1			
2			
3			
4			
5			
6	UNITED STATES DISTRICT COURT		
7	EASTERN DISTRICT OF CALIFORNIA		
8			
9	FRANCISCO OROSCO GARCIA,) 1:08-CV-1819 AWI JMD HC		
10	Petitioner,) ORDER GRANTING PETITIONER'S) MOTION TO FILE SUPPLEMENTAL		
11	v. () OBJECTIONS TO FINDINGS AND () RECOMMENDATIONS AND MOTION FOR		
12	WARDEN M.S. EVANS,) APPOINTMENT OF COUNSEL)		
13	Respondent.) (Doc. No. 34)		
14			
15			
16	On November 26, 2008, Petitioner Francisco Orosco Garcia ("Petitioner"), a state prisoner		
	proceeding pro se, filed a habeas corpus action pursuant to 28 U.S.C. § 2254. See Doc. No. 1.		
	Petitioner asserts five claims for relief. On May 18, 2009, Respondent filed an answer. See Doc. No.		
	16. On August 18, 2009, Petitioner filed a traverse. See Doc. No. 23. On June 1, 2010, the		
	Magistrate Judge issued a Findings and Recommendation ("F&R") that recommended the petition be		
21	denied. See Doc. No. 28. On July 27, 2010, Petitioner filed a request for appointment of counsel and		
22	objections to the F&R. See Doc. Nos. 31-32. On August 2, 2010, the Court denied Petitioner's		
23	request for appointment of counsel. See Doc. No. 33.		
24	On November 2, 2010, Petitioner filed the instant motion for leave of Court to file		
25	Supplemental Objections to the F&R and renewed motion for appointment of counsel. See Doc. No.		
26	28. Petitioner asserts that he needs counsel because of his indigency, ¹ limited education, inability to		
27	¹ Petitioner has established his indigency in his declaration, which he attached to his initial motion for appointment		
28	of counsel. See Doc. No. 31.		

speak, read, and understand the English language. See Doc. No. 28 at 1-2. 1

- 2 There currently exists no absolute right to appointment of counsel in habeas proceedings. See, e.g., Anderson v. Heinze, 258 F.2d 479, 481 (9th Cir. 1958); Mitchell v. Wyrick, 727 F.2d 773, 774 3 (8th Cir. 1984). However, 18 U.S.C. § 3006A(a)(2)(B) authorizes the appointment of counsel at any 4 stage of the case if "the interests of justice so require" (see Rule 8(c), Rules Governing Section 2254 5 Cases) and "such person is financially unable to obtain representation" (see 18 U.S.C. 6 7 §3006A(a)(2)(B)); see also Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). In deciding to 8 appoint counsel in a habeas proceeding, the court evaluates "the likelihood of success on the merits" 9 as well as "the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved." Weygandt, 718 F.2d at 954. The decision to appoint counsel is within the 10 11 discretion of the district court. See Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986). 12 In the present case, the Court has reviewed the record and finds that the interests of justice would be served by appointment of counsel at this time due to Petitioner's indigency, inability to read, 13 speak, and understand the English language, and given the complexity of the issues involved with 14 respect to Petitioner's fourth claim for relief. In addition, Petitioner has made a sufficient showing as 15 16 to why he believes he would be successful on the merits of his fourth claim for relief.² Accordingly, in the interests of justice, the Court grants Petitioner's motion for appointment of counsel for the 17 limited purpose of filing supplemental objections regarding Petitioner's fourth claim for relief. 18 19 ORDER 20 Accordingly, IT IS HEREBY ORDERED: 21 1. Petitioner's request for appointment of counsel is GRANTED for the limited purpose 22 of submitting supplemental objections regarding Petitioner's fourth claim for relief; 23

24

25

- 2. This matter is hereby referred to the Federal Public Defender's Office to find counsel for Petitioner;
- 2 Petitioner contends in his fourth claim for relief that the state trial court erred in issuing a modified version of jury 26 instruction CALJIC No. 3.16 because the instruction directed a guilty verdict against Petitioner and denied him his constitutional right to have a jury finding on the issue of guilt beyond a reasonable doubt. The F&R concluded that the trial 27 court's issuance of CALJIC No. 3.16 was erroneous but that the issuance did not rise to the level of a due process violation. The F&R further determined that even if the erroneous instruction rose to the level of due process violation, the error was 28 harmless.

1	3.	Within forty-five (45) days from the date that counsel is appointed, Petitioner's
2		counsel shall file supplemental objections with respect to Petitioner's fourth claim for
3		relief;
4	4.	Respondent may file a reply to Petitioner's supplemental objections within fifteen days
5		of the date the objections are filed; and
6	5.	The Clerk of the Court is directed to send a copy of this Order to Petitioner, the
7		Federal Defender's Office, and to Respondent.
8	IT IS SO O	RDERED.
9	Dated:	December 20, 2010 /s/ John M. Dixon UNITED STATES MAGISTRATE JUDGE
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25 26		
26		
27 28		
28		
t		