

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOSE MANUEL GARCIA-GAONA,

Petitioner,

v.

HAROLD WICKHAM, *et al.*,

Respondents.

Case No. 3:17-cv-00360-MMD-WGC

ORDER

Petitioner Jose Manuel Garcia-Gaona has submitted a 28 U.S.C. § 2254 petition for a writ of habeas corpus. He has now paid the filing fee (*see* ECF No. 5). The court has reviewed the petition pursuant to Habeas Rule 4, and it shall be docketed and served on respondents.

A petition for federal habeas corpus should include all claims for relief of which petitioner is aware. If petitioner fails to include such a claim in his petition, he may be forever barred from seeking federal habeas relief upon that claim. *See* 28 U.S.C. §2254(b) (successive petitions). If petitioner is aware of any claim not included in his petition, he should notify the court of that as soon as possible, perhaps by means of a motion to amend his petition to add the claim.

Petitioner has also submitted a motion for appointment of counsel (ECF No. 1-3). 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);

1 *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), cert. denied, 469 U.S. 838 (1984).
2 However, counsel must be appointed if the complexities of the case are such that denial
3 of counsel would amount to a denial of due process, and where the petitioner is a person
4 of such limited education as to be incapable of fairly presenting his claims. *See Chaney*,
5 801 F.2d at 1196; *see also Hawkins v. Bennett*, 423 F.2d 948 (8th Cir.1970). Here,
6 Garcia-Gaona's petition is clear in presenting the issues that he wishes to raise, and the
7 legal issues are not particularly complex. Therefore, counsel is not justified at this time.
8 The motion is denied.

9 The Court notes that Garcia-Gaona has acknowledged that he submitted his
10 petition outside the one-year statute of limitations imposed by the Antiterrorism and
11 Effective Death Penalty Act's (AEDPA) (*see* ECF No. 1-2). 28 U.S.C. § 2244(d). He
12 asserts that his state postconviction counsel failed to timely advise him that the Nevada
13 Supreme Court affirmed the denial of his state petition and indicates that he believes he
14 is entitled to equitable tolling. The Court will not consider the tolling issue at this time.
15 However, should respondents file a motion to dismiss, petitioner may raise and/or re-raise
16 any arguments regarding equitable tolling in an opposition to any such motion.

17 It is therefore ordered that the Clerk file and electronically serve the petition (ECF
18 No. 1-1) on the respondents.

19 It is further ordered that the Clerk shall add Adam Paul Laxalt, Nevada Attorney
20 General, as counsel for respondents.

21 It is further ordered that respondents file a response to the petition, including
22 potentially by motion to dismiss, within ninety (90) days of service of the petition, with any
23 requests for relief by petitioner by motion otherwise being subject to the normal briefing
24 schedule under the local rules. Any response filed shall comply with the remaining
25 provisions below, which are entered pursuant to Habeas Rule 5.

26 It is further ordered that any procedural defenses raised by respondents in this
27 case shall be raised together in a single consolidated motion to dismiss. In other words,
28 the Court does not wish to address any procedural defenses raised herein either *in*

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

12 It is further ordered that, in any answer filed on the merits, respondents must
13 specifically cite to and address the applicable state court written decision and state court
14 record materials, if any, regarding each claim within the response as to that claim.

15 It is further ordered that petitioner will have forty-five (45) days from service of the
16 answer, motion to dismiss, or other response to file a reply or opposition, with any other
17 requests for relief by respondents by motion otherwise being subject to the normal briefing
18 schedule under the local rules.

19 It is further ordered that any additional state court record exhibits filed herein by
20 either petitioner or respondents shall be filed with a separate index of exhibits identifying
21 the exhibits by number. The CM/ECF attachments that are filed further shall be identified
22 by the number of the exhibit in the attachment.

23 It is further ordered that the parties must send courtesy copies of all exhibits in this
24 case to the Clerk of Court, 400 S. Virginia St., Reno, NV, 89501, directed to the attention
25 of "Staff Attorney" on the outside of the mailing address label. Additionally, in the future,
26 all parties must provide courtesy copies of any additional exhibits submitted to the Court
27 in this case, in the manner described above.

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

It is further ordered that the Clerk file petitioner's motion for appointment of counsel (ECF No. 1-3).

It is further ordered that the motion for appointment of counsel is denied.

DATED THIS 18th day of December 2017.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE