

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 RONALD VELASQUEZ,

No. C 10-01814 SBA (PR)

4 Petitioner,

**ORDER (1) VACATING AUGUST 26, 2010
 ORDER DISMISSING ACTION WITHOUT
 PREJUDICE; (2) REOPENING ACTION;
 (3) DIRECTING RESPONDENT TO SHOW
 CAUSE WHY THE PETITION SHOULD NOT
 BE GRANTED; AND (4) DENYING
 PETITIONER'S PENDING MOTIONS**

5 v.

6 GREG LEWIS, Acting Warden,

7 Respondent.

8 _____
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 10 Petitioner, a state prisoner, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C.
 11 § 2254. In an Order dated August 26, 2010, the Court dismissed the petition because Petitioner had
 12 not paid the filing fee or provided the proper forms in support of his in forma pauperis (IFP)
 13 application. Petitioner's pending motions for appointment of counsel and for an evidentiary hearing
 14 were terminated as moot. However, the record shows that Petitioner had in fact paid the \$5.00 filing
 15 fee on June 7, 2010. In view of this, it is clear that the present petition was dismissed erroneously.
 16 Therefore, the Court's August 26, 2010 Order of Dismissal Without Prejudice; and Terminating
 17 Pending Motions is VACATED.

18 The Court now reviews the present petition and the pending motions that were previously
 19 terminated as moot. It does not appear from the face of the petition that it is without merit. Good
 20 cause appearing, the Court hereby issues the following orders:

- 21 1. The Court's August 26, 2010 Order of Dismissal Without Prejudice is VACATED.
 22 The Clerk of the Court shall REOPEN this action.
- 23 2. The Clerk serve a copy of this Order and the petition and all attachments thereto upon
 24 Respondent and Respondent's attorney, the Attorney General of the State of California.¹ The Clerk
 25 shall also serve a copy of this Order on Petitioner at his current address.
- 26 3. Respondent shall file with this Court and serve upon Petitioner, within **one-hundred**
 27 **and twenty (120) days** of the issuance of this Order, an Answer conforming in all respects to Rule 5
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¹ Greg Lewis, the current warden of the prison where Petitioner is incarcerated, has been substituted as Respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

1 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
2 be issued. Respondent shall file with the Answer a copy of all portions of the relevant state records
3 that have been transcribed previously and that are relevant to a determination of the issues presented
4 by the petition.

5 4. If Petitioner wishes to respond to the Answer, he shall do so by filing a Traverse with
6 the Court and serving it on Respondent within **sixty (60) days** of his receipt of the Answer. Should
7 Petitioner fail to do so, the petition will be deemed submitted and ready for decision **sixty (60) days**
8 after the date Petitioner is served with Respondent's Answer.

9 5. Respondent may file with this Court and serve upon Petitioner, within **sixty (60) days**
10 of the issuance of this Order, a motion to dismiss on procedural grounds in lieu of an Answer, as set
11 forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If
12 Respondent files such a motion, Petitioner shall file with the Court and serve on Respondent an
13 opposition or statement of non-opposition to the motion within **sixty (60) days** of receipt of the
14 motion, and Respondent shall file with the Court and serve on Petitioner a reply within **fifteen (15)**
15 **days** of receipt of any opposition.

16 6. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the Court
17 and Respondent informed of any change of address and must comply with the Court's orders in a
18 timely fashion. Petitioner must also serve on Respondent's counsel all communications with the
19 Court by mailing a true copy of the document to Respondent's counsel.

20 7. Extensions of time are not favored, though reasonable extensions will be granted.
21 Any motion for an extension of time must be filed no later than **ten (10) days** prior to the deadline
22 sought to be extended.

23 8. Petitioner's motions for the appointment of counsel and an evidentiary hearing (docket
24 nos 4, 5) are DENIED. The Sixth Amendment right to counsel does not apply in habeas corpus
25 actions. See Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir. 1986). Title 18 U.S.C.
26 § 3006A(a)(2)(B), however, authorizes a district court to appoint counsel to represent a habeas
27 petitioner whenever "the court determines that the interests of justice so require" and such person is
28 financially unable to obtain representation. The decision to appoint counsel is within the discretion


1 of the district court. See Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986); Knaubert, 791 F.2d
2 at 728; Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984). The courts have made appointment
3 of counsel the exception rather than the rule by limiting it to: (1) capital cases; (2) cases that turn on
4 substantial and complex procedural, legal or mixed legal and factual questions; (3) cases involving
5 uneducated or mentally or physically impaired petitioners; (4) cases likely to require the assistance
6 of experts either in framing or in trying the claims; (5) cases in which petitioner is in no position to
7 investigate crucial facts; and (6) factually complex cases. See generally 1 J. Liebman & R. Hertz,
8 Federal Habeas Corpus Practice and Procedure § 12.3b at 383-86 (2d ed. 1994). Appointment is
9 mandatory only when the circumstances of a particular case indicate that appointed counsel is
10 necessary to prevent due process violations. See Chaney, 801 F.2d at 1196; Eskridge v. Rhay, 345
11 F.2d 778, 782 (9th Cir. 1965). Such is not the case here.

12 There also is no indication that an evidentiary hearing is required under 28 U.S.C. § 2254(e).
13 Petitioner's claims do not rely upon extra-record evidence and a factual basis exists in the record to
14 determine the claims. If during its review of the merits of the petition the Court determines that
15 further fact finding is required, the Court will decide whether to hold an evidentiary hearing or
16 whether the facts can be gathered by way of mechanisms short of an evidentiary hearing, such as
17 supplementation of the record with sworn declarations from the pertinent witnesses. See Downs v.
18 Hoyt, 232 F.3d 1031, 1041 (9th Cir. 2000).

19 9. This Order terminates Docket nos. 4 and 5.

20 IT IS SO ORDERED.

21 DATED: 9/1/10


SAUNDRA BROWN ARMSTRONG
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 RONALD VELASQUEZ,

5 Plaintiff,

6 v.

7 GEORGE J. GIURBINO et al,

8 Defendant.

Case Number: CV10-01814 SBA

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
10 Court, Northern District of California.

11 That on September 1, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 Ronald Velasquez T-45458
16 Pelican Bay State Prison
17 P.O. Box 7500 SHU C6/113
18 Crescent City, CA 95531-7500

19 Dated: September 1, 2010

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk