

1 postconviction habeas petition. (Ex. 388.)

2 On October 3, 2019, Bailey filed his federal habeas petition. (ECF No. 4.) The Court
3 granted Respondents’ motion to dismiss, in part, finding the portion of Ground 1(a) alleging that
4 the state district court erred by permitting amendment to the charging instrument after trial
5 testimony and the presentation of evidence and Ground 8 unexhausted. (ECF No. 90 at 12.) The
6 Court also dismissed the portion of Ground 1(a) that relies on the Fourth Amendment and Grounds
7 2(a), 3(a), 5(a), 16, and 17 as noncognizable claims. (*Id.*)

8 The Court granted Bailey’s motion seeking a stay and abeyance pending exhaustion of his
9 unexhausted claims. (ECF No. 90.) In November 2022, the Court granted Bailey’s motion to
10 reopen. (ECF No. 95.) Bailey also filed a new petition, which the Court construes as a motion to
11 amend. (ECF Nos. 95, 96.) Respondents argue that amendment would be futile, and that Bailey
12 filed his motion to amend with undue delay. (ECF No. 100.) Bailey did not reply.

13 II. Discussion

14 a. Motion to Amend

15 Under Federal Rule of Civil Procedure 15(a)(2), leave to amend should be freely given
16 “when justice so requires.” “Rule 15’s policy of favoring amendments to pleadings should be
17 applied with extreme liberality.” *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).
18 Moreover, “[t]he district court is required to construe a *pro se* petition more liberally than it would
19 construe a petition drafted by counsel.” *Knaubert v. Goldsmith*, 791 F.2d 722, 729 (9th Cir.), *cert.*
20 *denied*, 479 U.S. 867 (1986).

21 The Court “considers the following five factors to assess whether to grant leave to amend:
22 (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and
23 (5) whether plaintiff has previously amended his complaint.” *In re W. States Wholesale Natural*
24 *Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013) (internal punctuation omitted). “[D]elay
25 alone—no matter how lengthy—is insufficient ground for denial of leave to amend.” *Webb*, 655
26 F.2d at 980.

27 Respondents argue that the proposed amendment will cause undue delay and prejudice in
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1 that Respondents “would have to devote significant resources to draft new pleadings based on an
2 amended petition, likely including drafting a new motion to dismiss.” (ECF No. 100 at 6.)
3 Although the Court acknowledges the delay caused by the amendment, such delay does not
4 outweigh Bailey’s need in this habeas corpus action to assert his claims. Moreover, there is no
5 evidence of bad faith on Bailey’s part.

6 Respondents further contend that amendment would be futile as certain claims are
7 noncognizable and either unexhausted or procedurally defaulted. (ECF No. 100 at 4-5.) As
8 Respondents acknowledge, futility of amendment with respect to the argument that certain claims
9 are unexhausted is uncertain because Respondents do not have the complete records related to
10 Bailey’s recent return to state court. (ECF No. 100 at 5.) Respondents assert certain claims are
11 procedurally defaulted. (*Id.*) A procedurally defaulted claim may not be barred from federal
12 review, however, “if the petitioner can demonstrate either (1) cause for the default and actual
13 prejudice as a result of the alleged violation of federal law, or (2) failure to consider the claims
14 will result in a fundamental miscarriage of justice. *Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir.
15 2012); *see also Boyd v. Thompson*, 147 F.3d 1124, 1126-27 (9th Cir. 1998). Accordingly, although
16 certain claims may be procedurally defaulted, such claims may nonetheless proceed if Bailey
17 makes the necessary showing to relieve the default.

18 Regarding the final factor, whether the party previously amended its pleadings, the Court
19 notes that Bailey has not previously been granted leave to file an amended petition. Because
20 motions seeking leave to amend should be liberally granted, Bailey has not previously amended
21 his petition, and Bailey’s proposed amendments are not necessarily futile, the Court will grant
22 Bailey’s motion to amend. The Court directs the Clerk of the Court to file the amended petition
23 currently in the docket at ECF No. 96.

24 **b. Motion to Strike**

25 Bailey asserts that Respondents did not respond to a state court order upon his return to
26 state court to exhaust claims and did not respond to his informal appellate brief. (ECF No. 101 at
27 2.) Bailey appears to request that the Court strike Respondents’ opposition to Bailey’s motion to
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1 amend (ECF No. 100) or Exhibit A to their opposition (ECF No. 100-1.). Bailey cites Rule 12 of
2 the Federal Rules of Civil Procedure in support of his request. (ECF No. 101 at 1.) Respondents
3 argue that they are not precluded from raising arguments in federal court that they failed to raise
4 in state court. (ECF No. 107 at 2.) They assert that they were not obligated to respond to Bailey’s
5 informal appellate brief and did not waive any defenses by failing to respond. (*Id.*)

6 Rule 12 of the Federal Rules of Civil Procedure allows the Court to strike documents that
7 contain “redundant, immaterial, impertinent, or scandalous” matter. Bailey fails to demonstrate a
8 sufficient basis for the Court to strike Respondents’ opposition or Exhibit A to their opposition.
9 Accordingly, the motion is denied.

10 **c. Motion to Seal**

11 Bailey filed a request for judicial notice attaching documents that do not comply with the
12 redaction requirements of LR IC 6-1(a)(1) and (3). (ECF No. 97 at 5.) The Court sealed that
13 document because it contains personal-data identifiers and instructed Bailey to file a redacted
14 publicly available copy of ECF No. 97 that complies with the Local Rules. (ECF No. 99.) LR IC
15 6-1(a)(1) states “[i]f an individual’s social security number must be included, only the last four
16 digits of that number should be used.” LR IC 6-1(a)(3) states “[i]f an individual’s date of birth
17 must be included, only the year should be used.”

18 Bailey now appears to request that the Court seal ECF No. 97. (ECF No. 102.) The Court
19 denies his request as moot as ECF No. 97 is already sealed. The Court again instructs Bailey to
20 file a redacted publicly available copy of ECF No. 97 that complies with LR IC 6-1(a)(1)-(5) within
21 14 days of the entry of this order. If Bailey fails to comply, the Court will strike ECF No. 97.

22 **d. Motion for Recusal**

23 Bailey appears to request recusal on the basis that the undersigned previously worked with
24 Eighth Judicial District Court Judge Charles Thompson (“Thompson”) and Clark County District
25 Attorney Elissa Luzaich (“Luzaich”).¹ (ECF No. 103 at 2.) He asserts that the undersigned and

26 ¹ Bailey’s assertion that the undersigned previously worked with Thompson or Luzaich is
27 incorrect. The undersigned has not worked with either Thompson or Luzaich. Nonetheless,
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1 federal judges are “favoring public officials committing criminal acts. . .” (*Id.* at 3.) Bailey also
2 refers to a separate case, Case No. 2:19-cv-0121-GMN. Bailey, however, is not a party to such
3 matter and the undersigned did not preside over the matter. Bailey refers to a separate case, Case
4 No. 2:22-cv-00306-GMN-VCF, wherein the undersigned adopted in full the Magistrate Judge’s
5 Report and Recommendation dismissing Bailey’s civil rights complaint regarding issues with the
6 parole board as a basis for recusal. (Case No. 2:22-cv-00306-GMN-VCF, ECF Nos. 5,8.)

7 Recusal is appropriate “where a reasonable person with knowledge of all the facts would
8 conclude that the judge’s impartiality might reasonably be questioned.” *Yagman v. Republic Ins.*,
9 987 F.2d 622, 626 (9th Cir. 1993) (citations omitted). “The alleged prejudice must result from an
10 extrajudicial source; a judge’s prior adverse ruling is not sufficient cause for recusal.” *United*
11 *States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986). Bailey has not demonstrated any facts upon
12 which the undersigned’s impartiality might reasonably be questioned. The Court finds that recusal
13 is neither justified nor necessary in this case. The Court denies Bailey’s motion for recusal.

14 **IT IS THEREFORE ORDERED** that Petitioner Anthony Bailey’s Motion to Amend
15 (ECF No. 96) is **GRANTED**.

16 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to file the first
17 amended petition currently in the docket at ECF No. 96.

18 **IT IS FURTHER ORDERED** that Respondents will have 60 days from the date of entry
19 of this order to answer or otherwise respond to the first amended petition. Bailey may file a reply
20 within 60 days of service of the answer. Local Rule LR 7-2(b) governs the response and reply
21 time to any motion filed by either party, including motions filed in lieu of a pleading.

22 **IT IS FURTHER ORDERED** that Petitioner’s Motion to Strike (ECF No. 101), Motion
23 to Seal (ECF No. 102), and Motion for Recusal (ECF No. 103) are **DENIED**.

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27 employment, by itself, without any involvement in Petitioner’s criminal case is insufficient for
28 disqualification.

