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8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 PAUL LAWRENCE ALEXANDER

11 Petitioner,

No. 2:08-cv-1817 LKK KJN P

12 vs.

13 DERRAL G. ADAMS

14 Respondent.

ORDER

15 _____/

16 Petitioner is a state prisoner proceeding with counsel with an application for writ
17 of habeas corpus under 28 U.S.C. § 2254. On October 4, 2010, petitioner filed a motion for
18 evidentiary hearing. Petitioner seeks the testimony of petitioner and witness Carol Alexander to
19 develop the factual bases for petitioner's claim, to allow the court to assess the credibility of both
20 Ms. Alexander and petitioner, to correct an alleged factual mistake in the Court of Appeal
21 opinion, and to determine whether the trial court knew petitioner wished to testify. Respondent
22 counters, inter alia, that there is no need for an evidentiary hearing as this case can be resolved on
23 the instant record.

24 The motion was heard on November 4, 2010. Upon review of the motion,
25 documents in support and opposition, and having considered the arguments of counsel for both
26 parties at the hearing, THE COURT MAKES THE FOLLOWING FINDINGS:

1 Because it was filed after April 24, 1996, this case is governed by the
2 Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (“AEDPA”). Lindh v.
3 Murphy, 521 U.S. 320, 336 (1997); see also Woodford v. Garceau, 538 U.S. 202, 210 (2003).

4 To obtain an evidentiary hearing, a petitioner must meet the standards set forth in 28 U.S.C.
5 § 2254(e)(2) for the conducting of an evidentiary hearing. Id. That statute provides:

6 (e)(2) If the applicant has failed to develop the factual basis of a
7 claim in State court proceedings, the court shall not hold an
evidentiary hearing on the claim unless the applicant shows that-

8 (A) the claim relies on-

9 (i) a new rule of constitutional law, made retroactive to cases on
10 collateral review by the Supreme Court, that was previously
unavailable; or

11 (ii) a factual predicate that could not have been previously
12 discovered through the exercise of due diligence; and

13 (B) the facts underlying the claim would be sufficient to establish
14 by clear and convincing evidence that but for constitutional error,
no reasonable fact finder would have found the applicant guilty of
the underlying offense[.]

15 28 U.S.C. § 2254(e)(2).

16 Under this statutory scheme, a district court presented with a request for an
17 evidentiary hearing must first determine whether a factual basis exists in the record to support a
18 petitioner’s claims and, if not, whether an evidentiary hearing “might be appropriate.” Baja v.
19 Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999); see also Earp v. Ornoski, 431 F.3d 1158, 1166
20 (9th Cir. 2005); Insyxiengmay v. Morgan, 403 F.3d 657, 669-70 (9th Cir. 2005). A petitioner
21 requesting an evidentiary hearing must also demonstrate that he has a “colorable claim for relief.”
22 Earp, 431 F.3d at 1167 (citations omitted). To show that a claim is “colorable,” a petitioner must
23 also “allege[] facts that, if proved, would entitle him to relief.” Schell v. Witek, 218 F.3d 1017,
24 1028 (9th Cir. 2000). This court is required to take into account the AEDPA standards in
25 deciding whether an evidentiary hearing is appropriate. Schriro v. Landrigan, 550 U.S. 465, 473-
26 74 (2007).

1 In the instant case, the court has benefit of declarations by petitioner and Carol
2 Alexander. In addition, respondent has lodged the reporter's transcript from the trial as well as
3 from oral argument on petitioner's motion for new trial, held on June 3, 2005. The judge who
4 presided over petitioner's underlying criminal trial also heard petitioner's motion for new trial.
5 Petitioner's defense attorney testified at the motion for new trial, as well as petitioner's sister,
6 Terri Shaffer. Testimony was also provided by an experienced criminal attorney, David Muller,
7 who rendered his professional opinion as to defense counsel's performance. This court
8 concludes that no additional factual supplementation is necessary at this time; therefore,
9 petitioner's motion will be denied without prejudice.

10 Petitioner also contends that an evidentiary hearing is required to determine
11 whether the trial court was ever aware of petitioner's desire to testify. Petitioner claims the trial
12 judge's recollection of events outside the courtroom on October 4, the day the prosecution rested,
13 indicates the trial judge was aware of petitioner's desire to testify and triggered a duty for the trial
14 judge to inquire of petitioner whether he wished to testify and to inform petitioner he had a
15 constitutional right to testify despite defense counsel's advice to the contrary.

16 The transcript from the oral argument on petitioner's motion for new trial sets
17 forth the remarks made by the trial judge. During the initial examination of Paul Chan,
18 petitioner's defense attorney, Mr. Chan was having difficulty recalling the specific time when he
19 was talking to petitioner's sister or one of his family members. (Reporter's Transcript II ("RT")
20 at 557.) The prosecution asked to approach, at which point a sidebar was held off the record.
21 (RT 558.) When the court returned to the record, the following occurred:

22 THE COURT: Counsel, it may be of some help to you, Mr. Chan.
23 I'm looking at the clerk's minutes, and the Monday that we've
24 been talking about is Monday, October 4th, and that's the day
25 where the prosecution rested at 10:19 in the morning. We then
26 entertained your defense motion under 1118. We received jury
instructions, ordered the defendant to return at 1:30. And it was
over that lunch hour that the question of whether you were going to
put your client on was – that would have been when you had made
that decision.

1 I do recall, and I will state this to help counsel, that it was at that
2 time as I was walking to go to lunch, I recall specifically stepping
3 out of the elevator and you, your client and I believe his sister or
4 sisters, I know there was about –

5 THE DEFENDANT: One sister.


6 THE COURT: One sister. There was a conversation right there by
7 the elevator by the first floor of the Sacramento Courthouse, and of
8 course I didn't try to listen to the conversation, but I was curious
9 because obviously I knew everybody that was involved. So I recall
10 specifically seeing you talk to them at that point, and that would
11 have been on Monday right around noon. So if that helps you
12 focus your comments, that's the reason for my comment.

13 THE WITNESS: Yeah, it does.

14 (RT 558-59.) The opinion of the Third District Court of Appeal also addresses this issue. This
15 court finds that an evidentiary hearing to obtain the testimony of petitioner and Ms. Alexander
16 would not clarify the issue as to what the trial court knew concerning petitioner's desire to
17 testify. Therefore, petitioner's request for an evidentiary hearing on this issue will also be
18 denied.

19 Accordingly, IT IS HEREBY ORDERED that the motion for evidentiary hearing
20 (Dkt. No. 49) is denied without prejudice.

21 DATED: November 4, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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