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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHARLES D. RIEL,

Petitioner,

v.

NO. CIV. S-01-0507 LKK/KJM
DEATH PENALTY CASE

ROBERT L. AYERS, JR.,
Warden of California State
Prison at San Quentin,

Respondent.

O R D E R

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Petitioner is before the court on a petition for habeas corpus, 28 U.S.C. § 2254. On April 14, 2008, the magistrate judge issued an order granting in part and denying in part petitioner's motion for an evidentiary hearing. On March 27, 2009, this court construed the magistrate judge's order as findings and recommendations, and issued an order granting in part and denying in part petitioner's motion. This court held that petitioner was entitled to an evidentiary hearing on an additional theory of relief, which is encompassed by four of petitioner's claims. On July 22, 2009, the magistrate judge granted respondent's motion to

1 depose petitioner as part of the evidentiary hearing. Petitioner
2 filed a motion for reconsideration of this order. For the reasons
3 stated below, petitioner's motion is denied.

4 Petitioner's theory of recovery that is relevant to this
5 motion concerns the evidence necessary to convict a non-killer of
6 felony murder based on that person's involvement. Particularly,
7 petitioner argued at trial that he slept through the robbery,
8 kidnaping, and homicide of the victim, although he was involved
9 with moving the body and may have been involved in a different
10 robbery that night. Pursuant to this court's March 27, 2009 order,
11 petitioner is entitled to an evidentiary hearing as to whether (1)
12 petitioner's trial counsel was ineffective for failing to
13 investigate and present evidence that would tend to show that it
14 was unlikely that he was the leader in the crimes, despite his
15 codefendants' testimony to the contrary; (2) petitioner's trial
16 counsel was ineffective for failing to object to physical evidence
17 (fingerprints on a beer can and a blood smear on petitioner's
18 clothes); and (3) the prosecutor unlawfully presented testimony by
19 a sheriff's deputy about the beer can, which the prosecutor should
20 have known was false. Petitioner is entitled to an evidentiary
21 hearing insofar as they effect the guilt phase, the penalty phase,
22 and the special circumstances determinations.

23 Respondent moved to depose petitioner, and petitioner filed
24 a motion to preclude his deposition. On July 22, 2009, the
25 magistrate judge issued an order granting respondent's motion and
26 denying petitioner's motion, Doc. 252. This order found good cause

1 to depose petitioner. The magistrate judge further set forth a
2 briefing schedule through which petitioner could file a brief
3 concerning his "assertion of the Fifth Amendment or other
4 objections anticipated during his deposition and any proposals for
5 the conduct of the deposition." Because petitioner filed a motion
6 to reconsider the July 22, 2009 order, the briefing of these issues
7 has yet to occur. Pursuant to Fed. Civ. P. 72(a) and E.D. Local
8 Rule 303(f), a magistrate judge's nondispositive orders shall be
9 upheld unless clearly erroneous or contrary to law. Because the
10 magistrate judge has not issued an order concerning petitioner's
11 objections to his deposition or to the scope of his deposition, the
12 court does not decide these questions.

13 Parties to habeas petitions are not "entitled to discovery as
14 a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904
15 (1997). Rather, "[a] judge may, for good cause, authorize a party
16 [to an action under 28 U.S.C. § 2254] to conduct discovery under
17 the Federal Rules of Civil Procedure and may limit the extent of
18 discovery." Rule Governing § 2254 Cases 6(a). The Ninth Circuit has
19 held that discovery is proper where essential to resolution of a
20 claim. Pham v. Terhune, 400 F.3d 740, 743 (9th Cir. 2005); Jones
21 v. Wood, 114 F.3d 1002, 1009 (9th Cir. 1997).

22 Here, the magistrate judge found good cause for respondent to
23 depose petitioner because (1) "[p]etitioner's claims that trial
24 counsel was ineffective for failing to investigate and present
25 evidence of petitioner's family and medical history put at issue
26 his conversations with trial counsel, with trial counsel's

1 investigators, and with Dr. Edwards, who provided trial counsel
2 with a mental health evaluation after interviewing and testing
3 petitioner;" and (2) "the simple fact that petitioner's background
4 is at issue in the evidentiary hearing means he necessarily has
5 both relevant information and information that may lead to the
6 discovery of relevant information." Magistrate Order, Doc. 252, at
7 2. Respondent argues in its opposition to petitioner's motion to
8 reconsider that it has good cause to depose petitioner because
9 "[p]etitioner will present evidence, in part, that his trial
10 counsel failed to investigate that Mr. Riel was unlikely the leader
11 in order to impeach his co-conspirator's testimony . . . and
12 counsel's failure to give background information of Mr. Riel to his
13 trial mental health expert (Dr. Daniel Edwards)." Opposition at 6.

14 Petitioner argues that while his deposition may produce
15 relevant evidence to his claims, the magistrate judge's order was
16 clearly erroneous in holding that respondent has demonstrated good
17 cause for such discovery. The court is not persuaded that the
18 magistrate judge's order was clearly erroneous. It is not clearly
19 erroneous to hold that respondent has good cause to depose
20 petitioner because his testimony may prove essential in defeating
21 petitioner's claims concerning ineffective assistance of counsel.
22 For example, respondent may be able to obtain evidence that
23 petitioner's trial counsel did investigate his personal and medical
24 history. The remaining arguments raised in petitioner's motion to
25 reconsider concern matters for which the magistrate judge has not
26 yet issued an order. These include the scope of petitioner's


1 deposition as well as constitutional objections to the deposition.
2 Accordingly, the court does not make any decision as to
3 petitioner's remaining objections to the deposition.

4 For the foregoing reasons, petitioner's motion for
5 reconsideration, Doc. No. 262, is DENIED.

6 IT IS SO ORDERED.

7 DATED: February 11, 2010.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT