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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

MICHAEL FOSTER,

1:10-cv-01684-OWW-SMS (HC)

Petitioner,

ORDER DENYING PETITIONER’S MOTION FOR EVIDENTIARY HEARING WITHOUT PREJUDICE AND DENYING PETITIONER’S MOTION FOR THE COURT TO ORDER RESPONDENT TO FILE A RESPONSE TO SUCH MOTION

v.

KATHLEEN ALLISON,

Respondent.

[Docs.17, 22]

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On December 17, 2010, Petitioner filed a motion requesting an evidentiary hearing. On January 21, 2011, Petitioner filed a motion requesting the Court to order Respondent to file a response to his motion. Both motions must be denied.

Rule 8(a) provides that where a petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and transcripts and record of the state court proceedings are filed, shall, *upon review* of those proceedings, determine whether an evidentiary hearing is required. The purpose of an evidentiary hearing is to resolve the merits of a factual dispute. An evidentiary hearing on a claim is required where it is clear from the petition that: (1) the allegations, if established, would entitle the petitioner to relief; and (2) the state court trier of fact has not reliably found the relevant facts. See Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir.1992). As the function of an evidentiary hearing is to try issues of fact, Townsend v.

1 Sain 372 U.S. 293, 309 (1963)(*overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112  
2 S.Ct. 1715 (1993)), such a hearing is unnecessary when only issues of law are raised. Id.

3           The purpose of an evidentiary hearing is to resolve the merits of a *factual* dispute. In the  
4 instant case, the Court has yet to review the instant petition and until a thorough review of the  
5 merits of Petitioner’s claims, it cannot be determined that a factual dispute necessitating an  
6 evidentiary hearing is present. Following a thorough review of the petition’s merits, the Court  
7 will sua sponte issue an order for an evidentiary hearing should it find one necessary.

8           Accordingly, the request for an evidentiary hearing and request for Respondent to file a  
9 response are DENIED.

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12 IT IS SO ORDERED.

13 **Dated:** February 8, 2011

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE