

allowed and a stay granted because the *Birchfield* holding recognizes a new Constitutional right that has been made retroactively applicable to cases on collateral review.

The Court disagrees and will neither allow the proposed amendment nor stay the case. A court can deny leave to amend if the proposed amendment would be futile on account of its failure to state a claim on which relief could be granted. *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 872–73 (5th Cir. 2000). At this point, Schroeder’s proposed amendment would be futile because this Court has no power to grant relief on the blood-draw claim until Schroeder presents it to the Texas state courts. *McGahey v. Quarterman*, No. H-06-3343, 2007 WL 611202, at *2 (S.D. Tex. Feb. 22, 2007) (J. Atlas).

The futility of the proposed amendment is reinforced by the analysis that would apply to Schroeder’s request for a stay if the amendment were allowed. When the standard set out by the Supreme Court for determining retroactivity is applied, it is clear that the *Birchfield* holding was not made retroactively applicable to cases on collateral review. *Tyler v. Cain*, 533 U.S. 656, 663–67 & n.7; *see also id.* at 668–70 (O’Connor, J., concurring). Thus, Schroeder’s blood-draw claim is time-barred under 28 U.S.C. § 2244(d)(1)(A) and, moreover, does not relate back to Schroeder’s timely filed petition, which did not even include a Fourth Amendment claim (Dkt. 1). *Mayle v. Felix*, 545 U.S. 644, 662 (2005) (“If claims asserted after the one-year [limitations] period could be revived simply because they

¹(...continued)
challenge.

relate to the same trial, conviction, or sentence as a timely filed claim, [the federal habeas] limitation period would have slim significance.”).

A stay of a federal habeas proceeding to allow the petitioner to exhaust state-court remedies is available only in limited circumstances—with a critical requirement being that the unexhausted claims have potential merit. *Neville v. Dretke*, 423 F.3d 474, 479 (5th Cir. 2005). A stay is not warranted if the unexhausted claims are time-barred. *McGahey v. Quarterman*, No. H-06-3343, 2007 WL 1234927, at *4 (S.D. Tex. Apr. 25, 2007) (J. Atlas). Instead, dismissal of the petition or (as is often the case with a hybrid petition containing both exhausted and unexhausted claims) deletion of the unexhausted claims would be appropriate. *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). In short, even if the Court allowed the proposed amendment, it would have to either excise the just-added *Birchfield* claim or dismiss the petition entirely.

The proposed amendment would be futile. The Court **DENIES** Schroeder’s motion (Dkt. 33).

The Clerk will provide a copy of this order to the parties.

SIGNED at Galveston, Texas, on August 2, 2016.



GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE