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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

_____ /

By order, filed on September 20, 2011, this matter was set for a further evidentiary hearing solely for the purpose of hearing the testimony of Inmate Troy Rhodes in order to assist the court in determining, as far as might be possible, the degree of diligence petitioner demonstrated “in pursuing the claims to the extent he could understand them,” and whether his “mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance.” See Order, filed on 9/20/11, p. 2, quoting Bills v. Clark, 628 F.3d 1092, 1100 (9th Cir. 2010). Thereafter, the hearing evolved into one wherein respondent, who had apparently lately found and produced documentation showing the latest of the petitioner’s TABE¹ score (in 1997 or 1999), intended to

¹ Tests of Adult Basic Education (TABE) score.

1 present a witness who could testify about petitioner's grade level as reflected in that score. See
2 Order, filed on 1/20/12, p. 2. Petitioner evidently intended to meet and counter any such
3 testimony by the services of a new expert, a Dr. Cowardin, averring that the expert on whom
4 petitioner had previously relied at the first evidentiary hearing, Dr. John Miller, did not have Dr.
5 Cowardin's expertise with regard to educational testing as reflected by TABE scores. Id. The
6 second evidentiary hearing was re-set for the third time,² for Wednesday, April 18, 2012, at 9:00
7 a.m., to accommodate petitioner's counsel's proposed new expert. See id. The court, however,
8 stated unequivocally that the new expert "may only be commissioned for the purposes of
9 providing her expertise with regard to the TABE or putative vicissitudes thereof, *and not for the*
10 *purpose of re-testing petitioner's cognitive functioning*, of which, like respondent, this court
11 believes it has previously been provided ample evidence." Id., p. 3 [emphasis added]. The
12 ample evidence referenced was the battery of tests related to cognitive functioning which Dr.
13 Miller had administered for presentation at the initial evidentiary hearing. Petitioner's request
14 for funding of the expert was vacated with directions to counsel to file a modified funding
15 request within seven days; thereafter, petitioner was granted an extension of time to file the
16 modified request.

17 In a status report regarding the modified funding request, petitioner's counsel
18 informed the court that, despite dogged efforts, she had been unable to secure the services of the
19 proposed new expert. See Order, filed on 2/10/12. The court granted petitioner additional time
20 to file a further status report but denied the request for any further re-setting of the date of the
21 evidentiary hearing. Id. Petitioner's counsel was informed that should an expert be located who
22 could generate a report which could be served upon respondent two weeks in advance of the
23 evidentiary hearing, petitioner would be permitted to present the potential expert there. As well,
24

25 ² The first time the hearing was re-set from the original Nov. 7, 2011, date was to
26 accommodate the court's schedule; the subsequent re-settings have been to accommodate
petitioner.

