

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RUFUS McNEELY,)	Case No. EDCV 17-1927-JGB (JPR)
)	
Petitioner,)	ORDER ACCEPTING FINDINGS AND
)	RECOMMENDATIONS OF U.S.
v.)	MAGISTRATE JUDGE
)	
)	
ROBERT FOX, Warden,)	
)	
Respondent.)	
_____)	

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. On August 24, 2018, the Magistrate Judge recommended that the FAP be dismissed without prejudice because its claims were wholly unexhausted and Petitioner had not shown good cause for a stay under Rhines v. Weber, 544 U.S. 269, 277 (2005). Among other reasons, she noted that Petitioner had not provided any documentation of his alleged visual impairment or demonstrated how "any lack of legal expertise or any aspect of his incarceration prevented him from exhausting his claims." (See R. & R. at 5-6.)

On October 29, 2018, Petitioner filed a "Motion to Withdrawl

1 [sic] Current Writ Without Prejudice, For Good Cause, To Refile
2 At Later Date," contending that his request should be granted
3 because he "is in fact blind in his right eye," he "has been in
4 special ed[.] all his years in school," and the inmate who filed
5 the "current writ" for him "saw and took advantage of [his]
6 disability, desperation, and educational l[e]v[e]l to gain \$250
7 for his assistance in filing this obvious[ly] lame writ."
8 (Pet'r's Mot. at 1-2.)¹ He attached medical records showing that
9 he suffers from various medical problems in his right eye,
10 including cataract and retinal detachment, all of which
11 apparently stem from an assault in 2014 or 2015. (Id. at 3-6.)
12 His left eye is apparently unimpaired. (See id. at 3.) He also
13 attached a CDCR "Mental Health Referral Chrono," dated October
14 11, 2018, and evidently signed by a social worker, stating that
15 he has a history of special education, is "not able to advocate,"
16 and "gets taken advantage of when he pays for [other inmates] to
17 write for him." (Id. at 7.) In a November 1, 2018 motion for
18 appointment of counsel, he attached a copy of his results on a
19 January 2017 TABE test, showing scores at about a third-grade
20 level.² Respondent did not respond to either motion or file
21 objections of his own to the R. & R.

22 Thus, although Petitioner's motion ostensibly seeks
23 voluntary dismissal of this action, its contents and attachments
24

25 ¹ For nonconsecutively paginated documents, the Court uses
26 the pagination provided by its Case Management/Electronic Case
27 Filing system.

28 ² The Court denied the motion for appointment of counsel on
November 5.


1 and the documents he attached to his motion for appointment of
2 counsel suggest that he may have intended both motions as
3 objections to the R. & R.'s finding on the absence of good cause
4 for a Rhines stay. See Erickson v. Pardus, 551 U.S. 89, 94
5 (2007) (per curiam) ("A document filed pro se is to be liberally
6 construed[.]" (citation omitted)). To the extent that is so, the
7 documents he submitted do not explain how the injuries to his
8 right eye affected his ability to exhaust his claims,
9 particularly given that he apparently has no impairment in his
10 left eye. Cf. Jacobs v. Fox, No. 15-cv-05046-YGR (PR), 2018 WL
11 306725, at *19 (N.D. Cal. Jan. 5, 2018) (petitioner's medical
12 records failed to show that his visual impairment prevented him
13 from timely filing federal petition). Moreover, his motion is
14 signed by an inmate who declares that he "authored" it on
15 Petitioner's behalf "free of any charge or favors of any kind"
16 (Pet'r's Mot. at 2), supporting the Magistrate Judge's finding
17 that Petitioner's educational level and reliance on inmate
18 assistance failed to provide good cause for a Rhines stay.

19 Having reviewed de novo those portions of the R. & R. to
20 which Petitioner constructively objected, the Court accepts the
21 findings and recommendations of the Magistrate Judge.
22 Accordingly, Respondent's motion to dismiss is GRANTED,
23 Petitioner's stay motion is DENIED, and the FAP is DISMISSED
24 without prejudice as wholly unexhausted. Petitioner's motion to
25 withdraw the FAP "with the ability to properly file at a later
26 date" (Pet'r's Mot. at 2) is DENIED because the Court cannot at

1 this time assess the timeliness or procedural regularity of any
2 future petition Petitioner may choose to file.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: November 25, 2018



JESUS G. BERNAL
U.S. DISTRICT JUDGE