

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

THEOGEN GARNER,

Defendant.

Case No. 05-20094-01-CM

MEMORANDUM AND ORDER

This matter comes before the court on defendant Theogen Garner's motion to appoint counsel (Doc. 74).

On September 15, 2005, defendant was charged with one count of possession with intent to distribute more than fifty grams of a substance or mixture containing cocaine base ("crack cocaine") within 1,000 feet of the real property comprising the University of Kansas. On February 8, 2006, after a two-day trial, defendant was found guilty by a jury of the count as charged in the indictment. On July 16, 2008, defendant sent a letter to Magistrate Judge O'Hara. The letter was docketed as a motion to appoint counsel. In the letter, defendant requests audio tapes of the proceedings in this case and appointment of legal counsel to assist him with his 28 U.S.C. § 2255 motion.

Prisoners do not have "a constitutional right to counsel when mounting collateral attacks upon their convictions." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Under Rule 8(c) of the rules governing section 2255 proceedings, the court must appoint counsel if an evidentiary hearing is warranted and the petitioner qualifies to have counsel appointed under 18 U.S.C. § 3006A. Section 3006A permits appointment of counsel in section 2255 suits when the "interests of justice so

require.” Here, defendant has not filed a motion seeking relief under section 2255, and thus, no evidentiary hearing is required at this time. Additionally, at this stage of the proceeding, the court finds that the interests of justice do not require appointment of counsel in this case.

Defendant’s motion is therefore denied without prejudice, which means defendant may seek appointment of counsel at a later time if such appointment becomes appropriate.

As for the audio tapes, defendant should contact Judge O’Hara’s chambers to make arrangements to get copies of the audio recordings of his hearings.

IT IS THEREFORE ORDERED that defendant’s motion to appoint counsel (Doc. 74) is denied.

Dated this 18th day of August 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge