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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Derrick Berry Fontenot,
10 Petitioner,

11 v.

12 Charles Ryan, et al.,
13 Respondents.
14

No. CV-15-00089-TUC-JGZ (EJM)

ORDER

15
16 Pending before the Court is Petitioner's Motion to Amend under Fed.R.Civ.P.
17 15(a) for Violation of Right to Counsel and Violation of the 4th, 5th, and 6th
18 Amendments. (Doc. 21). Respondents oppose amendment. (Doc. 22). Also before the
19 Court is Petitioner's Motion for Custody or Release of a Prisoner in a Habeas Corpus
20 Proceeding, Pending Review of Decision Rule 23(A)(B-3)& (C). (Doc. 27). For the
21 reasons set forth below, the motions are denied.

22 **I. BACKGROUND**

23 Petitioner filed his Petition for Writ of Habeas Corpus on March 6, 2015. (Doc. 1).
24 Respondents filed an Answer on June 19, 2015 (Doc. 15), and Petitioner filed his Reply
25 to the Response on July 21, 2015 (Doc. 16). Accordingly, the habeas petition has been
26 fully briefed for almost one year.

27 Petitioner also filed a Motion for Appointment of Counsel (Doc. 11), a Motion to
28 Over Turn and Dismiss for Violation of Right to Counsel (Doc. 13), and a Motion to

1 Expand the Record and Expand the Petition (Doc. 17). On November 23, 2015 the Court
2 denied Petitioner’s Motion for Appointment of Counsel. (Doc. 20). The Court construed
3 the Motion to Overturn and Dismiss as a motion to amend under Fed.R.Civ.P. 15(a), and
4 ordered that Document 13 shall be considered a supplement to the § 2254 Petition.
5 Finally, the Court granted the Motion to Expand the Record and Expand the Petition to
6 the extent that the Court allowed Petitioner’s Exhibit A to be included as an exhibit to the
7 § 2254 Petition.

8 Petitioner filed his Motion to Amend under Fed.R.Civ.P. 15(a) on January 29,
9 2016. (Doc. 21). Petitioner does not elaborate on what his new claims would be, but
10 states generally that he seeks amendment based on violation of his right to counsel and
11 violation of the 4th, 5th, and 6th Amendments.

12 **II. DISCUSSION**

13 A. Motion to Amend

14 A petition for habeas corpus may be amended pursuant to the Federal Rules of
15 Civil Procedure. 28 U.S.C. § 2242; *see also* Rule 12, Rules Governing § 2254 Cases, 28
16 U.S.C. foll. § 2254 (providing that the Federal Rules of Civil Procedure may be applied
17 to habeas petitions to the extent they are not inconsistent with the habeas rules). The
18 Court looks to Rule 15 of the Federal Rules of Civil Procedure to address a party’s
19 motion to amend a pleading in a habeas corpus action. *See James v. Pliler*, 269 F.3d
20 1124, 1126 (9th Cir. 2001).

21 Under Rule 15(a), leave to amend shall be freely given “when justice so requires.”
22 Fed.R.Civ.P. 15(a). Courts must review motions to amend in light of the strong policy
23 permitting amendment. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th
24 Cir. 1986). Factors that may justify denying a motion to amend are undue delay, bad faith
25 or dilatory motive, futility of amendment, undue prejudice to the opposing party, and
26 whether the petitioner has previously amended. *Foman v. Davis*, 371 U.S. 178, 182
27 (1962); *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). In addition, “a district court
28 does not abuse its discretion in denying a motion to amend where the movant presents no

1 new facts but only new theories and provides no satisfactory explanation for his failure to
2 fully develop his contentions originally.” *Bonin*, 59 F.3d at 845.

3 Leave to amend may be denied based upon futility alone. *See Bonin*, 59 F.3d at
4 845. To assess futility, a court necessarily evaluates whether relief may be available on
5 the merits of the proposed claim. *See Caswell v. Calderon*, 363 F.3d 832, 837–39 (9th
6 Cir. 2004) (conducting a two-part futility analysis reviewing both exhaustion of state
7 court remedies and the merits of the proposed claim). If the proposed claims are
8 untimely, unexhausted, or otherwise fail as a matter of law, amendment should be denied
9 as futile. Further, “[c]ourts have been justifiably unwilling to permit amendment to assert
10 new claims that were readily apparent and available when the petition was initially filed.”
11 *Halvorsen v. Parker*, 2012 WL 5866220, at *4 (E.D. Ky. Nov. 19, 2012); *cf. Jackson v.*
12 *Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990) (“Relevant to evaluating the delay
13 issue is whether the moving party knew or should have known the facts and theories
14 raised by the amendment in the original pleading.”).

15 Here, Petitioner does not actually specify what his new claims are, nor does he
16 provide the Court with a copy of his proposed amended petition as required by LRCiv
17 15.1(a).¹ It is thus impossible for the Court to determine whether Petitioner’s proposed
18 amended claims are meritorious, nor is the Court able to ascertain whether the claims
19 were readily apparent and available when the petition was initially filed. Further,
20 Petitioner has been in possession of all of the documents submitted by respondents in this
21 case since June 2015. Thus, it is unclear what, if any, information Petitioner would have
22 only recently obtained that would have given rise to new claims that were not readily
23 apparent before.

24
25 ¹ LRCiv 15.1 of the Rules of Practice of the U.S. District Court for the District of
26 Arizona requires that the party seeking leave to amend a pleading “must attach a copy of
27 the proposed amended pleading as an exhibit to the motion, which shall indicate in what
28 respect it differs from the pleading which it amends, by bracketing or striking through the
text to be deleted and underlining the text to be added.” LRCiv 15.1(a). Additionally, the
moving party must also “lodge with the Clerk of Court an original of the proposed
amended pleading.” LRCiv 15.1(b). Petitioner did not provide a copy of the proposed
amended pleading nor did he lodge a copy of the same as required.

1 B. Motion for Release

2 Petitioner requests that the Court order him to be released on his personal
3 recognizance until the Court issues its ruling on the merits of the § 2254 Petition. In
4 support of his motion, Petitioner cites Rule 23(A)(B-3) & (C). It is wholly unclear what
5 rules Petitioner is referring to: Rule 23 of the Federal Rules of Civil Procedure pertains to
6 class actions, while Rule 23 of the Federal Rules of Criminal Procedure pertains to jury
7 trials. There is no Rule 23 in either the Local Rules of Civil Procedure or the Local Rules
8 of Criminal Procedure. The Court assumes that Petitioner intends to cite Rule 23 of the
9 Federal Rules of Appellate Procedure, “Custody or Release of a Prisoner in a Habeas
10 Corpus Proceeding,” but this rule is inapplicable to the Court’s ruling on Petitioner’s
11 motion. *See United States v. Carreira*, 2016 WL 1047995, at *2 (D. Haw. Mar. 10, 2016)
12 (“It is undisputed that Rule 23 does not grant to district courts the same authority it
13 expressly grants to the Courts of Appeals.”).

14 Petitioner also cites the First Circuit case of *Woodcock v. Donnelly*, 470 F.2d 93
15 (1st Cir. 1972), and alleges that this case provides factual reasons and legal authority to
16 support his entitlement to release. In *Woodcock*, the court noted that “a district court
17 entertaining a petition for habeas corpus has inherent power to release the petitioner
18 pending determination of the merits.” *Id.* at 94. However, the court upheld the district
19 court’s denial of bail, and noted that the district court found the petitioner had not
20 established the likelihood of success on the merits or demonstrated that a health
21 emergency existed. In the present case, Petitioner states that his petition raises
22 “substantial relevant issues,” that the “Court has the authority to grant release,” and that
23 Petitioner has a “‘substantiated defense’ that has ‘T]rue’ weight for a favorable
24 determination in Petitioners favor.” (Doc. 27 at 1). Petitioner does not present any
25 argument as to why he should be released on bail other than to allege that *Woodcock*
26 provides the factual reasons and legal authority in support of his claim to release.
27 However, the Ninth Circuit has not yet resolved the issue of whether a federal court has
28 the power to grant bail pending a decision on a habeas corpus petition. *See In re Roe*, 257

1 F.3d 1077, 1080 (9th Cir. 2001). Further, in *In re Roe*, the court noted that even assuming
2 a district court does have the authority to release a habeas petitioner on bail, bail should
3 only be granted in extraordinary cases. *Id.* Petitioner’s bare assertion of entitlement to
4 release fails wholly short of this standard. Accordingly, the motion will be denied.

5 **III. CONCLUSION**

6 For the reasons set forth above, amendment is futile. Petitioner has failed to
7 provide the Court with a copy of his proposed amended pleading pursuant to LRCiv
8 15.1(a), and does not describe what his proposed new claims actually are. Petitioner has
9 been in possession of numerous documents related to this case for at least one year, and
10 does not explain why the new claims could not have been included when his habeas
11 petition was originally filed, or why he waited over one year from the filing date to
12 request amendment. Indeed, it does not appear that Petitioner has formulated any new
13 claims at all, but rather seeks the Court’s permission to file an amended petition at some
14 future time if he determines that there are any additional claims he wishes to present.

15 The Court will also deny Petitioner’s Motion for Release. There is no controlling
16 case law from the Ninth Circuit directing whether the district courts have the authority to
17 grant release pending a decision on a habeas petition filed by a state prisoner. Further,
18 even assuming this Court does possess such authority, Petitioner has failed to present any
19 argument suggesting that his case falls within the “extraordinary circumstances” where
20 bail is warranted.

21 Accordingly,

22 **IT IS HEREBY ORDERED** Petitioner’s Motion to Amend under Fed.R.Civ.P.
23 15(a) for Violation of Right to Counsel and Violation of the 4th, 5th, and 6th
24 Amendments is denied. (Doc. 21).

25 **IT IS FURTHER ORDERED** Petitioner’s Motion for Custody or Release of a
26 Prisoner in a Habeas Corpus Proceeding, Pending Review of Decision Rule 23(A)(B-3)&
27 (C) is denied. (Doc. 27).

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Dated this 2nd day of June, 2016.



Eric J. Markovich
United States Magistrate Judge

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