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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD LEE CARMICHAEL,

Petitioner,

vs.

JO GENTRY, *et al.*,

Respondents.

Case No. 2:16-cv-01142-RFB-GWF

ORDER

This represented habeas matter under 28 U.S.C. § 2254 comes before the Court on petitioner’s motion (ECF No. 14) for reconsideration as to the scheduling order (ECF No. 13) entered herein.

The scheduling order directed petitioner to file a counseled amended petition and respondents to file a response thereto. Petitioner requests that the Court instead direct respondents to state their position as to whether the action may proceed forward as a habeas action rather than a civil rights action under 42 U.S.C. § 1983. Petitioner additionally requests that if the Court ultimately were to hold that his claims sound in civil rights rather than habeas that the action be converted into and recharacterized as a § 1983 action.

The Court finds it more appropriate to litigate such issues within the framework of the existing scheduling order. The Court understands and appreciates that counsel felt it necessary to alert the Court to an issue that counsel believes goes to the Court's jurisdiction and that further may affect the ability of the Federal Public Defender to continue its representation under 18 U.S.C. § 3006A(a).

1 However, the Court has subject matter jurisdiction to consider this action through any dismissal or
2 recharacterization and beyond. Moreover, the Federal Public Defender's ability to represent
3 petitioner in this habeas action continues unless and until the Court were to recharacterize the habeas
4 action as a civil rights action, which has not occurred to date.

5 If petitioner includes claims and/or seeks relief in an amended petition that can be pursued
6 only under § 1983, then respondents may litigate that issue in their response notwithstanding any
7 arguments on the current motion for reconsideration made while discussing issues only in the abstract
8 against the backdrop of the original *pro se* pleadings. The first step in joining such issue is the filing
9 of a counseled amended pleading or subsequent submission.

10 While petitioner perhaps may present an amended pleading that in whole or in part presents
11 claims for relief arising instead under § 1983, the Court will not make a pre-filing commitment now
12 – in an advisory opinion – as to whether it will recharacterize the action as a § 1983 action. The two
13 types of actions are subject to markedly different procedures, including, *inter alia*, different filing fee
14 requirements and different exhaustion requirements. *See generally Nettles v. Grounds*, 830 F.3d
15 922, 931-34 & nn. 8 & 11 (9th Cir. 2016)(*en banc*) (“independent and mutually exclusive” procedural
16 channels). Any such recharacterization, if otherwise available on the pleadings presented and if
17 sought by petitioner after assessing the relative pros and cons of such relief, would be subject to all
18 requirements and potential defenses applicable to a newly-commenced § 1983 action following upon
19 the recharacterization, subject perhaps only to possible relation back to the prior habeas pleadings for
20 limitations purposes.

21 In this regard, the Court will follow a procedural track analogous to that often followed with
22 a motion to dismiss a petition for lack of complete exhaustion and a subsequent motion for a stay.
23 That is, if a motion to dismiss is granted on the basis that claims asserted in the counseled amended
24 petition arise instead under § 1983, the Court will withhold entry of judgment and allow petitioner an
25 opportunity to file a motion to recharacterize and/or for other appropriate relief in what then still
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1 would remain a proceeding under § 2254. The Federal Public Defender’s ability to litigate such
2 issues should continue for so long as an action under § 2254 remains pending that has not been fully
3 converted into a § 1983 action. Up to that point, the Federal Public Defender is protecting
4 petitioner’s interests in seeking appropriate relief on the record presented on his petition “seeking
5 relief under section . . . 2254” under § 3006A(a)(2)(B) in lieu of an outright dismissal of the petition
6 *qua* habeas petition.

7 The Court is cognizant of petitioner’s position that multiple medical issues constrain his
8 ability to prepare pleadings in proper person, such as in a possible separate § 1983 action now and/or
9 following any conversion order. The Court would strongly consider making a referral to the Pro
10 Bono Program to determine whether an attorney will accept an appointment if the subsequent filing
11 presents cognizable claims under Section 1983 that may not proceed under Section 2254. Such an
12 acceptance of representation, however, is purely voluntary on the part of attorneys. *See, e.g.,*
13 *Mallard v. United States District Court*, 490 U.S. 296 (1989)(district courts can only request that
14 attorneys accept representation of indigent litigants in civil cases). Petitioner thus, as a practical
15 matter, should proceed on an assumption that an attorney acceptance of a future referral may not be
16 forthcoming, or forthcoming timely in relation to the progress of the current habeas litigation.

17 In all events, the Court’s preference is to decide the issue of whether the action arises in habeas
18 or instead under § 1983 based upon actual specific pleadings and motions filed by counsel rather than
19 anticipatorily in the abstract.

20 IT THEREFORE IS ORDERED that the motion (ECF No. 14) for reconsideration is
21 DENIED.

22 IT FURTHER IS ORDERED that, within **ninety (90) days** of entry of this order, petitioner
23 shall file a counseled amended petition; that respondents shall file a response thereto, including
24 possibly by motion to dismiss, within **forty-five (45) days** of service; and that petitioner shall have
25 **forty-five (45) days** of service within which to file a reply to any answer filed. The deadlines to file

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1 a response or reply as to any motions filed, including a motion to dismiss, instead shall be governed
2 by Local Rule LR 7-2(b).

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4 DATED: March 13, 2018.

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RICHARD F. BOULWARE, II
United States District Judge