

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 GABRIEL ANTONIO MARTINEZ,
5 Petitioner,
6 v.
7 SUZANNE M. PEERY, Acting Warden,¹
8 Respondent.

Case No. [15-cv-03480-YGR](#) (PR)

**ORDER GRANTING RENEWED
MOTION FOR APPOINTMENT OF
COUNSEL; AND APPOINTING
COUNSEL *NUNC PRO TUNC* TO
PREPARATION OF FEDERAL
PETITION FOR FILING**

9 Petitioner, a state prisoner, has filed this petition for a writ of habeas corpus pursuant to 28
10 U.S.C. § 2254 challenging his 2013 conviction in the Monterey County Superior Court. Dkt. 1 at
11 1. Specifically, he was convicted of one count of involuntary manslaughter (Cal. Penal Code
12 § 192(b)). *Id.* at 2. He was also convicted of three counts of furnishing a controlled substance
13 (Cal. Health & Safety Code § 11352(a)), and of causing great bodily injury (Cal. Penal Code
14 § 12022.7(a)) with respect to two of these counts. *Id.* The trial court sentenced Petitioner to
15 eleven years and eight months in state prison. *Id.*

16 On October 29, 2015, Magistrate Judge Maria-Elena James issued an Order to Show
17 Cause. Dkt. 5. In the same Order, Petitioner's motion for appointment of counsel was also denied
18 without prejudice to the Court's *sua sponte* reconsideration of such a motion. *Id.* at 3. This action
19 was then reassigned to the undersigned Judge. Dkt. 8. Respondent has filed an answer to the
20 petition, and Petitioner has filed a traverse. Dkts. 13, 16.

21 Before the Court is Petitioner's renewed motion for appointment of counsel, which was
22 submitted on the same date as his traverse. Dkt. 15. He specifically requests the appointment of
23 Patrick McKenna, Esq. of the Sixth District Appellate Project, by whom Petitioner was
24 represented in state court. It appears that Attorney McKenna has "substantially" assisted
25 Petitioner in preparing his *pro se* federal petition and has prepared the traverse to the answer
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28 ¹ Suzanne M. Peery, 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 without compensation. Dkt. 1-2 at 1; Dkt. 15 at 2-3.

2 The Sixth Amendment's right to counsel does not apply in habeas corpus actions. *See*
3 *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). The Court may, however, appoint
4 counsel to represent a habeas petitioner whenever "the court determines that the interests of justice
5 so require and such person is financially unable to obtain representation." 18 U.S.C.
6 § 3006A(a)(2)(B). The decision to appoint counsel is within the discretion of the district court.
7 *See Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986); *Knaubert*, 791 F.2d at 728.

8 Here, as grounds for federal habeas relief, Petitioner claims that: (1) there was insufficient
9 evidence to support the finding of great bodily injury enhancements; and (2) there was insufficient
10 evidence to support a guilty finding on one of the counts of furnishing a controlled substance.
11 Dkt. 1 at 5.

12 The Court finds that the appointment of counsel is warranted in this action and that
13 Attorney McKenna is already familiar with the facts of the case and has prepared pleadings in
14 support of the petition. Therefore, the Court exercises its discretion to appoint Patrick McKenna,
15 Esq. of the Sixth District Appellate Project to represent Petitioner in this action, *nunc pro tunc* to
16 his preparation of the federal petition for filing. Petitioner's renewed motion for appointment of
17 counsel is GRANTED. Dkt. 15. Counsel should seek reimbursement pursuant to 18 U.S.C.
18 § 3006A(d) and (e) via the Federal Public Defender's Office.

19 The Clerk of the Court shall send a copy of this Order to Patrick McKenna, Esq., Sixth
20 District Appellate Project, 95 S. Market Street, Suite 570, San Jose, California 95113, to
21 Petitioner, to the Federal Public Defender, and to Respondent.

22 This Order terminates Docket No. 15.

23 IT IS SO ORDERED.

24 Dated: October 13, 2016

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26 YVONNE GONZALEZ ROGERS
27 United States District Judge
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