s ineffectiveness for failing adequately
8 to advise the petitioner to appeal one of the counts of conviction and to explain the waiver of appeal.
9 *Id.* at 22, 24.

10 The court in *Ciampi* found that the new claims did not relate back. Although both claims
11 “generally related to [the petitioner’s] ‘understanding’ of his appellate waiver,” they focused on
12 wholly different aspects and actors, which prevented a finding that the new claim related back to the
13 original petition. *Id.* at 24. “[A]mended habeas corpus claims generally must arise from the ‘same
14 core facts,’ and not depend upon events which are separate both in time and type from the events
15 upon which the original claims depended.” *Id.*

16 In this case, it is clear that the new claim Petitioner wishes to add does not relate back to the
17 original Petition. Under *Mayle*, the relationship between the original Petition and the new claim
18 must be stronger than the fact that both arose out of the “same trial, conviction, or sentence.” *Mayle*,
19 125 S. Ct. at 2574. Here, the original claims had to do with whether there was sufficient evidence of
20 assault, and whether certain witness statements should have been admitted at trial. The proposed
21 new claim has to do with whether a prior juvenile conviction should have been used to enhance
22 Petitioner’s sentence. This claim does not arise from the same “core facts” and is clearly different in
23 time and type from the claims in the original Petition. Therefore, the new claim does not relate back
24 to the original claims.

25 **C. Equitable Tolling**

26 In rare instances, a petitioner may receive equitable tolling of the statute of limitations. See
27 *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir.2003). Equitable tolling is appropriate only when
28 “extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on

1 time.” *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir.2006) (citation omitted) (citing *Calderon v.*
2 *United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288 (9th Cir.1997), overruled in part on other
3 grounds by *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 539-40 (9th Cir.1998)). The
4 burden of proof to show equitable tolling falls on the petitioner. See *Miranda v. Castro*, 292 F.3d
5 1063, 1065 (9th Cir.2002).

6 Petitioner believes he is entitled to equitable tolling of the statute of limitations because of
7 his medical condition and because prison policy denied him access to the law library and legal
8 materials. [Doc. No. 21 at 11, ¶ 7.] As to his medical condition, plaintiff claims that he has been on
9 various medications over the past three years. [Doc. No. 21 at 11, 12.] However, plaintiff does not
10 state how, whether, or when those medications rendered him incapable of pursuing his legal
11 remedies. Plaintiff does claim he had one seizure on March 25, 2008. [Doc. No. 21 at 12, ¶ 15.]
12 However, this was one and a half years after the statute of limitations expired, and therefore does not
13 provide a basis for tolling the statute. Moreover, there is no indication of the severity of the seizure
14 or how long it may have rendered him incapable of pursuing legal remedies. Petitioner also claims
15 that he was hospitalized in September 2006, but does not state how long he was hospitalized or for
16 what reason. [Doc. No. 21 at 13, ¶ 19.] Finally, Petitioner also refers to medical problems he had
17 resulting from a lack of a gluten-free diet. [Doc. No. 21 at 12.] Again, these problems appear to have
18 taken place after July 2007, or eight months after the statute of limitations expired. There is also no
19 specific evidence as to whether the lack of such a diet incapacitated Petitioner to the point where he
20 was incapable of pursuing his legal remedies. Petitioner has simply failed to meet his burden of
21 proof that his alleged medical conditions made it impossible for him to file his new claim in a timely
22 fashion. See *Lampert*, 465 F.3d at 969; *Miranda*, 292 F.3d at 1065. Therefore, Petitioner’s claimed
23 medical problems do not provide a basis for equitable tolling.

24 Petitioner also alleges that while he was at Salinas Valley State Prison, from July 2004
25 through December 2006, the “prison had lockdowns which completely precluded library access and
26 occasionally would go off lockdown and grant law library access but only to those with a filing
27
28

1 deadline.” [Doc. No. 21 at 13, ¶ 17.]² Later, petitioner alleges that his property, including his legal
2 papers, were taken and that the prison was on lockdown almost continuously throughout September,
3 October and November, “with only one or two weeks off during the entire period” but where even
4 then he was “denied access to the law library and to vocational programs due to the lockdown.”
5 [Doc. No. 21 at 13, ¶ 20.] While Petitioner has made specific allegations regarding the duration of
6 the lockdowns, he has provided no evidence of the existence of those conditions. It is not clear how
7 many lockdowns there were during the stretch Petitioner cites, or if there were opportunities between
8 lockdowns for Petitioner to use the law library. But even if Petitioner was prevented from using the
9 prison law library from time to time in September and October of 2006, he still would have lost only
10 a few weeks within the limitations period. Standing alone, this impediment does not amount to
11 “extraordinary circumstances.” See *Lampert*, 465 F.3d at 969; *United States v. Cicero*, 214 F.3d 199,
12 203-04 (D.C.Cir.2000) (finding that interruptions to a prisoner's access to the law library during the
13 final months of the limitations period did not constitute extraordinary circumstances); *United States*
14 *v. Van Poyck*, 980 F.Supp. 1108, 1111 (C.D.Cal.1997) (holding that brief security lockdowns “could
15 hardly be characterized as an ‘extraordinary circumstance’ ”); cf. *Lott v. Mueller*, 304 F.3d 918,
16 924-25 (9th Cir.2002) (finding that transfers which resulted in a prisoner's loss of access to legal
17 materials for eighty-two days, during a time when there were open questions about the proper
18 method of statutory tolling during the pendency of the prisoner's petition in state court, appear to
19 satisfy the extraordinary circumstances requirement for equitable tolling).

20 Additionally, while Petitioner claims that the lockdowns prevented him from visiting the
21 prison law library to prepare his motion, he does not claim that he made any effort to file his motion
22 after the lockdowns began. See *Spitsyn*, 345 F.3d at 802 (citing *Valverde v. Stinson*, 224 F.3d 129,
23 134 (2d Cir.2000)) (noting that “if the person seeking equitable tolling has not exercised reasonable
24 diligence in attempting to file, after the extraordinary circumstances began, the link of causation
25
26

27 ² Petitioner also makes allegations about lockdowns while he was at Kern Valley State Prison
28 and Centinela State Prison. [See Doc. No. 21 at 13, ¶¶ 21-25.] However, his incarceration at those
prisons was well after the statute of limitations had expired and therefore they do not provide a basis for
equitable tolling.

1 between the extraordinary circumstances and the failure to file is broken.”) Therefore, equitable
2 tolling does not apply.

3
4 IV. CONCLUSION

5 Based on the foregoing analysis, this Court **RECOMMENDS** that Petitioner’s Motion for
6 leave to file the Amended Petition be **DENIED**, that this action **PROCEED FORWARD** with the
7 claims in the original Petition and that the stay on this Court’s previous Report and Recommendation
8 [Doc. No. 14] be **LIFTED** .

9 This Report and Recommendation of the undersigned Magistrate Judge is submitted to the
10 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

11 On or before **October 10, 2008**, any party may file and serve written objections with the
12 Court and serve a copy on all parties. The document shall be entitled “Objections to Report and
13 Recommendation.” Any reply to the objections shall be filed and served no later than **ten days after**
14 **being served with the objections**. The parties are advised that failure to file objections within the
15 specified time may waive the right to raise those objections on appeal of the Court’s order. *Martinez*
16 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

17 **IT IS SO ORDERED.**

18 DATED: September 8, 2008

19
20 
21 **CATHY ANN BENCIVENGO**
United States Magistrate Judge