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2
3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 STEPHEN LEE CHOATE,

Case No. 2:16-cv-00813-RFB-GWF

6 Petitioner,

7 v.

ORDER

8 NEVADA ATTORNEY GENERAL, et al.,

9 Respondents.

10 This habeas matter is before the Court on *pro se* Petitioner Stephen Lee Choate's Motion
11 to Reopen Habeas Corpus Petition (ECF No. 106), Motion for Evidentiary Hearing (ECF No. 107),
12 Motion for Appointment of Standby Counsel (ECF No. 108), Motion for Certificate of Probable
13 Cause (ECF No. 109), Motion for Production of Documents (ECF No. 110), Motion for Discovery
14 (ECF No. 111). For the reasons discussed below, the Court grants his request to reopen this matter
15 and sets a schedule to complete briefing but denies his remaining motions.

16 **BACKGROUND**

17 Choate initiated this federal habeas action in April 2016. ECF No. 1. The Court granted
18 permission to proceed application to proceed *in forma pauperis* but issued multiple orders denying
19 premature and procedurally inappropriate motions and further directing Choate to file an amended
20 petition that complied with the Local Rules of Practice. ECF Nos. 56, 82, 91. In June 2018, Choate
21 filed a Second Amended Petition. ECF No. 93. The Court determined that the Second Amended
22 Petition was wholly unexhausted, but at least one of the claims was not plainly meritless. ECF
23 No. 98. Accordingly, consistent with Choate's previous request, this Court entered an order staying
24 this action and holding the Second Amended Petition in abeyance to allow him to exhaust his state
25 court remedies.¹ Id.

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27 ¹ Following the Court's stay and abeyance order, Choate renewed a prior request for appointed counsel
28 (ECF No. 100) and filed a petition for writ of mandamus (ECF No. 104). Both were denied. ECF Nos. 101,
105.

DISCUSSION

I. MOTION TO REOPEN CASE

Choate's motion indicates that he has now completed efforts to exhaust state court remedies. See Choate v. Williams, Case No. 80224.² A review of the appellate docket records indicates that the Nevada Court of Appeals issued an order in June 2020, affirming the state district court's denial of his post-conviction petition for writ of habeas corpus as untimely and procedurally barred. The Nevada Supreme Court issued a remittitur on July 21, 2020, thus finalizing his post-conviction appeal. Accordingly, the Court will grant Choate's motion and set a schedule to finalize the briefing in this case.

II. MOTION FOR APPOINTMENT OF STANDBY COUNSEL

Choate seeks the appointment of standby counsel to assist him in this habeas action. ECF No. 108. There is no constitutional right to appointed counsel in a federal habeas corpus proceeding. Luna v. Kernan, 784 F.3d 640, 642 (9th Cir. 2015) (citing Lawrence v. Florida, 549 U.S. 327, 336–37 (2007)). However, an indigent petitioner seeking relief under 28 U.S.C. § 2254 may request appointed counsel to pursue that relief. 18 U.S.C. § 3006A(a)(2)(B). The decision to appoint counsel is generally discretionary. Id. (authorizing appointed counsel “when the interests of justice so require”). However, counsel must be appointed if the complexities of the case are such that denial of counsel would amount to a denial of due process, and where the petitioner is so uneducated that he is incapable of fairly presenting his claims. LaMere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987); Brown v. United States, 623 F.2d 54, 61 (9th Cir. 1980). When a habeas petitioner has a good understanding of the issues and the ability to present forcefully and coherently his contentions, appointed counsel is not warranted. LaMere, 827 F.2d at 626.

Choate's motion requests “special stand by counsel <co-counsel>” to assist him during an evidentiary hearing. ECF No. 108. He argues that his lack of comprehension, the complexity of the issues, and the need for investigation and discovery justify the appointment of counsel. Id.

² The Court takes judicial notice of the proceedings in Choate's post-conviction matters in the Nevada appellate courts. The docket records of these courts may be accessed by the public online at: <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 Because an evidentiary hearing is not warranted at this stage of the case, appointment of counsel
2 is not justified at this time. The Court therefore denies the motion for standby counsel (ECF No.
3 108) without prejudice.

4 **III. REMAINING MOTIONS**

5 Choate's remaining motions are premature and/or procedurally inappropriate.

6 Three pending motions seek discovery and an evidentiary hearing. ECF Nos. 107, 110,
7 111. The Court's review of a 28 U.S.C. § 2254 petition is generally limited to the record that was
8 before the state courts. Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011). “A habeas petitioner,
9 unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary
10 course.” Bracy v. Gramley, 520 U.S. 899, 904 (1997). Because discovery is not automatic in
11 habeas cases, a petitioner must also demonstrate entitlement to an evidentiary hearing. Earp v.
12 Davis, 881 F.3d 1135, 1142 (9th Cir. 2018) (citing Williams v. Taylor, 529 U.S. 420, 430 (2000)).
13 An evidentiary hearing is not warranted when “the record refutes [a petitioner's] factual allegations
14 or otherwise precludes habeas relief.” Schriro v. Landrigan, 550 U.S. 465, 474 (2007). In this
15 order, the Court directs Respondents to submit the state court record with their response to the
16 Second Amended Petition. As such, Choate's motions for discovery (ECF No. 110, 111) and an
17 evidentiary hearing (ECF No. 107) are premature and therefore denied without prejudice.

18 Lastly, Choate seeks a “certificate of probable cause” for a bail determination. ECF No.
19 109. There are no federal rules or statutes addressing this Court's authority to grant release pending
20 a decision on the merits of a federal habeas petition. E.g., Fields v. Baker, 3:16-cv-00298-MMD-
21 CLB, 2020 WL 1914814, at *1 (D. Nev. Apr. 20, 2020). The Ninth Circuit has specifically left
22 open the question of “whether a district court has the authority to grant bail pending a decision on
23 a 28 U.S.C. § 2254 habeas corpus petition,” but also recognizes that certain modern authorities
24 favor recognizing such a power. In re Roe (“Roe”), 257 F.3d 1077, 1079–80 (9th Cir. 2001).
25 Assuming *arguendo* that a district court has such authority, a petitioner must demonstrate: (1) that
26 this is an “extraordinary case[] involving special circumstances,” and/or (2) “a high probability of
27 success.” Fields, 3:16-cv-00298-MMD-CLB, 2020 WL 1914814, at *1 (noting that case law does
28 not clearly indicate whether the standard is conjunctive or disjunctive) (quoting Roe, 257 F.3d at

1 1080).³ Here, Choate’s request fails because he fails to allege or show that this this is an
2 extraordinary case involving special circumstances and/or a high probability of success. In
3 particular, the Court cannot conclude that Choate has demonstrated “a high probability of success”
4 on the merits of his petition when Respondents have not yet received an opportunity to respond or
5 submit the state court record.

6 **IT IS THEREFORE ORDERED:**

- 7 1. Petitioner Stephen Lee Choate’s Motion to Reopen Case (ECF No. 106) is GRANTED.
- 8 2. Choate’s Motion for Evidentiary Hearing (ECF No. 107), Motion for Appointment of
9 Standby Counsel (ECF No. 108), Motion for Certificate of Probable Cause (ECF
10 No. 109), Motion for Production of Documents (ECF No. 110), Motion for Discovery
11 (ECF No. 111) are DENIED without prejudice.
- 12 3. As the stay is lifted by this order, the Clerk of Court will reopen this action.
- 13 4. The Clerk of Court is instructed to update the information for Respondents counsel to
14 Nevada Attorney General Aaron D. Ford and electronically serve the Nevada Attorney
15 General with a copy of the Second Amended Petition (ECF No. 93) and this order.
- 16 5. Respondents will have **60 days** to answer or otherwise respond to the Second Amended
17 Petition (ECF No. 93) in this case.
- 18 6. Choate will have **60 days** following service of the answer to file and serve a reply brief.
19 However, if a dispositive motion is filed, the parties will brief the motion in accordance
20 with Rules 7-2 and 7-3 of the Local Rules of Practice.
- 21 7. Respondents must raise all potential affirmative defenses in the initial responsive
22 pleading, including untimeliness, lack of exhaustion, and procedural default.
23 Procedural defenses omitted from such motion to dismiss will be subject to potential
24 waiver as successive motions to dismiss will not be entertained.

25 ³ See also Aronson v. May, 85 S. Ct. 3, 5 (1964) (explaining that in order to determine whether a habeas
26 petitioner can be released on bail, “it is . . . necessary to inquire whether, *in addition to there being*
27 *substantial questions presented by the appeal*, there is some circumstance making this application
28 exceptional *and* deserving of special treatment in the interests of justice”) (emphasis added); Land v. Deeds,
878 F.2d 318, 318 (9th Cir. 1989) (“Bail pending a decision in a habeas case is reserved for extraordinary
cases involving special circumstances *or* a high probability of success.”) (emphasis added).

