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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL CHRISTOPHER HALE,

Petitioner,

v.

KAREN BRUNSON.,

Respondent.

Case No. C07-5391 RBL/KLS

ORDER DENYING MOTION FOR
TRANSFER OF STATE COURT
RECORD AS PREMATURE

This habeas corpus action has been referred to United States Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1) and Local MJR 1, 3 and 4. Petitioner has filed his petition for habeas corpus (Dkt. # 1) and a motion for the transfer of the state appellate court record to this court for review of his habeas petition. (Dkt. # 2). Upon review of the motion, the Court finds that it is premature and should be denied at this time.

I. DISCUSSION

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court's power to upset a state court's adjudication of a criminal case is very limited. A federal court shall not grant a habeas petition with respect to any claim adjudicated on the merits in the state courts unless

1 the adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable
2 application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted
3 in a decision that was based on an unreasonable determination of the facts in light of the evidence
4 presented to the state courts. 28 U.S.C. §2254(d). A determination of a factual issue by a state
5 court shall be presumed correct, and the applicant has the burden of rebutting the presumption of
6 correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).
7

8 Rule 5(c) of the rules governing § 2254 cases provides that the respondent shall indicate in
9 the answer to a habeas petition what transcripts are available and what proceedings have been
10 recorded but not transcribed. The State must attach to its answer any parts of the transcript it deems
11 relevant. Once this is done, the court, “on its own motion or upon request of the petitioner *may*
12 order that further portions of the existing transcripts be furnished or that certain portions of the non-
13 transcribed proceedings be transcribed and furnished.” Rules Governing Section 2254 Cases in the
14 U.S. Dist. Cts., 28 U.S. C. Pt. VI, ch. 153, Rule 5 (emphasis added); *Simental v. Matrisciano*, 363
15 F.3d 607, 612 (7th Cir. 2004). As noted by the *Simental* court, on habeas review, except in limited
16 circumstances, the district court does not make independent factual determinations. *Id.* citing 28
17 U.S.C. § 2254(e); *United States ex rel. Green v. Greer*, 667 F.2d 585, 586 (7th Cir. 1981) (an
18 examination of a record is not required if the petitioner “fails to identify any incompleteness or
19 inaccuracies in the facts before the district court.”).
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22 The Ninth Circuit’s holding in *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985), requiring
23 that the district court examine all relevant parts of the state court record, is not inconsistent with
24 these holdings or Rule 5. Under Rule 5, the determination of relevance is left to the discretion of
25 the respondent. A demand for further documentation can only be executed by court order *sua sponte*
26 or by request of the petitioner. Rules foll. § 28 U.S.C.A. 2254, Rule 5, Advisory Committee Notes,
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1 1976 Adoption. Upon such a request the burden is placed on the petitioner to prove to the court that
2 the excluded materials requested are relevant and necessary. When a dispute concerning relevance
3 arises, the burden is on the petitioner to prove to the court that the excluded materials are necessary
4 for the petition. *Richmond v. Ricketts*, 640 F.Supp. 767 (Ariz. 1986).

5
6 **II. CONCLUSION**

7 Therefore, until the petition for habeas has been properly served on Respondent in this case
8 and Respondent has had an opportunity to respond and attach the relevant parts of the state court
9 record, Petitioner's motion for transfer of the state court docket need not be addressed.

10 Accordingly, Petitioner's motion for transfer of the state court docket (Dkt. # 2) is **DENIED** at this
11 time.

12 DATED this 15th day of August, 2007.

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17 Karen L. Strombom
18 United States Magistrate Judge
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