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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DELANO TOLDEN,	)	No. C 08-3782 CW
)	
Petitioner,)	
	)	ORDER GRANTING
v.	)	CERTIFICATE OF
	)	APPEALABILITY AND
GARY SWARTHOUT, Warden,	)	PETITIONER'S
	)	REQUESTS TO
Respondent.	)	APPOINT COUNSEL
_____	)	AND TO PROCEED IN
	)	FORMA PAUPERIS ON
	)	APPEAL

Petitioner filed a habeas corpus petition pursuant to 28 U.S.C. § 2254. On March 1, 2010, the Court entered judgment denying the petition. Petitioner seeks a certificate of appealability regarding all four claims in his habeas petition and requests the appointment of appellate counsel and leave to proceed in forma pauperis on appeal.

A habeas petitioner may not appeal a final order in a federal habeas proceeding without first obtaining a certificate of appealability (formerly known as a "certificate of probable cause to appeal"). 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A certificate of appealability should be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must indicate which issue or issues satisfy the showing required by § 2253(c)(2). 28 U.S.C. § 2253(c)(3).

1 The Court finds that Petitioner has made a sufficient
2 showing of the denial of a constitutional right in regard to his
3 Eighth Amendment claim of cruel and unusual punishment and his
4 two due process claims regarding improper jury instructions.
5 Petitioner's request for a certificate of appealability on these
6 three claims is GRANTED.

7 Petitioner also requests appointment of counsel. The Sixth
8 Amendment's right to counsel does not apply in habeas corpus
9 actions. Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir.
10 1986). However, 18 U.S.C. § 3006A(a)(2)(B) authorizes a district
11 court to appoint counsel to represent a habeas petitioner
12 whenever "the court determines that the interests of justice so
13 require and such person is financially unable to obtain
14 representation."

15 The decision to appoint counsel is within the discretion of
16 the district court. Chaney v. Lewis, 801 F.2d 1191, 1196 (9th
17 Cir. 1986); Knaubert, 791 F.2d at 728; Bashor v. Risley, 730 F.2d
18 1228, 1234 (9th Cir.) (1984). Appointment is mandatory only when
19 the circumstances of a particular case indicate that appointed
20 counsel is necessary to prevent due process violations. Chaney,
21 801 F.2d at 1196.

22 Because of Petitioner's low mental functioning, his motion
23 for appointment of counsel is GRANTED. Attorney Victoria
24 Stafford requests that she be appointed as counsel. Because Ms.
25 Stafford has represented Petitioner in his state appeal and
26 habeas proceedings in this Court, she is already familiar with
27 the case. Therefore, the Court grants Petitioner's request that
28 Ms. Stafford be appointed to represent him on appeal.

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CONCLUSION

Accordingly, the Court grants Petitioner's certificate of appealability on the three claims discussed above and grants his requests for the appointment of Victoria Stafford as appellate counsel and for leave to proceed in forma pauperis on appeal.

IT IS SO ORDERED.

Claudia Wilken

DATED: April 13, 2010

CLAUDIA WILKEN
United States District Judge