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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MARVIN MOSBY,

Petitioner,

Case No. 2:16-cv-03028-JCM-CWH

ORDER

v.

RENEE BAKER, et al.,

Respondents.

Petitioner Marvin Mosby, through the Federal Public Defender (FPD) has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. His application to proceed *in forma pauperis* shall be granted (ECF No. 6).

The FPD has moved to be appointed as counsel in this case (ECF No. 8). There is no constitutional right to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir.1993). The decision to appoint counsel is generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986), cert. denied, 481 U.S. 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), cert. denied, 469 U.S. 838 (1984). However, counsel must be appointed if the complexities of the case are such that denial of counsel would amount to a denial of due process, and where the petitioner is a person of such limited education as to be incapable of fairly presenting his claims. See *Chaney*, 801 F.2d at 1196; see also *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir.1970).

As the FPD explains in the motion for appointment of counsel, this petition is the third that Mosby has pending before this court (ECF No. 8). He challenges three

1 separate habitual offender convictions that were entered within several months of each  
2 other. This court has already appointed the FPD in the first and second of the three  
3 cases on the bases that Mosby is serving a life term without the possibility of parole, he  
4 suffers from health issues, and his access to legal materials may be restricted. Good  
5 cause appearing, the motion to appoint the FPD as counsel in this case is granted.

6 The court has reviewed the petition pursuant to Habeas Rule 4, and it shall be  
7 served on respondents.

8 **IT IS THEREFORE ORDERED** that petitioner's application to proceed *in forma*  
9 *pauperis* (ECF No. 6) is **GRANTED**.

10 **IT IS FURTHER ORDERED** that the Clerk shall **ELECTRONICALLY SERVE** the  
11 petition (ECF No. 1) on the respondents.

12 **IT IS FURTHER ORDERED** that the Clerk shall add Adam Paul Laxalt, Nevada  
13 Attorney General, as counsel for respondents.

14 **IT IS FURTHER ORDERED** that the motion to appoint the FPD as counsel for  
15 petitioner (ECF No. 8) is **GRANTED**.

16 **IT IS FURTHER ORDERED** that respondents shall file a response to the petition,  
17 including potentially by motion to dismiss, within **ninety (90) days** of service of the  
18 petition, with any requests for relief by petitioner by motion otherwise being subject to  
19 the normal briefing schedule under the local rules. Any response filed shall comply with  
20 the remaining provisions below, which are entered pursuant to Habeas Rule 5.

21 **IT IS FURTHER ORDERED** that any procedural defenses raised by respondents  
22 in this case shall be raised together in a single consolidated motion to dismiss. In other  
23 words, the court does not wish to address any procedural defenses raised herein either  
24 *in seriatum* fashion in multiple successive motions to dismiss or embedded in the  
25 answer. Procedural defenses omitted from such motion to dismiss will be subject to  
26 potential waiver. Respondents shall not file a response in this case that consolidates  
27 their procedural defenses, if any, with their response on the merits, except pursuant to  
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1 28 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly lacking merit. If  
2 respondents do seek dismissal of unexhausted claims under § 2254(b)(2): (a) they shall  
3 do so within the single motion to dismiss not in the answer; and (b) they shall  
4 specifically direct their argument to the standard for dismissal under § 2254(b)(2) set  
5 forth in *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). In short, no  
6 procedural defenses, including exhaustion, shall be included with the merits in an  
7 answer. All procedural defenses, including exhaustion, instead must be raised by  
8 motion to dismiss.

9 **IT IS FURTHER ORDERED** that, in any answer filed on the merits, respondents  
10 shall specifically cite to and address the applicable state court written decision and state  
11 court record materials, if any, regarding each claim within the response as to that claim.

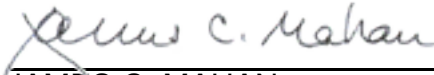
12 **IT IS FURTHER ORDERED** that petitioner shall have **forty-five (45) days** from  
13 service of the answer, motion to dismiss, or other response to file a reply or opposition,  
14 with any other requests for relief by respondents by motion otherwise being subject to  
15 the normal briefing schedule under the local rules.

16 **IT IS FURTHER ORDERED** that any additional state court record exhibits filed  
17 herein by either petitioner or respondents shall be filed with a separate index of exhibits  
18 identifying the exhibits by number. The CM/ECF attachments that are filed further shall  
19 be identified by the number of the exhibit in the attachment. **Any further exhibits shall**  
20 **continue sequentially from the exhibits petitioner has already filed** (see ECF Nos.  
21 3-5).  
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**IT IS FURTHER ORDERED** that the parties SHALL SEND courtesy copies of all exhibits in this case to the Clerk of Court, 400 S. Virginia St., Reno, NV, 89501, directed to the attention of "Staff Attorney" on the outside of the mailing address label. Additionally, in the future, all parties shall provide courtesy copies of any additional exhibits submitted to the court in this case, in the manner described above.

DATED: April 12, 2017.

  
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JAMES C. MAHAN  
UNITED STATES DISTRICT JUDGE