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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUIS MIGUEL GONZALEZ,
Petitioner,
v.
MICHAEL SEXTON,
Respondent.

Case No. 1:18-cv-00039-DAD-JDP (HC)
ORDER GRANTING PETITIONER’S
MOTION FOR DISCOVERY
ECF No. 18 at 38-40
ORDER APPOINTING COUNSEL FOR
LIMITED PURPOSE OF DISCOVERY

Petitioner Luis Miguel Gonzalez, a state prisoner without counsel, seeks a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner alleges that his appellate counsel abandoned him during his state appellate proceeding. According to petitioner, his appellate counsel failed to confer with him and to keep him informed of the status of the case. In addition, petitioner, his family members, and the state bar association contacted the appellate counsel to request records, but got no response. Even now, petitioner states, he lacks access to the records that he needs to pursue various postconviction remedies. He claims that his appellate counsel’s inaction constitutes ineffective assistance of counsel and violates the Sixth Amendment of the U.S. Constitution.

Petitioner moves for this court’s leave for discovery. ECF No. 18 at 38-40. He seeks certain transcripts and other records from his state criminal proceedings and his case file maintained by his appellate counsel. Respondent has not objected. We will grant petitioner leave

1 to conduct limited discovery and appoint him counsel for the narrow purpose of assisting with
2 discovery.¹

3 **I. Propriety of Discovery**

4 Under Rule 6(a) of the Rules Governing Section 2254 Cases, a federal district court may
5 authorize discovery in a Section 2254 proceeding for good cause. *See also Bracy v. Gramley*, 520
6 U.S. 899, 9043-05 (1997). Good cause exists if “specific allegations before the court show reason
7 to believe that the petitioner may, if the facts are fully developed,” demonstrate entitlement to
8 habeas relief. *Smith v. Mahoney*, 611 F.3d 978, 996-97 (9th Cir. 2010) (quoting *Bracy*, 520 U.S.
9 at 908-09). When good cause exists, the court must “provide the necessary facilities and
10 procedures for an adequate inquiry.” *Smith v. Mahoney*, 611 F.3d 978, 996-97 (9th Cir. 2010);
11 *accord; Earp v. Davis*, 881 F.3d 1135, 1142 (9th Cir. 2018) (reasoning that abuse of discretion
12 occurs if “discovery is indispensable to a fair, rounded, development of the material facts”). The
13 petitioner seeking discovery need not show that he will ultimately prevail on his habeas claim.
14 *See Smith*, 611 F.3d at 997. The district court may allow discovery without scheduling an
15 evidentiary hearing, unless the absence of an evidentiary hearing would make discovery futile.
16 *See Kemp v. Ryan*, 638 F.3d 1245, 1260 (9th Cir. 2011); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th
17 Cir. 1997).

18 Here, petitioner has shown good cause for discovery. Petitioner claims that he received
19 ineffective assistance of counsel from his appellate attorney because, among other things, she
20 failed to keep him informed of the status of his case during his appeal, despite repeated requests
21 for information by petitioner and his family. *See* ECF No. 1 at 4; ECF No. 18 at 2, 5-6.
22 According to petitioner, he learned that he had lost on appeal only long after the appeal was
23 decided. *See* ECF No. 18 at 2; ECF No. 14 at 5. His late discovery of the appellate decision
24 allegedly precluded him from filing a timely petition for review before the California Supreme
25 Court. *See* ECF No. 1 at 4. Petitioner also states that despite his repeated requests—and an

26 ¹ Earlier in the case, we recommended that the court deny a motion filed by respondent, noting
27 that if the court were to adopt our recommendation, we would appoint counsel and allow
28 petitioner to conduct discovery. ECF No. 19 at 3. The presiding district judge adopted the
recommendation in full. ECF No. 23 at 1-2.

1 instruction from the State Bar of California—his appellate counsel still has not given him the
2 records pertaining to his case. *See* ECF No. 1 at 14-15; ECF No. 14 at 3-5; ECF No. 18 at 30.
3 Petitioner indicates that because his appellate counsel has not provided him with necessary
4 materials, he cannot seek state or federal habeas relief. *See* ECF No. 18 at 39-40. Appointed
5 counsel’s complete abandonment of a criminal defendant can support a cognizable claim of
6 ineffective assistance of counsel.² We are satisfied that petitioner has shown good cause for
7 discovery, so we will allow it.

8 **II. Appointment of Counsel**

9 If necessary for effective discovery, a district court must appoint counsel for a habeas
10 petitioner who is eligible for counsel under 18 U.S.C. § 3006A. *See* Rule 6(a), Rules Governing
11 Section 2254 Cases. Under 18 U.S.C. § 3006A(a)(2)(B), a district court may appoint counsel for
12 a petitioner if “the interests of justice so require” and the petitioner is “financially eligible.” The
13 “interests of justice” standard is a context-specific inquiry, and no bright-line rule applies here.
14 *See Martel v. Clair*, 565 U.S. 648, 663 (2012). A habeas petitioner is financially eligible for
15 counsel if he cannot afford counsel, and this standard is “a lower standard than indigency.”
16 *United States v. Sarsoun*, 834 F.2d 1358, 1362 (7th Cir. 1987). The court must resolve any doubt
17 about the petitioner’s financial eligibility in his favor, and “erroneous determinations of eligibility
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20 ² *See Michigan v. Harvey*, 494 U.S. 344, 357 (1990) (reasoning that the accused has the
21 constitutional right to assist his appointed counsel on appeal); *Avery v. State of Alabama*, 308
22 U.S. 444, 446 (1940) (“[T]he denial of opportunity for appointed counsel to confer, to consult
23 with the accused and to prepare his defense, could convert the appointment of counsel into a sham
24 and nothing more than a formal compliance with the Constitution’s requirement that an accused
25 be given the assistance of counsel. The Constitution’s guarantee of assistance of counsel cannot
26 be satisfied by mere formal appointment.”); *Daniels v. Woodford*, 428 F.3d 1181, 1201 (9th Cir.
27 2005) (reasoning that “complete breakdown in communication” rendered counsel’s assistance
28 ineffective). Complete abandonment by appointed counsel can also establish cause for excusing
procedural default. *See Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019). We note that, to
prevail on his claim of ineffective assistance of counsel, petitioner may need to show, later in the
case, how he suffered prejudice from his appellate counsel’s deficiency—that is, whether he
would have prevailed if he had pursued and obtained review by the California Supreme Court.
But it appears that petitioner cannot demonstrate such prejudice or litigate this case at this time
without access to the requested documents.

1 may be corrected at a later time.” Admin. Office of the U.S. Courts, Guide to Judiciary Policies
2 and Procedures, Vol. 7, pt. A, § 210.40.30(b).

3 Here, we conclude that appointment of counsel is necessary for effective discovery.
4 Petitioner, his family members, and the state bar association have allegedly attempted to have his
5 appellate counsel produce various documents, but they have not succeeded. *See* ECF No. 1 at 14-
6 15; ECF No. 14 at 3-5; ECF No. 18 at 2, 5-6, 30-31. We find that petitioner, who appears pro se,
7 cannot obtain the necessary documents on his own and that an attorney is necessary for effective
8 discovery. Thus, appointment of counsel is required under Rule 6(a) of the Rules Governing
9 Section 2254 cases, and appointing counsel will serve the interests of justice under 18 U.S.C.
10 § 3006A. We find that petitioner is financially eligible because he has been eligible for appointed
11 counsel for his state court proceedings, and his economic circumstances presumably have not
12 changed during his incarceration.

13 **III. Scope of Discovery**

14 Petitioner appears to be seeking two sets of documents: (1) the transcripts and other
15 records from his state criminal proceedings, ECF No. 18 at 40, and (2) his case file maintained by
16 his appellate counsel, ECF No. 1 at 14. As for the first set of documents, we construe petitioner’s
17 discovery motion to be requesting the usual state-court records lodged in Section 2254 cases, such
18 as the reporter’s and the clerk’s transcripts. *See* Rule 5(c)-(d), Rules Governing Section 2254
19 Cases. Petitioner may obtain such records from respondent. *Cf. id.* As for the second set of
20 documents, petitioner may obtain them from his appellate counsel. We anticipate that obtaining
21 the two sets of documents would be a manageable task for appointed counsel. The appointed
22 counsel may be able to obtain the documents through informal means. While we encourage the
23 parties to resolve any disputes themselves, the parties are free to seek the court’s assistance
24 through appropriate motions.

25 In sum, we will appoint counsel for petitioner for the limited purpose of conducting
26 discovery. By the deadline set forth below, the appointed counsel must file a notice of
27 appearance or a motion to withdraw representation. Absent the court’s grant of a motion to
28 withdraw, the appointed counsel will assist petitioner in conducting limited discovery of the

1 documents identified above. After the completion of discovery, the appointed counsel must file a
2 notice informing the court that the requested discovery has been completed, and that notice will
3 terminate the appointment. Any question about the appointment may be directed at the assigned
4 magistrate judge's chambers, at jdporders@caed.uscourts.gov.

5 **IV. Order**

- 6 1. The Federal Defender for the Eastern District of California is appointed for the limited
7 purpose of conducting discovery consistent with this order.
- 8 2. The clerk of court directed to:
- 9 a. serve a copy of this order on the Office of the Federal Public Defender for
10 the Eastern District of California, Attention: Habeas Appointment.
- 11 b. send an electronic copy of this order to attorney David Porter at
12 David_Porter@fd.org.
- 13 3. By Monday, August 05, 2019, the appointed counsel must file a notice of appearance
14 or a motion to withdraw representation.
- 15 a. By Friday, September 20, 2019, the appointed counsel must file a notice
16 indicating the completion of discovery unless the court grants a motion to
17 withdraw.
- 18 b. A notice on the completion of discovery will terminate the counsel's
19 appointment.

20
21 IT IS SO ORDERED.

22
23 Dated: August 2, 2019

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25 _____
26 UNITED STATES MAGISTRATE JUDGE

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28 No. 202