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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KEVIN JAMES LISLE,)
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 Petitioner,)
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 vs.)
)
 E.K. McDANIEL, *et al.*,)
)
 Respondents.)
)
 _____)

2:03-cv-1006-RLH-LRL
ORDER

Introduction

In this capital habeas corpus action, on May 3, 2006, petitioner filed a motion entitled Motion for Extraordinary Relief (docket #62), along with nine exhibits in support of the motion (docket #62, #63, and #64).

In the Motion for Extraordinary Relief, petitioner claims that he suffers from a heart condition, high blood pressure, blood clotting, and a rash on his groin, and that he is receiving inadequate medical care with respect to those conditions at Ely State Prison (ESP). In his motion, petitioner seeks the following relief:

1. An order to enjoin the deliberate indifference related to Petitioner’s treatment at Ely State Prison concerning his medical conditions and to enjoin the continuing infringement on the attorney-client relationship between Petitioner and undersigned counsel due to the neglect of Petitioner’s physical impairments and lack of proper medical care;

1 2. A stay in proceedings until Petitioner’s medical needs are met
2 and his condition is stabilized;

3 3. An order for a preliminary injunction;

4 4. An evidentiary hearing regarding Petitioner’s treatment and
5 medical care;

6 5. An order requiring the Attorney General to make a duplicate of
7 all medical records, pictures, testing data, emails, audio and video tapes of
8 medical consultations and treatment, of any death row inmate, in the
9 possession of Ely State Prison; and to provide copies of all of Kevin Lisle’s
10 medical records, testing data, emails, pictures, audio and video recordings of
11 his treatment and consultation to undersigned counsel;

12 6. Any additional discovery regarding these medical issues as this
13 Court sees fit.

14 Motion for Extraordinary Relief (docket #62), pp. 1-2; *see also id.* at 16.

15 Respondents filed an opposition to petitioner’s motion on May 16, 2006 (docket #65).
16 Respondents argue that petitioner cannot seek such relief regarding the conditions of his confinement
17 within this habeas action, but rather must seek such relief in a civil rights action pursuant to
18 42 U.S.C. § 1983.

19 Petitioner replied on May 30, 2006 (docket #66), and he filed two further exhibits
20 with his reply.¹

21 Petitioner’s Claims of Constitutionally Inadequate Medical Care

22 Much of petitioner’s motion is dedicated to showing that prison officials have not
23 provided him with adequate medical care, in violation of his rights under Eighth and Fourteenth
24 Amendments to the United States Constitution. For the most part, this argument is misplaced
25 in this habeas action. The question in a federal habeas corpus action is the legality of the
26 petitioner’s confinement, vis-a-vis the federal constitution and other applicable federal law; on the

¹ The exhibits filed by petitioner with his motion, found in the record at docket #62, #63, and #64, are cited in this order in the following form: “Exhibit 1.” The exhibits filed by petitioner with his reply, located in the record at docket #66, are cited in this order in the following form: “Exhibit 1 to Reply.”

1 other hand, civil rights violations related to prison conditions are litigated in actions brought
2 pursuant to 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 484, 498-99 (1973).

3 Habeas actions and section 1983 actions are subject to different procedures and
4 prerequisites. For example, the exhaustion requirements are different: complete exhaustion of state
5 judicial remedies is required as a prerequisite to habeas actions, while exhaustion of administrative
6 remedies is a prerequisite to section 1983 actions. *See Ramirez v. Galaza*, 334 F3d 850, 854-55
7 (9th Cir. 2003), *cert. denied*, 541 U.S. 1063 (2004) (discussing the differing exhaustion rules).
8 Also, the procedural rules applicable in the two classes of cases are different: habeas cases are
9 litigated under the Rules Governing Section 2254 Cases in the United States District Courts, while
10 section 1983 cases are litigated pursuant to the rules governing civil litigation in general.

11 Petitioner relies upon the landmark Supreme Court cases of *Lewis v. Casey*, 518 U.S.
12 343 (1996), and *Bounds v. Smith*, 430 U.S. 817 (1977). *See* Motion for Extraordinary Relief, p. 9.
13 It is notable, however, that those were civil rights actions. Though those cases involved issues
14 involving the prisoner plaintiffs' right of access to the courts in habeas cases, the prisoners brought
15 separate civil rights actions to vindicate those rights.

16 Petitioner appears to assert that the Court should, in this habeas action, address the
17 issue of petitioner's alleged inadequate medical care "in exercising its inherent power to control the
18 proceedings before it and to provide a remedy for the infringement on the right to counsel...." *See*
19 Motion for Extraordinary Relief, p. 11, lines 3-5. While the Court may have such inherent power,
20 the Court will decline to exercise it, given that there is an adequate remedy available under
21 42 U.S.C. § 1983, specifically tailored for the resolution of such issues.

22 Petitioner has not stated any reason why he would be unable to pursue his civil rights
23 claims in an action under 42 U.S.C. § 1983, or why that remedy would be inadequate. It appears to
24 the Court that petitioner's "Motion for Extraordinary Relief" in this habeas case is, in effect -- if not
25 as a matter of design -- a circumvention of the usual procedures and prerequisites applicable to civil
26 rights claims regarding prison conditions. The Court will decline in this habeas action to entertain

1 petitioner’s civil rights claims regarding the conditions of his confinement. *See Ramirez*, 334 F.3d
2 at 859 (“[H]abeas jurisdiction is absent, and a § 1983 action proper, where a successful challenge to
3 a prison condition will not necessarily shorten the prisoner’s sentence.”); *Badea v. Cox*, 931 F.2d
4 573, 574 (9th Cir. 1991) (“A civil rights action ... is the proper method of challenging ‘conditions of
5 confinement.’” (citing *Preiser*)); *Crawford v. Bell*, 599 F.2d 890, 891-92 (9th Cir. 1979)
6 (“According to traditional interpretation, the writ of habeas corpus is limited to attacks upon the
7 legality or duration of confinement.” (citing *Preiser*)).

8 Petitioner’s Ability to Understand His Position and Communicate Rationally with Counsel

9 Petitioner argues that the inadequate medical care is undermining his ability to
10 communicate rationally with his counsel regarding his habeas corpus action. This argument raises
11 the issue of petitioner’s statutory right to legal representation under 21 U.S.C. § 848(q), and it
12 appears calculated to bring his motion within the ambit of *Rohan ex rel. Gates v. Woodford*, 334
13 F.3d 803 (9th Cir. 2003).

14 In *Rohan*, the court held that “where an incompetent capital habeas petitioner
15 raises claims that could potentially benefit from his ability to communicate rationally, refusing to
16 stay proceedings pending restoration of competence denies him his statutory right to assistance
17 of counsel, whether or not counsel can identify with precision the information sought.” *Rohan*,
18 334 F.3d at 819. The *Rohan* court stated, with respect to the definition of competence, that the
19 relevant question is whether the petitioner “has the capacity to understand his position and to
20 communicate rationally with counsel.” *Id.*

21 However, when viewed from the perspective of *Rohan*, petitioner’s motion has
22 significant shortcomings.

23 First, most of the relief sought by petitioner by means of his motion goes well beyond
24 the sort of stay envisioned in *Rohan*. *Rohan* provides only for a stay pending the restoration of a
25 petitioner’s competence.
26

1 Second, viewed as a motion for a stay pursuant to *Rohan*, much of the argument and
2 evidence submitted by petitioner is beside the point. Petitioner dedicates a large part of his motion,
3 and the evidence supporting it, to an attempt to show that prison officials have provided him
4 inadequate medical care, in violation of the Eighth and Fourteenth Amendments to the United States
5 Constitution. That argument, however, is not directly pertinent to a motion under *Rohan*. To show
6 that a stay is warranted under *Rohan*, a habeas petitioner must show that he lacks the capacity to
7 understand his position and to communicate rationally with counsel. *See Rohan*, 334 F.3d at 819.
8 Under *Rohan*, the cause of the incompetency is not directly at issue. Under *Rohan*, it does not matter
9 whether or not state officials bear responsibility for a petitioner’s incompetence, or whether
10 constitutional violations have somehow contributed to the incompetence; the issue is the petitioner’s
11 competence.

12 Third, with respect to the central inquiry under *Rohan*, the petitioner’s ability to
13 understand his position and communicate rationally with counsel, petitioner’s motion lacks
14 evidentiary support.

15 There appears to be no argument or evidence at all addressing the question of
16 petitioner’s capacity to understand his position.

17 With respect to petitioner’s capacity to communicate rationally with counsel,
18 petitioner’s counsel explains his position as follows:

19 The neglect of those impairments by prison officials has resulted in a situation
20 in which he cannot conduct “rational communication” with counsel about
21 the issues in his case, *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 813
22 (9th Cir. 2003), because he is so affected by the neglect of his physical
condition; and therefore he is being deprived of the “meaningful assistance of
counsel,” in the proceedings before this Court. *Id.*

* * *

23 Undersigned counsel’s efforts to provide Petitioner with “meaningful
24 assistance of counsel” have been and are being “hindered” by ESP’s refusal to
25 properly treat and medicate Petitioner and have unconstitutionally interfered
26 with the attorney-client relationship. This lack of adequate medical care has
impeded Petitioner’s ability to assist undersigned counsel in representing him
in his current federal habeas litigation, because of his unstable medical
condition, and this situation is aggravated by Petitioner’s mental illness, which

1 in his habeas proceedings, without proper medical care for his heart, blood
2 pressure, and other medical conditions. Because he is constantly in fear of
3 imminent death or further disability as a result of his medical conditions and
4 the lack of treatment for them, and is continuously distracted by the symptoms
5 from which he suffers, Petitioner cannot focus on the legal and factual issues
6 which are presented by [these] habeas proceedings and which I must discuss
7 [with] him.

8 Exhibit 1, ¶¶ 2, 11, 16, 17.

9 In his Reply, petitioner adds the following to his argument in this regard:

10 During conversations with counsel, Petitioner talks only about his
11 medical condition. He is unable to discuss legal issues due to his concern that
12 he will die. Because he is still experiencing dizziness, chest pains, leg pains,
13 vertigo, and numbness in his extremities, his mind is set on receiving some
14 type of medical care to alleviate his pain and treat his condition. When
15 undersigned counsel attempted to discuss the matters in his case, Petitioner
16 saw these conversations as futile because he believes the prison is killing him
17 by refusing to treat him. Discussions with undersigned counsel focus on the
18 conflicting information he is given by the prison about his medical condition
19 instead of the factual matters surrounding his federal habeas case.
20 Undersigned counsel has repeatedly tried to facilitate Petitioner's treatment
21 through unofficial channels. *See* Ex. 1 to Motion for Extraordinary Relief.
22 However, Petitioner's health continues to deteriorate, derailing all discussions
23 about his current federal litigation.

24 The failure to properly treat Petitioner's condition affect[s] not only
25 the attorney-client relationship, but the development of other areas of his
26 federal habeas litigation. Undersigned counsel has attempted to have
27 Petitioner evaluated by a mental health expert. That expert is unable to
28 conduct any psychological testing until Petitioner's medical condition has
29 stabilized. *See* Ex. 1 *hereto*. According to Dr. Barry Crown, a
30 neuropsychologist, Petitioner needs to be fully diagnosed for his medical
31 condition and stabilized prior to his psychological evaluation because his
32 conditions [have] the potential of distorting the results. Dr. Crown stated that
33 he will need an indication from a physician that Petitioner is stabilized prior to
34 his participation and evaluation. *See id.* This evaluation is imperative for
35 Petitioner's case. Several of the issues pertaining to his federal habeas
36 litigation will be affected by Dr. Crown's evaluation. The fact that it cannot
37 be completed until Petitioner's condition is treated and stabilized is indicative
38 of the severity of his medical condition.

39 Additionally, other matters related to Petitioner's habeas case cannot
40 be developed or completed until communication between him and counsel is
41 restored. Petitioner needs to assist in the development of a social history, guilt
42 and penalty phase investigation, and various other areas pertaining to the
43 development of his amended habeas petition. As in *Rohan*, these matters
44 cannot be completed without Petitioner's assistance. *Rohan ex rel. Gates v.*
45 *Woodford*, 334 F.3d 803 (9th Cir. 2003).

1 Reply, pp. 4-5 (footnote omitted); *see also* Reply, pp. 2-3 (“Petitioner’s medical condition makes it
2 *nearly* impossible for him to discuss the factual matters pertaining to his federal habeas litigation
3 with undersigned counsel.” (emphasis added)), and p. 6.

4 In essence, as the Court understands it, the argument regarding the effect of
5 petitioner’s medical condition upon his ability to communicate rationally with counsel is that
6 petitioner’s symptoms are so distracting that he cannot focus on his habeas litigation. The Court
7 does not find petitioner’s position to be convincing. The question under *Rohan* is whether petitioner
8 is *unable* -- without *capacity* -- to communicate rationally with his counsel regarding his habeas
9 litigation. The Court finds that petitioner’s motion falls far short of making such a showing.

10 There is no evidence that petitioner currently suffers from any mental condition that
11 prevents him from communicating rationally with counsel. Petitioner submits Exhibit 5, which is a
12 psychological report from 1995. Clearly, that report is too old to be of any real weight in assessing
13 petitioner’s current competence. That said, however, the notable portions are as follows:

14 Possible Diagnoses

15 He appears to fit the following Axis II classifications best: Passive-
16 Aggressive (Negativistic) Personality Traits, Depressive Personality Traits,
Self-defeating Personality Features, and Schizotypal Personality Features.

17 Axis I clinical syndromes are suggested by the client’s MCMI-III profile in the
18 areas of Generalized Anxiety Disorder, Adjustment Disorder with Depressed
Mood, and Alcohol Abuse.

19 Therapeutic Considerations

20 Moody and unpredictable, this patient may act in a self-demeaning yet angry
21 way in anticipation of condemnation from others. Psychological difficulties
22 may leave him feeling unduly vulnerable and contrary. Close attention and a
23 supportive attitude should diminish noncompliance. Any sign of
24 uncooperativeness should be responded to in a firm, no-nonsense manner that
25 is professional rather than punitive in character. A brief and focused approach
26 to therapy should be effective in moderating this patient’s erratic emotions and
behavior.

1 Exhibit 5, p. 2. While that report indicates that petitioner had mental-health issues in 1995, it does
2 not come anywhere near to showing that he was without the capacity then -- much less now -- to
3 communicate rationally with counsel.

4 Petitioner also submits a declaration of a neuropsychologist, Barry M. Crown, Ph.D.,
5 in support of his position. Exhibit 1 to Reply. In that declaration, Dr. Crown states:

6 4. Due to the severity of the medical conditions Mr. Lisle is
7 currently suffering from, I cannot conduct a neuropsychological evaluation at
8 this time. Conducting a neuropsychological evaluation while a patient is
9 suffering from severe medical illness falls below a reasonable standard of
10 care. A client must be able to concentrate for extended periods of time, be of
11 stable health, and fit physical condition. Mr. Lisle's physical impairments
affect his ability to concentrate and focus on the questions and testing required
for a neuropsychological examination. Because Mr. Lisle complained of
vertigo and dizziness, it is highly unlikely that he will be able to undergo
neuropsychological testing in the next few months.

12 5. Mr. Lisle must be fully diagnosed and treated before any
13 mental health assessment can be completed. His current medical condition
14 will distort any neuropsychological testing conducted at this time. It is likely
15 that his condition will inhibit his ability to properly assess the questions being
16 asked which will impact on the scoring of any testing done. Any mental
health impairment that Mr. Lisle possibly suffers from may not be discovered
based on his medical condition. For these reasons, it is imperative that a
medical doctor confirm that Mr. Lisle's condition has been treated and he is
stable before any mental health testing can be conducted.

17 Exhibit 1 to Reply, pp. 1-2. Dr. Crown's declaration does not speak at all to the capacity of
18 petitioner to communicate with his counsel about this action; rather Dr. Crown's declaration speaks
19 to the capacity of petitioner to undergo a particular type of neuropsychological evaluation.²
20 So, while Dr. Crown's declaration might indicate that petitioner is having difficulty completing
21 neuropsychological testing that he believes is important to his case, that declaration has no bearing
22 on the standard that must be met to justify a stay under *Rohan*.

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² It appears to the Court that the neuropsychological testing referred to by Dr. Crown is something different from the sort of professional assessment that might have been conducted to support petitioner's motion. The effects of petitioner's medical condition would be an important subject of such an assessment; not a hindrance to it.

1 In the absence of any demonstrable mental condition preventing him from
2 communicating rationally with counsel regarding his habeas case, there are only the effects of
3 petitioner's physical condition to consider. In that regard, the Court notes that the exhibits submitted
4 by petitioner reflect that petitioner is able to communicate lucidly with prison officials regarding his
5 medical care. *See* Exhibit 2; Exhibit 2 to Reply. If petitioner is able to do that, it seems unlikely that
6 he is without *the capacity* to communicate rationally with counsel about his litigation. Petitioner has
7 not made a showing to the contrary.

8 The only evidence submitted to the Court regarding the effect of petitioner's medical
9 problems on his ability to communicate with counsel is the declaration of petitioner's counsel.
10 *See* Exhibit 1. The majority of that declaration provides information about petitioner's medical
11 condition and appears dedicated to showing that prison officials have not provided petitioner
12 adequate care. *See, e.g.*, Exhibit 1, ¶¶ 3-10, 12-14. Only in four paragraphs of that declaration does
13 counsel focus on the effect of petitioner's condition on his ability to communicate with counsel; and,
14 in those paragraphs, counsel really does nothing more than indicate that petitioner has seemed too
15 distracted by his medical condition to concentrate on his case. *See* Exhibit 1, ¶¶ 2, 11, 16, 17
16 (quoted extensively, *supra*). The Court determines that this slim evidentiary support is insufficient
17 to show that petitioner may lack the capacity to understand his position or communicate rationally
18 with counsel, and that a stay might be warranted pursuant to *Rohan*.


19 Moreover, the Court determines that an evidentiary hearing is not warranted at this
20 time on the question of petitioner's competence. In his motion, what little petitioner says about his
21 need for an evidentiary hearing is focused on his claim that prison officials have unconstitutionally
22 denied him adequate medical care. *See* Motion for Extraordinary Relief, p. 2, line 1 ("evidentiary
23 hearing regarding Petitioner's treatment and medical care"); p. 3, lines 23-25 ("evidentiary hearing to
24 establish the pervasiveness of the inadequate medical care being provided to Petitioner"); *see also*
25 Reply, p. 3. Petitioner does not specifically request an evidentiary hearing focused on the subject of
26 his competence, and, at any rate, does not indicate what sort of evidence, beyond what little is

1 presented in the declaration of his counsel, could be presented at such a hearing. In view of the
2 nature of petitioner's motion, the lack of any substantial evidence to support a finding that petitioner
3 lacks the capacity to understand his position or communicate rationally with counsel, and petitioner's
4 failure to make any showing that an evidentiary hearing is warranted, the Court will deny petitioner's
5 motion.

6 **IT IS THEREFORE ORDERED** that petitioner's Motion for Extraordinary Relief
7 (docket #62) is **DENIED**.

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Dated this 18th day of June, 2006.


UNITED STATES DISTRICT JUDGE