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

MANUEL ZARATE,

Petitioner,

v.

GREG LEWIS, Acting Warden,

Respondent.

No. C 10-04727 CW (PR)

ORDER TO SHOW CAUSE; AND
DENYING REQUESTS FOR
APPOINTMENT OF COUNSEL AND FOR
EVIDENTIARY HEARING

Petitioner, a state prisoner, has filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the \$5.00 filing fee. It does not appear from the face of the petition that it is without merit. Good cause appearing, the Court hereby issues the following orders:

1. The Clerk of the Court shall serve a copy of this Order and the petition and all attachments thereto upon Respondent and Respondent's attorney, the Attorney General of the State of California.¹ The Clerk shall also serve a copy of this Order on Petitioner at his current address.

2. Respondent shall file with this Court and serve upon Petitioner, within one-hundred twenty (120) days of the issuance of this Order, an Answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent shall file with the Answer a copy of all portions of the relevant state records that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

¹ Greg Lewis, the current acting 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 3. If Petitioner wishes to respond to the Answer, he shall
2 do so by filing a Traverse with the Court and serving it on
3 Respondent within sixty (60) days of his receipt of the Answer.
4 Should Petitioner fail to do so, the petition will be deemed
5 submitted and ready for decision sixty (60) days after the date
6 Petitioner is served with Respondent's Answer.

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

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

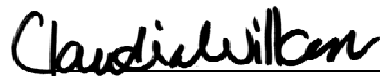
23 6. Extensions of time are not favored, though reasonable
24 extensions will be granted. Any motion for an extension of time
25 must be filed no later than ten (10) days prior to the deadline
26 sought to be extended.

27 7. Petitioner has requested the appointment of counsel and
28 an evidentiary hearing. The Sixth Amendment's right to counsel does

1 not apply in habeas corpus actions. See Knaubert v. Goldsmith, 791
2 F.2d 722, 728 (9th Cir. 1986) (unless an evidentiary hearing is
3 required, the decision to appoint counsel in habeas corpus
4 proceedings is within the discretion of the district court).
5 Petitioner clearly presented his claims for relief in the petition
6 and an order to show cause is issuing. Accord Bashor v. Risley, 730
7 F.2d 1228, 1234 (9th Cir. 1984) (although petitioner had no
8 background in law, denial of appointment of counsel within
9 discretion of district court where petitioner clearly presented
10 issues in petition and accompanying memorandum). There also is no
11 indication that an evidentiary hearing is required under 28 U.S.C. §
12 2254(e). Petitioner's claims do not rely upon extra-record evidence
13 and a factual basis exists in the record to determine the claims.
14 If during its review of the merits of the petition the Court
15 determines that further fact finding is required, the Court will
16 decide whether to hold an evidentiary hearing or whether the facts
17 can be gathered by way of mechanisms short of an evidentiary
18 hearing, such as supplementation of the record with sworn
19 declarations from the pertinent witnesses. See Downs v. Hoyt, 232
20 F.3d 1031, 1041 (9th Cir. 2000). The Court will appoint counsel on
21 its own motion if an evidentiary hearing is later required. See
22 Knaubert, 791 F.2d at 728 (appointment of counsel mandatory if
23 evidentiary hearing is required). For these reasons, Petitioner's
24 requests for the appointment of counsel and an evidentiary hearing
25 are DENIED.

26 IT IS SO ORDERED.

27 Dated: 1/7/2011



CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

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

4 MANUEL ZARATE,

5 Plaintiff,

6 v.

7 ROBERT A HORELL et al,

8 Defendant.

Case Number: CV10-04727 CW

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 January 7, 2011, 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
13 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
14 receptacle located in the Clerk's office.

15 Manuel Zarate C75553
16 Pelican Bay State Prison
17 P.O. Box 7500
18 D8-222
19 Crescent City, CA 95532

20 Dated: January 7, 2011

21 Richard W. Wieking, Clerk
22 By: Nikki Riley, Deputy Clerk
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