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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 BRIAN HOWARD ELLIOTT,

7 Petitioner,

8 v.

9 ELDON VAIL and WASHINGTON  
10 STATE DEPARTMENT OF  
11 CORRECTIONS,

12 Respondents.

No. C11-5377 BHS/KLS

ORDER DENYING PETITIONER'S  
MOTIONS FOR EVIDENTIARY  
HEARING, TO EXPAND THE RECORD,  
AND RENEWED MOTION TO PROCEED  
IN FORMA PAUPERIS AND  
APPOINTMENT OF COUNSEL

13 Before the Court are Petitioner's Motion for Consideration of Missing Portions of Record  
14 and Motion for Evidentiary Hearing. ECF Nos. 31 and 33. Petitioner is requesting that two  
15 motions that he filed in state court relating to his indigency be included in the state court record  
16 and that he be granted an evidentiary hearing and counsel. *Id.* Respondent opposes the motions.  
17 ECF Nos. 32 and 34. In his reply, Petitioner renews an earlier motion to proceed *in forma*  
18 *pauperis*. ECF No. 36. The Court finds that Petitioner's motions should be denied.

19 **DISCUSSION**

20 This Court previously granted Petitioner's motion to supplement the record with a reply  
21 that he filed in Washington Court of Appeals Case No. 39674-2-II and the trial transcripts  
22 relevant to an ineffective assistance of counsel claim. ECF No. 25, at 2. The Court denied Mr.  
23 Elliott's motion to supplement the record in all other respects. *Id.* The Court also denied Mr.  
24 Elliott's request to proceed *in forma pauperis* because Mr. Elliott paid the filing fee and had,  
25 therefore, established that he is financially able to commence this action. *Id.*, at 6.  
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ORDER - 1

1 **A. Motion to Expand the Record (ECF No. 31)**

2 Mr. Elliott motions the Court to order the inclusion of motions for finding of continued  
3 indigency that he filed in the state court in February and March 2010. He argues that these  
4 motions “expressly request an evidentiary hearing and/or a reference hearing in the respective  
5 courts through finding Petitioner indigent and appointment of counsel to develop the facts  
6 necessitating an evidentiary hearing.” ECF No. 31, at 3.  
7

8 Rule 5(d) of the Rules Governing Section 2254 Cases provides that Respondent is to  
9 include “any brief that the petitioner submitted in appellate court contesting the conviction or  
10 sentence, or contesting an adverse judgment or order in a post-conviction proceeding.” Neither  
11 the rule nor advisory committee notes indicate the Respondents must attach petitioner’s motions  
12 for appointment of counsel and finding of indigency or that such motions qualify as briefs by  
13 Petitioner. In addition, the motions do not reflect that Mr. Elliott requested a state evidentiary  
14 hearing. In the second paragraph of the motions, Mr. Elliott requested the state court, inter alia,  
15 to “*preliminarily adjudicate the assignment of counsel upon finding of the Chief Justice that the*  
16 *issues raised within the Personal Restraint petition are not frivolous....*” See ECF No. 31,  
17 Appendix A, at 1 and Appendix B, at 1 (emphasis added). Accordingly, this motion (ECF No.  
18 31) is **DENIED**.  
19

20 **B. Motion for Evidentiary Hearing (ECF No. 33)**

21 Prior to the Antiterrorism and Effective Death Penalty Act (AEDPA), the decision to  
22 grant an evidentiary hearing was generally left to the discretion of the district court. *Schriro v.*  
23 *Landrigan*, 550 U.S. 465, 473-74 (2007). While that basic rule remains the same, the AEDPA  
24 changed the standards for granting habeas corpus relief. *Id.* The AEDPA prohibits federal  
25 courts from granting relief unless the state court’s decision was contrary to or an unreasonable  
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1 application of, clearly established federal law, or was based on an unreasonable determination of  
2 the facts in light of the evidence presented in state court. *Id.* (citing 28 U.S.C. § 2254(d)). “The  
3 question under AEDPA is not whether a federal court believes the state court’s determination  
4 was incorrect but whether that determination was unreasonable - a substantially higher  
5 threshold.” *Landrigan*, 550 U.S. at 473 (citing *Williams v. Taylor*, 529 US. 362 (2000)).  
6

7         The AEDPA also requires federal habeas courts to presume as correct any state court  
8 factual findings unless the petitioner rebuts the findings by clear and convincing evidence.  
9 *Landrigan*, 550 U.S. at 474 (citing 28 U.S.C. § 2254(e)(1)). Thus, under the AEDPA, “[i]n  
10 deciding whether to grant an evidentiary hearing, a federal court must consider whether such a  
11 hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would  
12 entitle the applicant to federal habeas relief.” *Landrigan*, 550 U.S. at 474. “Because the  
13 deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court  
14 must take into account those standards in deciding whether an evidentiary hearing is  
15 appropriate.” *Id.* “*It follows that if the record refutes the applicant’s factual allegations or*  
16 *otherwise precludes habeas relief, a district court is not required to hold an evidentiary*  
17 *hearing.*” *Id.* (emphasis added). “This principle accords with AEDPA’s acknowledged purpose  
18 of ‘reduc[ing] delays in the execution of state and federal criminal sentences.’” *Id.* (quoting  
19 *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (other citations omitted)).  
20

21         As noted by Respondent, the current version of 28 U.S.C. § 2254(e)(1) and (2), as well as  
22 the application of *Schriro v. Landrigan*, supersede the former statute as well as the old case law  
23 on which Mr. Elliott relies, specifically, *Townsend v. Sain*, 372 U.S. 293, 313 (1963), for his  
24 contention that he is entitled to an evidentiary hearing. ECF No. 36.  
25  
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1 In order to obtain an evidentiary hearing, Mr. Elliott must show that the decisions by the  
2 Washington State courts in his case were objectively unreasonable, or that they were  
3 unreasonable determinations of the facts in light of the evidence presented during his State court  
4 proceedings. *See* 28 U.S.C. § 2254(d)(1) and (2); *see also Lonchar v. Thomas*, 517 U.S. 314,  
5 326 (1996). Mr. Elliott has failed to carry this burden. As noted in the discussion above, the  
6 motions that Mr. Elliott filed in state court did not request a state court evidentiary hearing and  
7 the mere filing of a personal restraint petition in state court does not substitute as a request for a  
8 hearing. Respondent correctly notes that Rule of Appellate Procedure (RAP) 16.11 does not  
9 support this argument. The Rule outlines four possible actions when the Chief Judge receives a  
10 personal restraint petition (PRP): (1) initial dismissal by the Chief Judge if it is frivolous, (2)  
11 referral to the panel of judges for determination on the merits based solely on the record, (3)  
12 referral to the superior court for determination on the merits, or (4) referral to superior court for a  
13 reference hearing if the petition cannot be determined solely on the record. RAP 16.11(b). The  
14 rule does not state that filing a PRP, without more, amounts to a request for a state reference  
15 hearing.  
16  
17

18 Mr. Elliott's PRP was ruled on by a chief judge who held it was frivolous in accordance  
19 RAP 16.11(b). ECF No. 16, Exh. 10. Mr. Elliott claims the chief judge denied his request for an  
20 evidentiary hearing. ECF No. 33, at 6. However, the record reflects that Mr. Elliott filed four  
21 motions (for sanctions, to recover previously imposed appellate courts, to strike the State's  
22 motion, and for finding of continued indigency). ECF No. 16, Exh. 10, at 6. He never moved  
23 for a state evidentiary hearing. Therefore, the chief judge did not and could not have denied it.  
24

25 Mr. Elliott also argues that he is entitled to an evidentiary hearing because Respondent  
26 conceded an issue regarding polygraph evidence. ECF No. 33, at 7. Mr. Elliott bases this

1 contention on a declaration signed by his trial counsel on February 1, 2012. *Id.* In it, his trial  
2 counsel relates what six of the jurors told her regarding the polygraph evidence and how they  
3 reached their verdict on the second count. ECF No. 27-2 (Reply, Appendix B – Declaration of  
4 Lennel Nussbaum), at 2. The undersigned has declined to consider this declaration for several  
5 reasons and those reasons are set out in a separate Report and Recommendation addressing Mr.  
6 Elliott’s federal habeas petition. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the  
7 parties will have ample opportunity to file written objections, if any, to the undersigned’s Report  
8 and Recommendation.<sup>1</sup>

10 There is no record that Mr. Elliott requested a state court evidentiary hearing and  
11 therefore, he is not entitled to a hearing in this Court. *See, Williams v. Taylor*, 529 U.S. 420, 437  
12 (2000):

13 Diligence will require in the usual case that the prisoner, at a minimum, seek an  
14 evidentiary hearing in state court in the manner prescribed by state law. ... If the  
15 prisoner fails to do so, himself or herself contributing to the absence of a full and  
16 fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to  
17 develop the relevant claims in federal court, unless the statute’s other stringent  
18 requirements are met. Federal courts sitting in habeas are not an alternative forum  
19 for trying facts and issues which a prisoner made insufficient effort to pursue in  
20 state proceedings.

21 (Emphasis added).

22 Mr. Elliott is not entitled to an evidentiary hearing in this Court. His request for counsel  
23 is, therefore, also denied.

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25 <sup>1</sup> Under separate Report and Recommendation, the undersigned has recommended that Grounds One, Three, Four,  
26 Six, Seven, Eight, and Sub-Claim Two of Ground Five of Mr. Elliott’s federal habeas petition be dismissed with  
prejudice because they are unexhausted and that Ground Four be denied and dismissed on the merits. The  
undersigned has also recommended to the District Court that this matter be re-referred so that the parties may  
provide further briefing as to Grounds Two, Nine, and Sub-Claim One of Ground Five.

1 **C. Renewed Motion to Proceed *In Forma Pauperis***

2 This Court denied Mr. Elliott's motion to proceed *in forma pauperis* on November 29,  
3 2011. ECF No. 25. Mr. Elliott has already paid the \$5.00 filing fee and has, therefore,  
4 established that he is financially able to commence this action. The Court denies Mr. Elliott's  
5 motions for evidentiary hearing and for the appointment of counsel. Therefore, his renewed  
6 motion to proceed *in forma pauperis* is also denied.  
7

8 **IT IS ORDERED:**

- 9 (1) Petitioner's motions to expand the record, for evidentiary hearing, to proceed *in*  
10 *forma pauperis* and for the appointment of counsel (ECF Nos. 31 and 33) are  
**DENIED.**
- 11 (2) The Clerk is directed to send copies of this Order to Petitioner and counsel  
12 counsel for Respondent.

13 **DATED** this 27th day of March, 2012.

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16 Karen L. Strombom  
17 United States Magistrate Judge  
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