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**FILED**

DEC 21 2009

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MIGUEL GARCIA, JR.,

Petitioner,

v

R.A. HOREL, Warden,

Respondent.

NO C-07-01105-VRW

ORDER DENYING CERTIFICATE FOR  
APPEALABILITY AND MOTION FOR  
APPOINTMENT OF COUNSEL

The court has denied the petition for a writ of habeas corpus in the above-captioned matter and has issued judgment in favor of respondent. Petitioner has since filed a timely notice of appeal, which also contains a request for a certificate of appealability ("COA"). A notice of appeal may properly be construed as an application for a COA. See United States v Asrar, 116 F3d 1268, 1270 (9<sup>th</sup> Cir 1997); 28 USC § 2253(c)(3)). Petitioner has also filed a separate motion for appointment of counsel.

I

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2 "[A]n appeal may not be taken to the court of appeals  
3 from" the denial of a habeas petition unless a certificate of  
4 appealability is issued. 28 USC § 2253(c)(1) (2009). A  
5 certificate of appealability may be issued "only if the applicant  
6 has made a substantial showing of the denial of a constitutional  
7 right," id § 2253(c)(2); the certificate "shall indicate which  
8 specific issue or issues satisfy [this] showing," id §  
9 2254(c)(3).

10 For the reasons stated in the court's prior order  
11 denying the petition, petitioner has not made any showing of the  
12 denial of any constitutional right, much less the substantial  
13 showing required for the issuance of a certificate of  
14 appealability. Accordingly, petitioner's application for a  
15 certificate of appealability is DENIED.

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17 II

18 Petitioner also moves for appointment of counsel in  
19 further litigation of this action. The Sixth Amendment right to  
20 counsel does not apply in habeas corpus actions. See Knaubert v  
21 Goldsmith, 791 F2d 722, 728 (9<sup>th</sup> Cir 1986). Title 18 USC §  
22 3006A(a)(2)(B), however, authorizes a district court to appoint  
23 counsel to represent a habeas petitioner whenever "the court  
24 determines that the interests of justice so require" and such  
25 person is financially unable to obtain representation. The  
26 decision to appoint counsel is within the discretion of the  
27 district court. See Chaney v Lewis, 801 F2d 1191, 1196 (9<sup>th</sup> Cir  
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1 1986). The courts have made appointment of counsel the exception  
2 rather than the rule by limiting it to: (1) capital cases; (2)  
3 cases that turn on substantial and complex procedural, legal or  
4 mixed legal and factual questions; (3) cases involving uneducated  
5 or mentally or physically impaired petitioners; (4) cases likely  
6 to require the assistance of experts either in framing or in  
7 trying the claims; (5) cases in which petitioner is in no  
8 position to investigate crucial facts; and (6) factually complex  
9 cases. See generally 1 J Liebman & R Hertz, Federal Habeas  
10 Corpus Practice and Procedure § 12.3b at 383-386 (2d ed 1994).  
11 Appointment is mandatory only when the circumstances of a  
12 particular case indicate that appointed counsel is necessary to  
13 prevent due process violations. See Chaney, 801 F2d at 1196;  
14 Eskridge v. Rhay, 345 F2d 778, 782 (9<sup>th</sup> Cir. 1965).

15           The court finds that appointment of counsel is not  
16 warranted in this case. Petitioner's claims are typical claims  
17 that arise in criminal appeals and are not especially complex.  
18 This is not an exceptional case that would warrant representation  
19 on federal habeas review. Therefore, petitioner's motion for  
20 appointment of counsel is DENIED.

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III

For the foregoing reasons, petitioner's request for a  
COA and motion for appointment of counsel are DENIED.

IT IS SO ORDERED.

  
Vaughn R Walker  
United States District Chief Judge