

1 On February 8, 2018, the Court issued an order re-opening petitioner's "Motion for
2 Nexus" (Dkt. 33), "Motion for Evidentiary Hearing" (Dkt. 35), and "Motion to Order the State to
3 Reply to Additional Exceptions to the Time Bar" (Dkt. 36) and re-noting the motions to March 2,
4 2018. Dkt. 40. Pursuant to that order respondent was directed to respond to petitioner's motions
5 on or before February 26, 2018, and petitioner was to file replies on or before the noting date of
6 March 2, 2018. *Id.* On February 18, 2018, petitioner filed objections to the Court's order re-
7 opening and re-noting the motions. Dkt. 47. On February 26, 2018, petitioner moved for
8 additional time to file replies to respondent's responses to the above motions due to delays in the
9 prison mail system. Dkt. 48. On March 19, 2018, District Court Judge Benjamin H. Settle issued
10 an order denying petitioner's objections to the order re-opening and re-noting petitioner's
11 motions (Dkt. 40). Dkt. 51.

12 As the deadlines set by the Court's prior order have now passed while petitioner's
13 objections to the Court's order were being resolved, and in light of the Court's order directing
14 respondent to file the complete State court record, the Court hereby re-notes petitioner's "Motion
15 for Nexus" (Dkt. 33), "Motion for Evidentiary Hearing" (Dkt. 35), and "Motion to Order the
16 State to Reply to Additional Exceptions to the Time Bar" (Dkt. 36) to **May 25, 2018**.
17 Respondent may file responses to these motions on or before **May 11, 2018**, and petitioner may
18 file replies on or before the noting date of **May 25, 2018**. Petitioner's motion for an extension of
19 time to file his replies to the above motions (Dkt. 48) is **GRANTED** to the extent that his replies
20 are due on the new noting date of **May 25, 2018**.

21 **C. Petitioner's Motion For Appointment of Counsel (Dkt. 45) and Motion to Proceed**
22 ***In Forma Pauperis* (Dkt. 46)**

23 On February 28, 2018, petitioner filed a Motion for Appointment of Counsel (Dkt. 45). In
24 his motion, petitioner asks the Court to appoint counsel because he is indigent and cannot afford
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1 counsel, he is chronically mentally ill, has limited education and no legal experience, he cannot
2 understand complex legal matters, he “has never had effective counsel defend him, ever,” and his
3 claims have merit. Dkt. 45, at 1-3. Petitioner also filed a Motion to Proceed *In Forma Pauperis*
4 (Dkt. 46) which appears to be intended to support of his claim of indigency in connection with
5 his Motion for Appointment of Counsel.

6 “[T]he Sixth Amendment right to counsel does not apply in habeas corpus actions.”
7 *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986); *see also Pennsylvania v. Finley*, 481
8 U.S. 551, 555 (1987) (“[T]he right to appointed counsel extends to the first appeal of right, and
9 no further.”). Appointment of counsel is required “if necessary for the effective utilization of
10 discovery procedures . . . , or if an evidentiary hearing is required.” *Weygandt v. Look*, 718 F.2d
11 952, 954 (9th Cir. 1983) (citing Rule 6(a) and Rule 8(c), 28 U.S.C. foll. § 2254); *see also Owino*
12 *v. Napolitano*, 575 F.3d 952, 956 (9th Cir. 2009). A district court also may appoint counsel
13 “under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.”
14 *Weygandt*, 718 F.2d at 954. In deciding whether to appoint counsel, the Court “must evaluate the
15 likelihood of success on the merits as well as the ability of the petitioner to articulate his claims
16 *pro se* in light of the complexity of the legal issues involved.” *Id.* “[W]hen the case is so complex
17 that due process violations will occur absent the presence of counsel,” counsel must be
18 appointed. *Bonin v. Vasquez*, 999 F.2d 425, 428-29 (9th Cir. 1993). But when the Court
19 “properly declines to hold an evidentiary hearing, the court’s denial of a motion to appoint
20 counsel at government expense does not amount to a denial of due process.” *Knaubert*, 791 F.3d
21 at 729-30.

22 Here, petitioner has moved for an evidentiary hearing (Dkt. 35). Because the Court
23 requires the State court record in order to properly evaluate petitioner’s actual innocence claim, it
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1 is also not yet clear whether an evidentiary hearing will be required in this case. Upon receipt of
2 the State court record, the Court will be able to properly address whether an evidentiary hearing
3 is required and whether it is appropriate to appoint counsel in this case. Accordingly, petitioner's
4 Motion for Appointment of Counsel (Dkt. 45) and Motion to Proceed *In Forma Pauperis* (Dkt.
5 46) are also re-noted for consideration to **May 25, 2018**. Respondent may file a response to these
6 motions on or before **May 11, 2018**, and petitioner may file a reply on or before the noting date
7 of **May 25, 2018**.

8 **D. Petitioner's "Motion that the Clerk Change its Reporting of Exhibits 1-37 re:
9 Motion for Recusal/Affidavit of Prejudice" (Dkt. 43)**

10 Petitioner contends that the exhibits (#1-37) he intended as attachments to his "Response
11 to the State's Brief" (Dkt. 32) were mistakenly attached to his "Motion for Recusal/Affidavit of
12 Prejudice" (Dkt. 31). Dkt. 43. He requests that these exhibits (#1-37) be attached to the correct
13 submission, his "Response to the State's Brief" (Dkt. 32). *Id.* Petitioner's motion (Dkt. 43) is
14 **GRANTED**. The Clerk is directed to include the exhibits petitioner references in his motion
15 (numbered by the petitioner as exhibits #1-37 and currently included as pages 50-304 of
16 petitioner's "Motion for Recusal/Affidavit of Prejudice" (Dkt. 31)) as attachments to petitioner's
17 "Response to the State's Brief" (Dkt. 32).

18 For the reasons discussed specifically above, the Court hereby **ORDERS**:

- 19 • Respondent is directed to file the complete State court record, including all transcripts of
20 the proceedings, on or before **May 11, 2018**.
- 21 • Petitioner's "Motion for Nexus" (Dkt. 33), "Motion for Evidentiary Hearing" (Dkt. 35),
22 "Motion to Order the State to Reply to Additional Exceptions to the Time Bar" (Dkt. 36),
23 Motion for Appointment of Counsel (Dkt. 45), and Motion to Proceed *In Forma Pauperis*
24 (Dkt. 46) are re-noted to **May 25, 2018**. Respondent's responses to these motions are due
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1 on or before **May 11, 2018**, and petitioner’s replies are due on or before the noting date
2 of **May 25, 2018**. Petitioner’s Motion for an Extension of Time (Dkt. 48) to file his
3 replies to these motion (Dkts. 33, 35, 36) is **GRANTED** to the extent that his replies are
4 due on the new noting date of **May 25, 2018**.

- 5 • Petitioner’s “Motion that the Clerk Change its Reporting of Exhibits 1-37 re: Motion for
6 Recusal/Affidavit of Prejudice” (Dkt. 43) is **GRANTED** to the following extent: the
7 Clerk is directed to include the exhibits petitioner references in his motion (numbered 1-
8 37 and currently at pages 50-304 of petitioner’s “Motion for Recusal/Affidavit of
9 Prejudice” (Dkt. 31)) as attachments to petitioner’s “Response to the State’s Brief” (Dkt.
10 32).
- 11 • The habeas petition, including consideration of the parties’ supplemental briefing
12 regarding the actual innocence exception to the time-bar, is re-noted for consideration to
13 **May 25, 2018**.

14 The Clerk shall send a copy of this Order to the petitioner and counsel for respondent.

15 Dated this 12th day of April, 2018.

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Theresa L. Fricke
20 United States Magistrate Judge
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