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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 JASON W. CLARK,

11 Petitioner,

12 vs.

13 LARRY SMALL, Warden,

14 Respondent.

CASE NO. 09cv0063-LAB (CAB)

**ORDER DENYING LEAVE TO
AMEND PETITION**

15
16 In his original habeas petition, Petitioner Jason W. Clark alleged that the California
17 Board of Parole violated his due process rights by denying him parole. Clark maintained: (1)
18 The Board considered certain factors that were outside of his plea agreement (e.g., his prior
19 criminal history and the fact that he used a knife in his commitment offense); and (2) the
20 Board lacked sufficient justification for its decision. The Court, following the R&R, denied
21 Clark's petition on the merits, but in his objection to the R&R Clark sought leave to amend
22 the petition to incorporate two new claims. The first is that he did not knowingly enter into
23 his plea agreement, and the second is that his guilty plea was the result of ineffective
24 assistance of counsel. When it denied his petition on the merits, the Court ordered Clark to
25 show cause why leave to amend should be granted. He then filed a motion for stay and
26 abeyance, seeking to exhaust his new claims in state court.

27 A stay and abeyance may be appropriate in limited circumstances for mixed petitions
28 that contain both exhausted and unexhausted claims. *Wooten v. Kirkland*, 540 F.3d 1019,

1 1023 (9th Cir. 2008) (citing *Rhines v. Weber*, 544 U.S. 269, 273–75, 277–78 (2005)). This
2 would allow a petitioner to “present his unexhausted claims to the state court without losing
3 his right to federal habeas review due to the relevant one-year statute of limitations.” *Id.* But
4 Clark’s habeas petition was not mixed. Rather, it advanced four claims, and the two claims
5 he now wishes to add were advanced for the first time in his objection to the R&R. Clark’s
6 motion for stay and abeyance is not responsive, then, to the Court’s order, when it adopted
7 the R&R, to show cause why he should be granted leave to *amend* his petition. The new
8 claims are also untimely, given the late stage that he raised them. Clark’s parole hearing
9 took place on September 5, 2007. Clark waited almost 5 months to file a state habeas
10 petition, and when that was denied in November 2008 he waited another two months to file
11 his federal petition. His objection to the R&R wasn’t filed until July 2009, taking him well
12 beyond the one year he’s allowed to present habeas claims in federal court, even accounting
13 for tolling while his state habeas petition was pending.¹ See *King v. Ryan*, 564 F.3d 1133,
14 1141 (9th Cir. 2009) (citing *Duncan v. Walker*, 533 U.S. 167 (2001)) (filing of a federal
15 habeas petition doesn’t toll the AEDPA statute of limitations). The Court specifically ordered
16 Clark to show why his claims are not time-barred (Doc. No.26), and he has failed to do so.²

18 ¹ Clark did not attempt to amend his petition in his traverse (Doc. No.13). Moreover,
19 Clark received notice from the Court on or around January 22, 2009, informing him of
20 AEDPA’s one-year statute of limitations and the rules governing exhaustion of claims. (Doc.
21 No. 8.) That notice explicitly warned: “However, Petitioner should consider that if state court
22 remedies have not been exhausted, ‘the clock may be ticking’ on his one-year statute of
23 limitations.” (*Id.* at p. 3.)

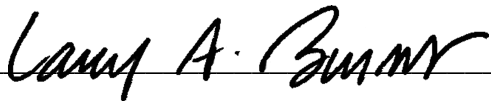
24 ² On April 24, 2009, after the government answered Clark’s petition, Magistrate Judge
25 Bencivengo observed “it appears Petitioner claims he did not knowingly enter a plea,” and
26 she ordered the respondent to lodge with the Court a copy of the transcript from the plea
27 hearing. (Doc. No. 12.) Clark argues that it wasn’t until then that he became aware of his
28 additional claims and that he should have been instructed by Judge Bencivengo to amend
his petition at the time. The Court rejects this argument. First, Judge Bencivengo’s
characterization of Clark’s claim doesn’t, in the least, imply there is a factual basis for such
a claim. Second, Judge Bencivengo didn’t suggest Clark had an *additional* claim for not
knowingly entering into a plea; that was just her way of characterizing the timely and
exhausted claims in Clark’s petition. Third, and most importantly, the claims Clark now
wishes to add to his petition are not so categorically distinct from his original claims that it is
unreasonable to have expected that he would allege them originally. If Clark had the
sophistication to allege that the Board of Parole breached the terms of his plea agreement,
and that its decision was objectively unreasonable, surely he had the sophistication to allege
that he didn’t knowingly enter into the plea agreement and that his lawyer’s assistance was

1 His request for leave to amend his petition is therefore **DENIED**.

2 As to Clark's original four claims, the Court **DENIES** him a certificate of appealability.
3 Those claims are not "debatable among jurists of reason" and do not "deserve
4 encouragement to pursue further." *Doe v. Woodford*, 508 F.3d 563, 567 (9th Cir. 2007)
5 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). As to Clark's first two claims
6 alleging a breach of his plea agreement, Clark's subjective understanding of the plea
7 agreement, or intent in entering into it, cannot override the words of the document. *Buckley*
8 *v. Terhune*, 441 F.3d 688, 695 (9th Cir. 2006) (citing principles of contract interpretation
9 under California law). And, Clark concedes that "the plea did not specifically mention the
10 parole board or limitations on said board," and "the District Attorney never mentioned the
11 parole board in the pleading." (Traverse at 4–5.) See *Thompson v. Watson*, 2009 WL
12 800932 at *4 (E.D. Cal. 2009) (R&R finding that habeas petitioner "must demonstrate that
13 the parole board's denial of parole violates an express promise made in connection with
14 Petitioner's acceptance of the plea agreement"). As to Clark's second two claims challenging
15 the parole board's decision on the merits, the Supreme Court has recently restricted the
16 bases on which claims arising out of parole proceedings are cognizable on federal habeas
17 review. See *Swarthout v. Cooke*, 562 U.S. ____ (2011). *Swarthout* held that the due process
18 protections in the context of parole are "minimal"; they include an opportunity to be heard and
19 a statement of reasons why parole is denied. *Id.* Clark received both of those.

20 **IT IS SO ORDERED.**

21 DATED: February 23, 2011

22 
23 **HONORABLE LARRY ALAN BURNS**
United States District Judge

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27 _____
28 ineffective. In other words, neither of Clark's new claims draw upon facts that weren't
available to him at the time he filed his petition, which cuts against granting him leave to
amend.