

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

QUINCY KIBLER,

Petitioner,

v.

CIVIL ACTION NO. 1:06CV109

AL HAYNES,

Respondent.

ORDER AFFIRMING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

On July 20, 2006, the *pro se* petitioner, Quincy Kibler ("Kibler"), filed a petition for writ of *habeas corpus*, (Doc. No. 1), and, on August 3, 2006, he filed an "Application for Leave to Proceed Without Prepayment of Fees." (Doc. No. 5.) On August 14, 2006, United States Magistrate Judge James E. Seibert issued a Report and Recommendation ("R&R") recommending that Kibler's request to proceed without the prepayment of fees be denied because his "Prisoner Trust Account Report" showed sufficient funds to pay the \$5.00 filing fee. (Doc. No. 10.)

On August 29, 2006, Kibler filed a document titled "Objection[s] to [Order or Findings and Recommendation] of Magistrate Judge." (Doc. No. 13)(brackets in original). While the majority of Kibler's objections relate to other orders entered in the case, in paragraph six he states:

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The Plaintiff/Petitioner submitted a consent to collection of fees from his 'inmate trust fund account.' Such form was sent with an application to proceed in forma pauperis.

Id. at 2-3.

Given the Court's obligation to construe *pro se* filings liberally, Haines v. Kerner, 404 U.S. 519 (1972), it finds paragraph six of his "Objection[s]", to be an objection to the Magistrate Judge's recommended denial of his application to proceed without the prepayment of fees. Thus, the Court must conduct a *de novo* review of the issue presented.

Analysis

Pursuant to 28 U.S.C. § 1914(a), to file a petition for writ of *habeas corpus*, a petitioner must pay a \$5.00 filing fee. Pursuant to 28 U.S.C. § 1915(a), however, "any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor." Thus, it is within a court's discretion to allow a petition for writ of *habeas corpus* to proceed without the prepayment of the \$5.00 filing fee.

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Here, the Magistrate Judge recommends that the Court deny Kibler's application to proceed without the prepayment of fees and the Court agrees. As of July 25, 2006, Kibler's Prisoner Trust Account had a balance of \$350.64, and a six-month average daily balance of \$219.57. There is no indication that Kibler is unable to pre-pay the \$5.00 filing fee required to proceed with his claim.

Therefore, the Court **AFFIRMS** Magistrate Judge Seibert's Report and Recommendation, (Doc. No. 10), and **ORDERS** Kibler to pay the \$5.00 filing fee within forty-five (45) days of the entry of this Order or his petition will be dismissed without prejudice.

The Clerk is directed to mail a copy of this Order to the pro se petitioner via certified mail, return receipt requested and to transmit this Order to counsel of record.

Dated: November 1, 2006.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE