

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 JUSTIN JAMES EDMISTEN,

10 Petitioner,

11 vs.

12 DWIGHT NEVEN, et al.,

13 Respondents.
14

Case No. 2:15-cv-00952-RFB-NJK

ORDER

15 Petitioner has submitted an application to proceed in forma pauperis (#1) and a petition for a
16 writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court finds that petitioner is unable to pay the
17 filing fee.

18 The court has reviewed the petition pursuant to Rule 4 of the Rules Governing Section 2254
19 Cases in the United States District Courts. The court will serve the petition upon respondents for a
20 response, with a note.

21 In state court, petitioner pleaded guilty to one count of robbery. Petitioner did not directly
22 appeal the judgment of conviction. Petitioner pursued a post-conviction habeas corpus petition through
23 the state courts, without success.

24 [A] guilty plea represents a break in the chain of events which has preceded it in the criminal
25 process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty
26 of the offense with which he is charged, he may not thereafter raise independent claims relating
27 to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He
28 may only attack the voluntary and intelligent character of the guilty plea by showing that the
advice he received from counsel was not within the standards set forth in [McMann v.
Richardson, 397 U.S. 759 (1970)].

1 Tollett v. Henderson, 411 U.S. 258, 267 (1973). Part of ground 3, at page 7a of the petition, is a claim
2 that petitioner's guilty plea was involuntary or unknowing. The rest of petitioner's allegations are
3 claims of constitutional error, such as ineffective assistance of counsel, that occurred before petitioner
4 entered his plea agreement. These claims would appear to be barred by Tollett v. Henderson. However,
5 the court will not dismiss these claims now because it is possible that petitioner signed a conditional
6 plea agreement that reserved the rights to raise some claims or that there are other circumstances that
7 may permit these claims to go forward. Consequently, respondents will need to file a response to the
8 petition.

9 Petitioner has filed a motion for appointment of counsel (#2). Whenever the court determines
10 that the interests of justice so require, counsel may be appointed to any financially eligible person who
11 is seeking habeas corpus relief. 18 U.S.C. § 3006A(a)(2)(B). "[T]he district court must evaluate the
12 likelihood of success on the merits as well as the ability of the petitioner to articulate his claims pro se
13 in light of the complexity of the legal issues involved." Weygandt v. Look, 718 F.2d 952 (9th Cir.
14 1983). There is no constitutional right to counsel in federal habeas proceedings. McCleskey v. Zant,
15 499 U.S. 467, 495 (1991). The factors to consider are not separate from the underlying claims, but are
16 intrinsically enmeshed with them. Weygandt, 718 F.2d at 954. After reviewing the petition, the court
17 determines that appointment of counsel is not warranted at this time.

18 IT IS THEREFORE ORDERED that the application to proceed in forma pauperis (#1) is
19 **GRANTED**. Petitioner need not pay the filing fee of five dollars (\$5.00).

20 IT IS FURTHER ORDERED that the motion for appointment of counsel (#2) is **DENIED** at
21 this time.

22 IT IS FURTHER ORDERED that the clerk of the court shall file the petition for a writ of habeas
23 corpus pursuant to 28 U.S.C. § 2254.

24 IT IS FURTHER ORDERED that the clerk shall add Adam Paul Laxalt, Attorney General for
25 the State of Nevada, as counsel for respondents.

26 IT IS FURTHER ORDERED that the clerk shall electronically serve upon respondents a copy
27 of the petition and this order. In addition, the clerk shall return to petitioner a copy of the petition.
28

1 IT IS FURTHER ORDERED that respondents shall have forty-five (45) days from the date on
2 which the petition was served to answer or otherwise respond to the petition. Respondents shall raise
3 all potential affirmative defenses in the initial responsive pleading, including lack of exhaustion and
4 procedural default. Successive motions to dismiss will not be entertained. If respondents file and serve
5 an answer, then they shall comply with Rule 5 of the Rules Governing Section 2254 Cases in the United
6 States District Courts, and then petitioner shall have forty-five (45) days from the date on which the
7 answer is served to file a reply.

8 IT IS FURTHER ORDERED that any exhibits filed by the parties shall be filed with a separate
9 index of exhibits identifying the exhibits by number or letter. The CM/ECF attachments that are filed
10 further shall be identified by the number or numbers (or letter or letters) of the exhibits in the
11 attachment. The hard copy of any additional state court record exhibits shall be forwarded—for this
12 case—to the staff attorneys in Las Vegas.

13 IT IS FURTHER ORDERED that henceforth, petitioner shall serve upon respondents or, if
14 appearance has been entered by counsel, upon the attorney(s), a copy of every pleading, motion or other
15 document submitted for consideration by the court. Petitioner shall include with the original paper
16 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed
17 to the respondents or counsel for the respondents. The court may disregard any paper received by a
18 district judge or magistrate judge that has not been filed with the clerk, and any paper received by a
19 district judge, magistrate judge, or the clerk that fails to include a certificate of service.

20 DATED: July 20, 2015.

21
22
23 
24 RICHARD F. BOULWARE, II
25 United States District Judge
26
27
28