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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JIMMY LEE BILLS,

Petitioner,

No. CIV S-06-2223 MCE GGH P

vs.

KEN CLARK, et al.,

Respondent.

ORDER

_____ /

Petitioner, a state prisoner represented by appointed counsel, has filed a petition for writ of habeas corpus which, following an evidentiary hearing regarding the question of equitable tolling as well as supplemental briefing, this court dismissed as untimely on October 8, 2008; petitioner appealed. In a mandate filed in district court on May 4, 2011, the Ninth Circuit remanded this case for reconsideration in light of a newly articulated appropriate standard to determine petitioner’s eligibility for equitable tolling due to mental impairment. By order, filed on May 5, 2011, the undersigned directed counsel for the parties to file simultaneous briefs addressing how the clarified standard should be applied to the facts of this case, arguing the question of petitioner’s diligence in seeking assistance, including whether any such assistance was available. The parties were also directed to state their positions with regard to the taking of additional evidence on the issues above.

1 Having reviewed the responses, the court has determined, reluctantly in light of
2 the additional burden on limited judicial resources, that a further evidentiary hearing should be
3 held, but only for the purpose of hearing the testimony of Troy Rhodes, the inmate who had
4 submitted a declaration stating that he had provided assistance to petitioner in preparing
5 petitioner’s state and federal habeas petitions. The purpose of the hearing will be to assist in
6 determining, to the extent possible, the degree of diligence petitioner demonstrated “in pursuing
7 the claims to the extent he could understand them,” and whether his “mental impairment made it
8 impossible to meet the filing deadline under the totality of the circumstances, including
9 reasonably available access to assistance.” Bills v. Clark, 628 F.3d 1092, 1100 (9th Cir. 2010).

10 The parties are directed to contact the undersigned’s courtroom deputy, Valerie
11 Callen, (916) 930-4199, within seven days, to set a mutually acceptable date on the court’s
12 calendar within 45 days from the date of this order for this limited evidentiary hearing. Of
13 course, Inmate Rhodes may be called by either party.

14 1. No other witness will be permitted to testify unless:

15 a. The party offering the witness demonstrates that the witness is for the
16 purpose of rebutting evidence which could not be reasonably anticipated
17 prior to the evidentiary hearing.

18 b. The witness was discovered after the exchange of witnesses and the
19 proffering party makes the showing required in “2,” below.

20 2. If not timely designated within the fourteen-day period prior to the evidentiary
21 hearing, the parties shall promptly inform the court and opposing parties of the
22 existence of the unlisted witnesses so that the court may consider at the
23 evidentiary hearing whether the witnesses shall be permitted to testify. The
24 witnesses will not be permitted unless:

25 a. The witnesses could not reasonably have been discovered prior to the
26 exchange of witness lists;

1 b. The court and the opposing party were promptly notified upon
2 discovery of the witnesses;

3 c. If time permitted, the party proffered the witnesses for deposition; or

4 d. If time did not permit, a reasonable summary of the witnesses'
5 testimony was provided to the opposing party.

6 3. Both parties shall exchange copies of their exhibits twenty-one days prior to
7 the evidentiary hearing. Any objections to exhibits may be raised at the hearing.

8 Movant will use numbers to mark exhibits; respondents will use letters.

9 a. No other exhibits will be permitted to be introduced unless:

10 i.) The party proffering the exhibit demonstrates that the exhibit is
11 for the purpose of rebutting evidence which could not have been
12 reasonably anticipated, or

13 ii.) The exhibit was discovered after the exchange of exhibits and
14 the proffering party makes the showing required in Paragraph "2 " below.

15 b. If not timely exchanged within the twenty-one day period prior to the
16 evidentiary hearing, the parties shall promptly inform the court and opposing party
17 of the existence of such exhibits so that the court may consider their admissibility
18 at the evidentiary hearing. The exhibits will not be received unless the proffering
19 party demonstrates:

20 i.) The exhibits could not reasonably have been discovered earlier;

21 ii.) The court and the opposing party were promptly informed of
22 their existence; or

23 iii.) The proffering party forwarded a copy of the exhibit(s) (if
24 physically possible) to the opposing party. If the exhibit(s) may not be
25 copied the proffering party must show that he has made the exhibit(s)
26 reasonably available for inspection by the opposing party.

