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E-FILED on 09/30/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BOBBY ANTOINE MCKENZIE,

Petitioner,

v.

LYDIA C. HENSE, Warden,

Respondent.

No. CV-08-03512 RMW

ORDER GRANTING PETITIONER'S
REQUEST FOR APPOINTMENT OF
COUNSEL, ORDER TO SHOW CAUSE RE:
PETITION FOR WRIT OF HABEAS
CORPUS

I. INTRODUCTION

Bobby Antoine McKenzie, ("petitioner"), a California state prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his 2005 conviction of first degree murder in Alameda County Superior Court. On July 22, 2008, petitioner filed a motion for appointment of counsel. For the reasons set forth below, the court GRANTS petitioner's motion for appointment of counsel (docket no. 3) pursuant to 18 U.S.C. § 3006A and requires respondent to show cause why a writ of habeas corpus should not be granted.

II. BACKGROUND

Petitioner was charged with first-degree murder in violation of Cal. Pen. Code § 187(a) for the homicide of Abdul Nawabi. On July 20, 2005, the jury convicted petitioner and sentenced him

1 to to fifty (50) years to life in prison. At trial it was undisputed that petitioner shot the victim at
2 close range. The question before the jury was petitioner's claim of self defense. Petitioner timely
3 appealed and the Court of Appeal affirmed his conviction on August 1, 2007. Petitioner filed a
4 petition for review in the California Supreme Court. The California Supreme Court denied his
5 petition for review on October 31, 2007. Petitioner's writ for habeas corpus was filed in this court
6 on July 22, 2008.

7 **III. DISCUSSION**

8 **A. Appointment of Counsel**

9 Solomon Wollock has appeared as counsel of record, and has filed this petition on behalf of
10 petitioner. Petitioner has moved for appointment of counsel pursuant to 18 U.S.C. § 3006A
11 (a)(2)(B), which authorizes a district court to appoint counsel to represent a habeas petitioner
12 whenever “the court determines that the interests of justice so require” and such person is financially
13 unable to obtain representation.

14 The Sixth Amendment’s right to counsel does not apply in habeas corpus actions. *Knaubert*
15 *v. Goldsmith*, 791 F.2d 722, 728 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986). The decision to
16 appoint counsel under 18 U.S.C. § 3006A(a)(2)(B) is within the discretion of the district court.
17 *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986); *Knaubert*, 791 F.2d at 728; *Bashor v. Risley*,
18 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). The courts have made
19 appointment of counsel the exception rather than the rule by limiting it to: (1) capital cases; (2) cases
20 that turn on substantial and complex procedural, legal or mixed legal and factual questions; (3) cases
21 involving uneducated or mentally or physically impaired petitioners; (4) cases likely to require the
22 assistance of experts either in framing or in trying the claims; (5) cases in which petitioner is in no
23 position to investigate crucial facts; and (6) factually complex cases. *See generally* R. Hertz and J.
24 Liebman, *Federal Habeas Corpus Practice and Procedure* § 12.3b at 699-701 (5th ed. 2001). Thus,
25 appointment is mandatory only when the circumstances of a particular case indicate that appointed
26 counsel is necessary to prevent due process violations. *See Chaney*, 801 F.2d at 1196; *Eskridge v.*
27 *Rhay*, 345 F.2d 778, 782 (9th Cir. 1965), *cert. denied*, 382 U.S. 996 (1966).

1 In this case, Mr. Wollock previously served as petitioner's counsel in his appeal to the
2 California Court of Appeal for the First Appellate District and also wrote his petition for review to
3 the California Supreme Court. Petitioner seeks relief from his incarceration on the grounds that (1)
4 the prosecutor violated petitioner's Sixth Amendment confrontation rights by repeatedly referencing
5 out of court testimonial statements of witnesses who were unavailable for trial; (2) defense counsel
6 provided ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments by
7 failing to make contemporaneous objection to various instances of prosecutorial misconduct; and (3)
8 the trial court violated petitioner's Sixth and Fourteenth Amendment rights to a jury verdict based on
9 the evidence presented at trial by failing to order an evidentiary hearing into petitioner's showing
10 that the jury relied on facts not in evidence.

11 Petitioner is indigent and otherwise unable to obtain representation. Petitioner's claims
12 present complex constitutional issues. As a lay person without any legal training, petitioner is
13 unlikely to have an understanding of the legal rules relating to hearsay, prosecutorial misconduct
14 and jury misconduct. To properly brief the court on petitioner's claims and applicable precedent,
15 and to ensure that petitioner is adequately represented in the present habeas proceedings, the use of
16 an attorney is required in this case. Furthermore, in light of Mr. Wollock's extensive representation
17 of the petitioner's habeas petition at the state level, the court finds that Mr. Wollock is particularly
18 well-suited to represent petitioner in this action.

19 **B. Order to Show Cause**

20 **1. Standard of Review**

21 A district court may entertain a petition for writ of habeas corpus "in behalf of a person in
22 custody pursuant to the judgment of a state court only on the ground that he is in custody in violation
23 of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*,
24 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an order directing the
25 respondent to show cause why the writ should not be granted, unless it appears from the application
26 that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243.

27 **2. Petitioner's Claims**

1 shall file with the answer a copy of all portions of the state trial record that have been transcribed
2 previously and that are relevant to a determination of the issues presented by the petition.


3 (4) If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the
4 court and serving it on respondent within thirty (30) days of his receipt of the answer.

5 (5) Respondent may file a motion to dismiss on procedural grounds in lieu of an answer,
6 as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases.
7 If respondent files such a motion, petitioner shall file with the court and serve on respondent an
8 opposition or statement of non-opposition within thirty (30) days of receipt of the motion, and
9 respondent shall file with the court and serve on petitioner a reply within fifteen (15) days of receipt
10 of any opposition.

11 (6) Petitioner is reminded that all communications with the court must be served on
12 respondent by mailing a true copy of the document to respondent's counsel. Petitioner must also
13 keep the court and all parties informed of any change of address.

14 IT IS SO ORDERED.

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17 DATED: 09/30/09



RONALD M. WHYTE
United States District Judge

