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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

EVARISTO JONATHAN GARCIA,
#1108072,

Petitioner,

vs.

NEVADA DEPARTMENT OF
CORRECTIONS, *et al.*,

Respondents.

2:17-cv-03095-JCM-CWH

ORDER

This habeas action under 28 U.S.C. § 2254 comes before the court on petitioner's application (ECF No. 1) to proceed *in forma pauperis*, his motion (ECF No. 2) for appointment of counsel, and for initial review.

The pauper application is deficient in that petitioner did not attach an inmate account statement for the prior six months in addition to the financial certificate submitted. This deficiency possibly may have been due, however, to petitioner having been transferred to be held by Arizona authorities for the Nevada corrections department. When petitioner filed a prior petition in this court in June 2017 that was dismissed without prejudice, he then was incarcerated at Ely State Prison. See *Garcia v. State of Nevada*, No. 3:17-cv-00378-MMD-WGC. In all events, the incomplete materials submitted reflect that petitioner has sufficient funds to pay the \$5.00 filing fee. The pauper application therefore will be denied.

The financial materials submitted otherwise establish petitioner's financial eligibility for appointment of counsel. The court finds that appointment of counsel is in the interests of

1 justice given, *inter alia*: (1) petitioner's lengthy sentencing consisting of two consecutive
2 sentences of life with the possibility of parole after a minimum of ten years on each sentence,
3 on his conviction, following a jury trial, of second-degree murder with the use of a deadly
4 weapon; (2) the very limited ability demonstrated by petitioner in articulating his claims in this
5 and the prior action, with petitioner presenting more or less bare documents covering copies
6 of prior state court filings and/or orders; (3) the prospect that petitioner's access to Nevada-
7 specific legal materials and inmate assistance while incarcerated in Arizona may be more
8 limited than the resources that may have been available to him while held within Nevada; and
9 (4) the complexity of the potential procedural and substantive issues presented, including
10 those potentially arising with respect to *Martinez v. Ryan*, 566 U.S. 1 (2012), following upon
11 counsel not being appointed in the state post-conviction proceedings.

12 The motion for appointment of counsel therefore will be granted. The court is
13 proceeding forward with appointment of counsel prior to and while the filing fee is being paid
14 so that counsel may begin working on the case at the earliest possible juncture.¹ The \$5.00
15 filing fee still must be paid timely by petitioner or the action will be dismissed, the appointment
16 of counsel notwithstanding.

17 IT THEREFORE IS ORDERED that petitioner's application (ECF No. 1) to proceed *in*
18 *forma pauperis* is denied. Petitioner shall have **thirty (30) days** from entry of this order within
19 which to have the filing fee of five dollars (\$5.00) sent to the clerk of court. Failure to timely
20 comply with this order will result in the dismissal of this action.

21 IT FURTHER IS ORDERED that petitioner's motion (ECF No. 2) for appointment of
22 counsel is GRANTED. The counsel appointed will represent petitioner in all federal
23 proceedings related to this matter, including any appeals or *certiorari* proceedings, unless
24 allowed to withdraw.

25 _____
26 ¹The court notes, however, that preliminary review reflects that the one-year federal limitation period
27 potentially putatively will expire only two weeks following the December 13, 2017, constructive filing date of
28 the petition. The court is not appointing counsel at this juncture with an assumption that counsel potentially
would be able to file new claims in a counseled amended petition without reliance upon, *inter alia*, relation
back.

1 IT FURTHER IS ORDERED that the federal public defender shall be provisionally
2 appointed as counsel and shall have **thirty (30) days** to undertake direct representation of
3 petitioner or to indicate to the court the office's inability to represent petitioner in these
4 proceedings. If the federal public defender is unable to represent petitioner, the court then
5 shall appoint alternate counsel. A deadline for the filing of an amended petition and/or
6 seeking other relief will be set after counsel has entered an appearance. The court
7 anticipates, given the number of potential claims herein and the associated investigation
8 potentially involved, setting the deadline for approximately one hundred twenty (120) days
9 from entry of the formal order of appointment. Any deadline established and/or any extension
10 thereof will not signify any implied finding of a basis for tolling during the time period
11 established. Petitioner at all times remains responsible for calculating the running of the
12 federal limitation period and timely presenting claims. That is, by setting a deadline to amend
13 the petition and/or by granting any extension thereof, the court makes no finding or
14 representation that the petition, any amendments thereto, and/or any claims contained therein
15 are not subject to dismissal as untimely. See *Sossa v. Diaz*, 729 F.3d 1225, 1235 (9th Cir.
16 2013).

17 IT FURTHER IS ORDERED, so that the respondents may be electronically served with
18 any papers filed through counsel, that the clerk shall add state attorney general Adam P.
19 Laxalt as counsel for respondents and shall make informal electronic service of this order
20 upon respondents by directing a notice of electronic filing to him. Respondents' counsel shall
21 enter a notice of appearance within **twenty-one (21) days** of entry of this order, but no further
22 response shall be required from respondents until further order of the court.

23 IT FURTHER IS ORDERED that the clerk shall file the petition.


24 The clerk accordingly shall send a copy of this order to petitioner in proper person, the
25 federal public defender, the state attorney general and the CJA coordinator for this division.

26 The clerk additionally shall provide copies of all prior filings herein to both the attorney
27 general and the federal public defender in a manner consistent with the clerk's current
28 practice, such as regeneration of notices of electronic filing.

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Finally, the clerk shall provide petitioner two hard copies of this order in proper person. Petitioner shall make the necessary arrangements to have a copy of this order attached to the check for the \$5.00 filing fee, if the filing fee is paid through the institution.²

DATED: December 29, 2017.



JAMES C. MAHAN
United States District Judge

²It may be more practical for petitioner to pay the filing fee directly from the institution in proper person, without the intermediation of newly provisionally appointed counsel. In all events, this order directs only the time within which the filing fee must be paid, not how it is done.