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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOAQUIN MURRIETTA  
MARTINEZ,

Plaintiff,

v.

BEARD,

Defendant.

Civil No. 13-CV-1457-BTM (WVG)

ORDER DENYING PETITIONER’S  
MOTION FOR EXCEPTION TO  
RULE TO APPOINT COUNSEL ON  
APPEAL

[DOC. NO. 77]

**I. BACKGROUND**

On June 24, 2013, Petitioner filed a Petition for Writ of Habeas Corpus. (Doc. No. 1.) On July 8, 2013, Petitioner’s case was dismissed without prejudice because he failed to satisfy the filing fee requirement, failed to name a proper respondent, and failed to allege exhaustion of state court remedies. (Doc. No. 2.) On August 19, 2013, Petitioner filed a First Amended Petition for Writ of Habeas Corpus. (Doc. No. 3.) On December 27, 2013, Respondent filed an Answer. (Doc. No. 21.) On May 20, 2014, this Court issued a Report and Recommendation (“R&R”) which recommended that the Petition be dismissed without prejudice to Petitioner refile a future petition which contained only exhausted claims. (Doc. No. 33.) On August 19, 2014, Petitioner filed a Motion to Amend the First Amended Petition and a Motion for Stay and Abeyance. (Doc. Nos. 37, 39.)

1 On October 16, 2014, the Honorable Barry Ted Moskowitz, United States District  
2 Judge, issued an Order Declining to Adopt the R&R. (Doc. No. 40.) On December 1, 2014,  
3 Petitioner filed a Notice of Assisting Petitioner; Declaration of Anthony Ivan Bobadilla.  
4 (Doc. No. 45.) In the Declaration, Mr. Bobadilla notified the Court that he was an inmate  
5 assisting Petitioner with his First Amended Petition. Id. On December 8, 2014, the District  
6 Judge issued an Order Denying Petitioner's Request for Relief related to Mr. Bobadilla.  
7 (Doc. No. 46.) In its Order, the Court noted that it received a Notice of Assisting Petitioner  
8 and Prayer for Relief filed by Mr. Bobadilla, a person currently incarcerated with Petitioner.  
9 Id. at 1. The Court noted that, to the extent Mr. Bobadilla was requesting appointment of  
10 "next friend" status to assist Petitioner in this action, his request was denied. Id. at 2. The  
11 Court also denied a request for an order directing that Mr. Bobadilla and/or Petitioner not be  
12 transferred to another institution while Petitioner's action was pending.

13 On December 30, 2014, the District Judge issued an Order Granting Petitioner's  
14 Unopposed Motion to Amend the Petition and Denying Petitioner's Motion for Stay and  
15 Abeyance as Moot. (Doc. No. 50.) The Court noted that Petitioner filed a Motion to Amend  
16 the First Amended Petition to present additional claims. Id. at 1-2; citing Doc. No. 37. The  
17 Court also noted that Petitioner filed a Motion for Stay and Abeyance in which he requested  
18 the Court hold the First Amended Petition in abeyance while he returned to state court to  
19 exhaust state court remedies as to the new claims, and as to the ineffective assistance of trial  
20 counsel claim raised in the First Amended Petition. Id. at 2; citing Doc. No. 39. In order to  
21 avoid the delay in requiring Petitioner to file a Second Amended Petition which presented  
22 all claims in a single pleading, the District Judge consolidated the First Amended Petition  
23 with the habeas petition which constituted Petitioner's Motion to Amend (Doc. No. 37), and  
24 ordered that, together, they formed the operative pleading in this action. (Doc. No. 50 at 2.)  
25 The Court denied Petitioner's Motion for Stay and Abeyance as moot because the new  
26 claims were technically exhausted and procedurally defaulted due to Petitioner's failure to  
27 present them to the state court in a timely, procedurally proper manner. Id.

1 **II. MOTIONS TO APPOINT COUNSEL**

2 **A. PRIOR MOTIONS TO APPOINT COUNSEL**

3 On October 22, 2013, the Court received a letter from Petitioner requesting that an  
4 attorney be appointed for him. (Doc. No. 8.) The Court construed the letter to be a Motion  
5 for Appointment of Counsel, and on October 24, 2013, this Court issued an Order Denying  
6 Motion for Appointment of Counsel. (Doc. No. 9.) On October 30, 2013, the Court received  
7 an undated letter from Petitioner which again requested appointment of counsel. (Doc. No.  
8 13.) In the October 30, 2013 letter, Petitioner stated that he had a stroke and needed “more  
9 time.” Id.

10 On October 31, 2013, the Court ordered Respondent to submit for an *in camera*  
11 review, Petitioner’s medical records at the prison at which he was housed and any other  
12 evidence in the files at the prison that showed Petitioner’s medical condition(s) and his  
13 ability to represent himself in this action. (Doc. No. 14.) On November 21, 2013, the Court  
14 received Petitioner’s medical records dated from March 27, 2012 to November 5, 2013.  
15 These documents included medical records from Donovan State Prison and the San Diego  
16 Sheriff’s Department. The Court did not receive any records dated prior to March 27, 2012.  
17 The Court conducted an *in camera* review of Petitioner’s medical records.

18 On November 25, 2013, this Court issued a second Order Denying Petitioner’s  
19 Application for Appointment of Counsel. (Doc. No. 15.) The Court stated that its review  
20 of Petitioner’s medical records did not support his renewed request for appointment of  
21 counsel. Id. at 3. The Court found that Petitioner suffered from psychological problems,  
22 took medications to treat his psychological problems, and could manage his psychological  
23 problems if he took his medications. Id. at 2. The Court also noted that Petitioner could  
24 communicate in English, was generally alert and cooperative, and his thought processes were  
25 organized, linear, logical, and goal-directed. Id. at 2-3. After a review of his medical  
26 records, the Court observed that Petitioner aggressively sought the medications he believed  
27 to be best for him by repeatedly requesting those medications from prison psychiatrists, and  
28 by filing prison grievances when he did not receive those medications. Id. at 3. The Court

1 stated that, in July of 2012, Petitioner engaged in a hunger strike because he did not receive  
2 the medications he deemed best for him, and he refused consultations with prison  
3 psychiatrists after those psychiatrists did not prescribe medications Petitioner deemed best  
4 for him. Id.

5 The Court found that Petitioner's medical records showed that he did not suffer a  
6 stroke, at least not after March 27, 2012. (Doc. No. 15 at 3.) The Court noted that, even if  
7 Plaintiff suffered a stroke before March 27, 2012, his medical records amply demonstrated  
8 that he was quite capable of forming opinions about his health care, and obtaining the health  
9 care he needed while in prison. Id. The Court observed that the medical records indicated  
10 that Petitioner had used many avenues to obtain what he needed or believed he needed. Id.  
11 The Court concluded that for the reasons stated in its first Order denying Petitioner's motion  
12 for appointment of counsel, and based on the Court's review of his medical records,  
13 Petitioner had not demonstrated that he required counsel to represent him in this action. Id.  
14 at 3-4. Therefore, the Court denied Petitioner's renewed Motion for Appointment of  
15 Counsel. Id. at 4.

16 On December 18, 2014, Petitioner filed a third Motion to Appoint Counsel. (Doc. No.  
17 49.) The District Judge accepted Petitioner's Motion to Appoint Counsel through a  
18 discrepancy order on December 18, 2014, directing that the motion be filed nunc pro tunc  
19 to the date received in the Clerk's Office. On April 27, 2015, the Motion was assigned to  
20 the undersigned. In his third Motion, Petitioner asserted that he did not have the financial  
21 resources to retain counsel, and he was in no position to investigate crucial facts. (Doc. No.  
22 49 at 1-2, 24.) He argued that his case involved substantial and complex procedural legal  
23 or mixed legal and factual questions, and that he had no comprehension of federal habeas  
24 corpus procedures. Id. at 4. He also asserted that the case would require the assistance of  
25 experts in framing and proving the claims. Id. at 23. Petitioner claimed that he had another  
26 inmate assisting him with his Court filings, but noted that the inmate helping him had no  
27 experience with federal habeas corpus petitions, and either Petitioner or the assisting inmate  
28 could be moved at any time. Id. at 4-5.

1 Petitioner also claimed that he lacked education and was mentally impaired/disabled.  
2 (Doc. No. 49 at 9.) He stated that, at the time of filing, he was an inmate in the Mental  
3 Health Services Delivery System and had a qualifying mental disorder. Id. at 9. He referred  
4 the Court to Exhibit B, California Department of Corrections and Rehabilitation (“CDCR”)  
5 form 128MH3, and claimed that the form confirmed his qualifying medical disorder. Id.  
6 Petitioner claimed that the CDCR form noted that “Petitioner ‘revealed a potential effective  
7 communication trigger (TABE reading score of 2.3) that requires...assistance for reading or  
8 writing or any other accommodation for a possible learning disability...” Id.

### 9 **B. INSTANT MOTION TO APPOINT COUNSEL**

10 On August 7, 2015, Petitioner filed a fourth Motion to Appoint Counsel. (Doc. No.  
11 77.) In his instant Motion, Petitioner states that he has submitted various documents to show  
12 “the level of mental damage done to him.” (Doc. No. 77 at 2.) Petitioner also asserts that  
13 he has a third grade education level. Id. He states that exceptional circumstances exist to  
14 warrant appointment of counsel. Id. at 1.

### 15 **III. APPLICABLE LAW AND DISCUSSION**

16 The Sixth Amendment right to counsel does not extend to federal habeas corpus  
17 actions by state prisoners. McCleskey v. Zant, 499 U.S. 467, 495 (1991); Chaney v. Lewis,  
18 801 F.2d 1191, 1196 (9th Cir. 1986); Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir.  
19 1986). However, financially eligible habeas petitioners seeking relief pursuant to 28 U.S.C.  
20 § 2254 may obtain representation whenever the court “determines that the interests of justice  
21 so require.” 18 U.S.C. § 3006A(a)(2)(B) (West Supp. 2005); Terrovona v. Kincheloe, 912  
22 F.2d 1176, 1181 (9th Cir. 1990); Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984);  
23 Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994).

24 The interests of justice require appointment of counsel when the court conducts an  
25 evidentiary hearing on the petition. Terrovona, 912 F.2d at 1177; Knaubert, 791 F.2d at 728;  
26 Abdullah v. Norris, 18 F.3d 571, 573 (8th Cir. 1994); Rule 8(c), 28 U.S.C. foll. § 2254. The  
27 appointment of counsel is discretionary when no evidentiary hearing is necessary.  
28 Terrovona, 912 F.2d at 1177; Knaubert, 791 F.2d at 728; Abdullah, 18 F.3d at 573.

1 In the Ninth Circuit, “[i]ndigent state prisoners applying for habeas relief are not  
2 entitled to appointed counsel unless the circumstances of a particular case indicate that  
3 appointed counsel is necessary to prevent due process violations.” Chaney, 801 F.2d at  
4 1196; Knaubert, 791 F.2d at 728-29. A due process violation may occur in the absence of  
5 counsel if the issues involved are too complex for the petitioner. In addition, the  
6 appointment of counsel may be necessary if the petitioner has such limited education that he  
7 or she is incapable of presenting his or her claims. Hawkins v. Bennett, 423 F.2d 948, 950  
8 (8th Cir. 1970).

9 In the Eighth Circuit, “[t]o determine whether appointment of counsel is required for  
10 habeas petitioners with nonfrivolous claims, a district court should consider the legal  
11 complexity of the case, the factual complexity of the case, the petitioner’s ability to  
12 investigate and present his claim, and any other relevant factors.” Abdullah, 18 F.3d at 573  
13 (citing Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990)); Hoggard, 29 F.3d at 471;  
14 Boyd v. Groose, 4 F.3d 669, 671 (8th Cir. 1993); Smith v. Groose, 998 F.2d 1439, 1442 (8th  
15 Cir. 1993); Johnson v. Williams, 788 F.2d 1319, 1322-23 (8th Cir. 1986).

16 Because these factors are useful in determining whether due process requires the  
17 appointment of counsel, they are considered to the extent possible based on the record before  
18 the Court. Here, Petitioner has sufficiently represented himself to date. From the face of the  
19 Petition, filed *pro se*, it appears that Petitioner has a good grasp of this case and the legal  
20 issues involved. Under such circumstances, a district court does not abuse its discretion in  
21 denying a state prisoner’s request for appointment of counsel as it is simply not warranted  
22 by the interests of justice. See LaMere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987).

23 Further, while Petitioner claims that he lacks education and is mentally im-  
24 paired/disabled, the documents attached to his third Motion to Appoint Counsel and the new  
25 documents attached to his instant Motion to Appoint Counsel, do not support granting  
26 Petitioner’s instant Motion. Along with his third Motion, Petitioner attached two CDCR  
27 128-MH3 forms, titled State of California Mental Health Placement Chrono. (Doc. No. 49  
28 at 11-12.) The forms, dated October 1 and 23, 2014, indicate that Petitioner has a qualifying

1 mental disorder, but do not specify any details of the disorder. Id. Petitioner also attached  
2 to his third Motion, a First Level Appeal Response from Mule State Creek Prison dated  
3 November 24, 2014, and a Second Level Appeal Response dated December 1, 2014. Id. at  
4 16-19. Petitioner submitted the first level appeal seeking a document that certified that he  
5 was disabled, along with a description of his disability. Id. at 18. The First Level Appeal  
6 Response indicates that Petitioner participated in a face-to-face interview with a Supervisor  
7 of Academic Instruction on November 20, 2014. Id. The Response noted that, while  
8 Petitioner does have medical records that indicate that he has medical issues, a review of the  
9 education files did not reveal any documentation of a verifiable learning disability. Id. The  
10 first level appeal was partially granted in that accommodations would be provided for  
11 Petitioner’s physical disability if he requested assistance, and Petitioner could request staff  
12 assistance with reading and writing. Id. at 18-19. In the second level appeal, Petitioner  
13 again sought a document that certified he was disabled, along with a description of his  
14 disability. Id. at 16. The Second Level Appeal Response indicates that the prison is not  
15 required to test for learning disabilities, as it is not necessary to verify a learning disability  
16 in order to accommodate the associated limitations. Id. at 17. The second level appeal was  
17 also partially granted in that Petitioner could request staff assistance with reading or writing  
18 or any other accommodation for a possible learning disability, and referenced his current  
19 CDCR 128-MH3 form showing his level of mental health care. Id. at 17. At both levels of  
20 appeal, the prison stated that it could not provide Petitioner with a document verifying a  
21 learning disability at that time. Id. at 17, 19.

22         Along with the instant Motion to Appoint Counsel, Petitioner attaches academic  
23 transcripts from middle school and high school, which demonstrate his extremely low grade  
24 point average. Additionally, he attaches medical records from February of 1986, which  
25 show that he was diagnosed at Mercy Hospital with “right hemiparesis,” and a CT scan  
26 showed “a wedge area in the left parietal zone of the cerebral cortex of either hemorrhage  
27 or infarction.” (Doc. No. 77 at 28.) Petitioner also attaches a CDCR Reasonable  
28 Accommodation Request dated February 14, 2015. (Doc. No. 77 at 3.) In his Request,

1 Plaintiff noted that he has a learning disability and a mental disability, and he needs help to  
2 understand his legal work. Id. He explained that he had a stroke in his adolescence and it  
3 is difficult for him to learn and understand. Id. Petitioner requested someone to help him  
4 with his legal work in every capacity. Id. Petitioner also attaches a CDCR Response to his  
5 Reasonable Accommodation Request. Id. at 4. The Response, dated February 19, 2015,  
6 indicated that “Staff assistance will be provided due to his Learning Disability.” Id.

7 This Court has already conducted an *in camera* review of Petitioner’s medical records  
8 from March 27, 2012 to November 5, 2013, and determined that there was nothing in the  
9 records to merit a granting of his previous Motion to Appoint Counsel. With the instant  
10 Motion, Petitioner has provided additional information about his academic records, as well  
11 as medical records indicating that he had a medical issue when he was eight years old.  
12 However, Petitioner has also provided the Court with documentation that staff assistance will  
13 be provided due to his learning disability. All briefing is complete in this habeas petition,  
14 with the exception of a possible objection to the undersigned’s Report and Recommendation.  
15 At this stage of the proceedings, the Court finds that the interests of justice do not require the  
16 appointment of counsel.

17 The Court also notes that “[w]here the issues involved can be properly resolved on the  
18 basis of the state court record, a district court does not abuse its discretion in denying a  
19 request for court-appointed counsel.” Hoggard, 29 F.3d at 471; McCann v. Armontrout, 973  
20 F.2d 655, 661 (8th Cir. 1992); Travis v. Lockhart, 787 F.2d 409, 411 (8th Cir. 1986) (per  
21 curiam) (holding that district court did not abuse its discretion in denying Section 2254  
22 habeas petitioner’s motion for appointment of counsel where allegations were properly  
23 resolved on basis of state court record). Here, Petitioner asserts that certain statements were  
24 admissible under an exception to the California hearsay rule, and that his federal constitu-  
25 tional right to a fair trial was violated. See Doc. No. 3. Petitioner also argues that he was  
26 compelled to testify against himself when a videotaped statement he made to the police was  
27 shown to the jury and because he was forced to take the stand at trial to respond to that  
28 statement, his appellate counsel was ineffective for failing to argue he was compelled to



1 testify against himself, his trial counsel was ineffective for failing to present evidence of his  
2 medical condition, that there was improper admission of hearsay statements, and arbitrary  
3 and discriminatory prosecution. See Doc. No. 37. Respondent has provided the Court with  
4 the Clerk’s Transcript (two volumes), the Reporter’s Transcript (fourteen volumes),  
5 Appellant’s Opening Brief, Respondents’ Opening Brief, the Opinion of the California Court  
6 of Appeal, the Petition for Review, and the Order of the Supreme Court of California. See  
7 Doc. No. 22. The Court has issued a Report and Recommendation to the District Judge. At  
8 this stage of the proceedings, it appears that the issues can be properly resolved on the basis  
9 of the state court record.

10 “The procedures employed by the federal courts are highly protective of a *pro se*  
11 petitioner’s rights. The district court is required to construe a *pro se* petition more liberally  
12 than it would construe a petition drafted by counsel.” Knaubert, 791 F.2d at 729 (citing  
13 Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding *pro se* complaint to less stringent  
14 standard) (per curiam)); Bashor, 730 F.2d at 1234. The Petition in this case was pled  
15 sufficiently to warrant this Court’s order directing Respondent to file an answer or other  
16 responsive pleading to the Petition.

17 On December 13, 2014, Judge Moskowitz granted Petitioner’s Motion to Amend the  
18 Petition, and Ordered that Respondents file an Answer by March 2, 2015. (Doc. No. 50 at  
19 4.) The Court ordered that Petitioner may file a Traverse by April 2, 2015. Id. On March  
20 6, 2015, the undersigned granted in part and denied in part Respondents’ Application for  
21 Enlargement of Time to File an Answer. (Doc. No. 58.) The Court ordered that Respon-  
22 dents file an Answer by March 18, 2015, and that Petitioner may file a Traverse by April 20,  
23 2015. Id. at 2. Petitioner did not file a Traverse. Accordingly, because further briefing is  
24 not required of Petitioner, his claim that he is at a disadvantage in responding and thus needs  
25 counsel is without merit. Further, CDCR has represented that staff assistance will be  
26 provided to Petitioner.

27 “The district court must scrutinize the state court record independently to determine  
28 whether the state court procedures and findings were sufficient.” Knaubert, 791 F.2d at 729;

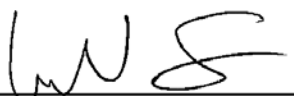
1 Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir.1985); Rhinehart v. Gunn, 598 F.2d 557,  
2 558 (9th Cir.1979) (per curiam); Turner v. Chavez, 586 F.2d 111, 112 (9th Cir.1978) (per  
3 curiam). Even when the district court accepts a state court’s factual findings, it must render  
4 an independent legal conclusion regarding the legality of a petitioner’s incarceration. Miller  
5 v. Fenton, 474 U.S. 104, 112 (1985). The district court’s legal conclusion, moreover, will  
6 receive de novo appellate review. Hayes v. Kincheloe, 784 F.2d 1434, 1436 (9th Cir. 1986).

7 The assistance counsel provides is valuable. “An attorney may narrow the issues and  
8 elicit relevant information from his or her client. An attorney may highlight the record and  
9 present to the court a reasoned analysis of the controlling law.” Knaubert, 791 F.2d at 729.  
10 However, as the court in Knaubert noted: “unless an evidentiary hearing is held, an  
11 attorney’s skill in developing and presenting new evidence is largely superfluous; the district  
12 court is entitled to rely on the state court record alone.” Id. (citing Sumner v. Mata, 449  
13 U.S. 539, 545-57 (1981), and 28 U.S.C. § 2254(d)). Because this Court denies Petitioner’s  
14 motion for appointment of counsel, it must “review the record and render an independent  
15 legal conclusion.” Id. Moreover, because the Court does not appoint counsel, it must  
16 “inform itself of the relevant law. Therefore, the additional assistance provided by attorneys,  
17 while significant, is not compelling.” Id. (emphasis in original).

18 If an evidentiary hearing is required, Rule 8(c) of the Rules Governing Section 2254  
19 Cases requires that counsel be appointed to a petitioner who qualifies under 18 U.S.C. §  
20 3006A(a)(2)(B). Rule 8(c), 28 U.S.C. foll. § 2254; see Wood v. Wainwright, 597 F.2d 1054  
21 (5th Cir. 1979). In addition, the Court may appoint counsel for the effective utilization of  
22 any discovery process. Rule 6(a), 28 U.S.C. foll. § 2254. For the above-stated reasons, the  
23 “interests of justice” in this matter do not compel the appointment of counsel. Accordingly,  
24 Petitioner’s request for appointment of counsel is DENIED without prejudice.

25 IT IS SO ORDERED.

26 DATED: September 14, 2015

27   
28 Hon. William V. Gallo  
U.S. Magistrate Judge