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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.,

Respondents.

ORDER

_____ /

The proceedings in this case, still focused, after nearly six years from its initial filing, on preliminary procedural issues, begin to evoke the interminable – not to imply, futile – litigation of Dickens’ iconic Jarndyce v. Jarndyce. Petitioner, proceeding with counsel, has filed a second motion to vacate and reset the second evidentiary hearing in this matter, now scheduled for February 6, 2012,¹ to some time between April 1st and April 15, 2012, when testimony from a proposed new expert may be obtained (specifically in a narrow time frame limited to April but not later than April 20, 2012). Of particular concern to petitioner are the 1997 T.A.B.E.² scores

_____ ¹ This second hearing had previously been continued from November 7, 2011, to December 7, 2011 (due to the court’s trial schedule) and then, from December 7, 2011, to February 6, 2012 (at the behest of petitioner’s counsel).

² Respondent identifies the Tests of Adult Basic Education (TABE) scores that he emailed, along with petitioner’s high school transcript to petitioner in November of 2011 as

1 that counsel states were never provided to her until November, 2011 (which respondent's counsel
2 does not deny), although counsel for petitioner had made repeated written requests for all of
3 petitioner's records, including educational records, in 2007, which requests were updated in
4 2011. Docket # 80, Hillberg declaration, ¶2; dkt. # 81. As these scores for petitioner are
5 markedly higher than those recorded for 1992 and 1995 for petitioner, records of which petitioner
6 had had previously, petitioner's counsel states that she needs the testimony of a new expert, Dr.
7 Nancy Cowardin, evidently to counter the witness that the respondent intends to call with respect
8 to the significance of the late-revealed, higher TABE scores. Dkt.# 80, ¶ 9; dkt # 81. Petitioner
9 maintains that Dr. Miller does not have Dr. Cowardin's expertise with respect to educational
10 testing reflected by TABE scores. Dkt # 80, ¶¶ 6-10.

11 In a response, filed on January 17, 2012, respondent set forth an opposition,
12 noting the battery of tests related to cognitive functioning that has already been administered by
13 petitioner's expert at the initial evidentiary hearing, Dr. John Miller, averring that petitioner has
14 had ample time to obtain an expert for the purpose of re-testing and/or re-analyzing the TABE
15 scores; that petitioner does not make an offer of proof as to what the new proposed expert would
16 testify to with regard to petitioner's cognitive functioning; that petitioner does not demonstrate
17 the new expert could testify competently about the TABE concerning any flaws in the testing or
18 could provide evidence that is relevant and non-cumulative with regard to the claim of equitable
19 tolling still before this court. Dkt. # 83.

20 In light of respondent's having apparently only lately located and provided
21 petitioner the latest of the TABE scores (either dating from 1997 or 1999), and respondent's
22 evident intent to have a witness testify to the grade level petitioner has attained as reflected in
23 that score, the court will permit petitioner to present Dr. Cowardin as an expert witness.

24 However, this witness may only be commissioned for the purpose of providing her expertise with

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26 dating from the year 1999, not 1997.

1 regard to the TABE or putative vicissitudes thereof, and not for the purpose of re-testing
2 petitioner's cognitive functioning, of which, like respondent, this court believes it has previously
3 been provided ample evidence. Therefore, petitioner will be required to re-submit the motion
4 requesting funding for the expert with the modification that there will be no funding for further
5 testing of the petitioner permitted.

6 Accordingly, IT IS ORDERED that:

7 1. Petitioner's second motion to vacate and re-set the evidentiary hearing date,
8 filed on January 12, 2012 (dkt # 81) is granted;

9 2. The second evidentiary hearing in this matter is re-set for Wednesday, April
10 18, 2012, at 9:00 a.m. before the undersigned;

11 3. The parties are to reference the guidelines and deadlines set forth in the order,
12 filed on November 22, 2011 (dkt # 77), with regard to witnesses and exhibits to be presented at
13 the second evidentiary hearing;

14 4. Counsel for petitioner is reminded of the need to prepare and file any writs of
15 habeas corpus ad testificandum for petitioner and any inmate witness to be present at the hearing
16 no later than six weeks prior to the date of the evidentiary hearing.

17 5. Petitioner's motion for funding of an expert, filed on January 12, 2012 (dkt #
18 80), is hereby vacated; petitioner is to re-submit, within seven (7) days, a motion requesting
19 funding pursuant to the modification referenced above. Petitioner is also directed, in addition to
20 filing a modified request and lodging a proposed order via CM/ECF, to conform with L.R.
21 137(b) in also e-mailing the proposed order to the e-mail box of the undersigned.

22 DATED: January 19, 2012

23 /s/ Gregory G. Hollows
24 UNITED STATES MAGISTRATE JUDGE

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