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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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12 Darin Jones,)

13) Plaintiff,)

No. CIV 10-2769-PHX-RCB (JRI)

14) vs.)

O R D E R

15 Corrections Corporation of)
16 America)

17) Defendant.)

18 This is a prisoner civil rights action brought pursuant to
19 42 U.S.C. § 1983. Currently there are several matters pending
20 before the court in this action. The first is a document
21 denoted "Notice of Appeal" filed by plaintiff *pro se* Darin Jones
22 (Doc. 122). Plaintiff is "appealing" the order of the Honorable
23 Jay R. Irwin, United States Magistrate Judge ("the Magistrate
24 Judge"), denying without prejudice "Plaintiff's Motion for
25 Appointment of Counsel[.]" Ord. (Doc. 110) at 12:2-3. Also
26 pending is plaintiff's "Motion for Request for Stay[,]" filed
27 simultaneous with his "Notice of Appeal." Mot. (Doc. 123).
28 Third, defendant Corrections Corporation of America ("CCA")

1 filed a "Request to Strike Plaintiff's Notice of Appeal[,]" as
2 well as opposing that motion for a stay. Resp. (Doc. 126) at
3 1:14-15. Lastly, even before the issuance of the Magistrate
4 Judge's order denying plaintiff's motion for appointment of
5 counsel, plaintiff also filed a motion for a "Stay of
6 Proceedings to Enforce a Judgement Under Fed.R.Civ.P. 62
7 Physical and Mental Examinations[] Under Fed.R.Civ.P. 35[.]"
8 Mot. (Doc. 107) at 1.

9 Background

10 Pursuant to this court's referral order, among other
11 things, Magistrate Judge Irwin issued an order expressly
12 "consider[ing] . . . Plaintiff's Motion for Appointment of
13 Counsel[.]" Ord. (Doc. 110) at 2:8. Plaintiff sought counsel
14 due to his "mental incompetence, the complexity and merits of
15 the case, and his inability to secure counsel." Id. at 2:9-11.
16 Stressing that plaintiff "founds his request upon due process
17 protections[,]" the Magistrate Judge devoted the bulk of his
18 order to discussing the constitutional limitations on
19 plaintiff's request. Id. at 3:9-10.

20 As the starting point for his analysis, the Magistrate
21 Judge recited the established rule that there is no "general
22 constitutional right for an indigent to have appointed counsel
23 in a civil case[]" in this Circuit. Id. at 2:13-14 (citing
24 Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980)).
25 Likewise, the Magistrate Judge accurately stated that the
26 Supreme Court has "adopted a '*presumption* that an indigent
27 litigant has a right to appointed counsel only when, if he
28 loses, he may be deprived of his physical liberty interest.'"

1 Id. at 2:23-24 (quoting Lassister v. Department of Social Servs.
2 of Durham Cty., 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640
3 (1981)) (emphasis added). Accordingly, the Magistrate Judge
4 explained that “[a]bsent such a deprivation of physical liberty,
5 a constitutional right to appointment of counsel must be found
6 as a corollary to other general constitutional principles.” Id.
7 at 2:25-27.

8 Consistent with the foregoing, the Magistrate Judge
9 examined plaintiff’s request for counsel in light of the
10 constitutional principles of “right of access” and “procedural
11 due process[.]” Id. at 2:28 and at 3:9 (emphasis omitted). He
12 soundly reasoned that “Plaintiff’s right of access is not at
13 issue, and therefore cannot justify appointment of counsel[.]”
14 on that basis. Id. at 3:7-8. Next, the Magistrate Judge
15 properly engaged in “a due process analysis of the type
16 announced in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 892,
17 47 L.Ed.2d 18 (1976),” *i.e.*, a balancing test. See Hernandez
18 v. Whiting, 881 F.2d 786, 771 n.3 (9th Cir. 1989). After
19 identifying the various interests at stake and thoroughly
20 discussing each, the Magistrate Judge found that plaintiff could
21 not “overcome the presumption against appointed counsel.” Ord.
22 (Doc. 110) at 10:13-14. The Magistrate Judge thus found that
23 “Plaintiff will not be denied procedural due process in the
24 absence of appointed counsel.” Id. at 10:15-16.

25 Prior to the transfer of this action,¹ the United States
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27 ¹ In accordance with 28 U.S.C. § 1631, this case was transferred here
28 because it “should have been brought in the District of Arizona, where the events
at issue occurred.” Ord. (Doc. 73) at 1.

1 District Court, District of Alaska, granted plaintiff's
2 application for "in forma pauperis" ("IFP") status pursuant to
3 28 U.S.C. § 1915. Doc. 12 (3:10-cv-00054-TMB) at 1. As that
4 statute allows, the court waived plaintiff's prepayment of the
5 \$350.00 filing fee, but it assessed him an initial partial
6 filing fee, and required monthly installment payments of the
7 remainder from plaintiff's prisoner trust account. Id. at 1-2.
8 Despite having been previously granted IFP status, plaintiff did
9 not mention section 1915 in his motion, let alone subsection
10 (e)(1) thereof. Section 1915(e)(1) authorizes a court to
11 "request an attorney to represent any person unable to afford
12 counsel." 28 U.S.C. § 1915(e)(1).

13 Nonetheless, undoubtedly adhering to the well-recognized
14 rule that "in general, courts must construe pro se pleadings
15 liberally[,]" Hamilton v. Brown, 630 F.3d 889, 893 (9th Cir.
16 2001) (citations and internal quotation marks omitted), the
17 Magistrate Judge addressed a "statutory request for counsel
18 under" section 1915(e)(1). Ord. (Doc. 110) at 10:17 (emphasis
19 omitted).

20 After careful consideration, the Magistrate Judge found
21 that plaintiff could show "neither the likelihood of success nor
22 the complexity of the issues necessary" to satisfy the
23 "'exceptional circumstances'" standard necessary "to support a
24 request for counsel under" that particular statute. Id. at
25 11:20-21; and at 10:19. Based upon the foregoing, the
26 Magistrate Judge denied without prejudice to renew plaintiff's
27 motion for appointment of counsel.

28 Two days prior to the issuance of that order, plaintiff

1 filed a motion for a stay pending resolution of his motion for
2 appointment of counsel. After the issuance of the Magistrate
3 Judge's order plaintiff filed a "Notice of Appeal[]" in this
4 district court, "chall[ing] [the Magistrate] Judge's denial
5 of his appointment of counsel[.]" Not. (Doc. 122) at 1.
6 Simultaneous with the filing of that Notice, plaintiff filed a
7 second motion for a stay essentially reiterating his reasons for
8 seeking appointment of counsel.

9 Defendant CCA did not address the merits of plaintiff's
10 "appeal" or his second motion for a stay. Instead, CCA is
11 taking the position that the order denying appointment of
12 counsel "is not immediately appealable[.]" and hence "there is
13 no viable reason to stay this case." Resp. (Doc. 126) at 2:4;
14 2:6. CCA thus reasons that the court should deny plaintiff's
15 motion for a stay. CCA also specifically "requests that the
16 Court . . . strike the notice of appeal." Id. at 2:8.

17 As to plaintiff's first filed motion for a stay, CCA does
18 not object to a brief extension "to allow the parties to submit
19 their Joint Case Management Plan." Resp. (Doc. 118) at 1:20-21.
20 CCA is opposing "the remainder of Plaintiff's Motion" on two
21 grounds, however. Id. at 1:22. First, CCA asserts that that
22 motion is "premature[.]" Id. at 1:23. Second, CCA contends that
23 plaintiff cannot invoke Rule 35 as "a weapon" to "be used to
24 force CCA to pay for Plaintiff's expert." Id. at 1:24.

25 Discussion

26 I. "Appeal"

27 Evidently the parties are operating under the misconception
28 that plaintiff filed his "appeal" in the Ninth Circuit Court of

1 Appeals.² He did not; plaintiff filed his "appeal" in this
2 district court. Therefore, CCA's argument that the Magistrate
3 Judge's denial of counsel is an "interlocutory order" which
4 "must fit within the 'collateral order exception to the final
5 judgment rule of 28 U.S.C. § 1291" misses the mark. See Resp.
6 (Doc. 126) at 1:21-23 (citing Cohen v. Beneficial Industrial
7 Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528
8 (1949)). Section 1291 confers jurisdiction upon circuit courts
9 to review "final decisions" of the district courts. See 28
10 U.S.C. § 1291; see also Ortiz v. Jordan, --- U.S. ---, 131 S.Ct.
11 884, 891, 178 L.Ed.2d 703 (2011) (internal quotation marks
12 omitted) ("The jurisdiction of a Court of Appeals under 28
13 U.S.C. § 1291 extends only to appeals from . . . final decisions
14 of the district courts.") Consequently, section 1291's
15 jurisdictional grant does not come into play in the present
16 case. Hence, despite what the CCA urges, whether the Magistrate
17 Judge's order fits within the collateral order exception to
18 section 1291 is irrelevant at this juncture. Moreover, despite
19 its designation as a "Notice of Appeal," given the statutory
20 framework for a magistrate judge's authority discussed below,
21 the court will be treating that "Notice" as objections under

23 2 The CCA expressly declares that it is opposing "Plaintiff's motion to
24 stay this case while *this* Ninth Circuit considers his appeal[.]" Resp. (Doc. 126)
25 at 1:16-18 (emphasis added). Further, the CCA reasons that because plaintiff's
26 "appeal" does not "confer jurisdiction on the Ninth Circuit," the court should
27 strike his "notice of appeal" and deny his motion for a stay. Id. at 2:5-6.
28 Likewise, plaintiff mistakenly relies upon Fed. R. App. 4, governing appeals
as of right to a circuit court from a judgment or order of a district court. See
Not. (Doc. 122) at 1. Moreover, plaintiff concludes his motion for a stay
asserting that "[t]here should be no further actions taken or decided [until] the
9th Circu[i]t[] [C]ourt of [A]ppeals has made a decision and if denied in the 9th
[C]irc[i]t[] [he] [i]ntend[s] to appeal to the Supreme Court of Appeals [sic]." Id. at 2.

1 Fed. R. Civ. P. 72(a). Clearly, this court has the authority
2 to address such objections. See 28 U.S.C. § 636(b)(1)(A).

3 **A. Standard of Review**

4 28 U.S.C. § 636 delineates the powers of federal magistrate
5 judges. The referral order in the present case was made
6 pursuant to section 636(b)(1). Under that statute, the standard
7 of review differs depending upon whether a magistrate judge's
8 decision is non-dispositive or dispositive. Section
9 636(b)(1)(A), with the exception of eight types of motions,³
10 authorizes a magistrate judge to resolve "any pretrial
11 matter[s]" subject to "reconsider[ation] thereunder "where it
12 has been shown that the magistrate judge's order is clearly
13 erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); see
14 also Estate of Conners by Meredith v. O'Connor, 6 F.3d 656, 658
15 (9th Cir. 1993) ("Under 28 U.S.C. § 636(b)(1)(A), a district
16 judge may designate a magistrate judge to hear any
17 *nondispositive pretrial* matter pending before the court.") In
18 discussing "nondispositive matters[,]" Rule 72(a) explains that
19 "[w]hen a pretrial matter not dispositive of a party's claim or
20 defense is referred to a magistrate judge to hear and decide,
21 the magistrate judge must promptly conduct the required
22 proceedings and, when appropriate, issue a written order stating
23 the decision." Fed.R.Civ.P. 72(a). That Rule allows a party
24 14 days within which to file and serve objections to the

25
26 ³ Specifically excluded from that grant of authority are motions "for
27 injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss
28 or quash an indictment or information. . . , to suppress evidence in a criminal
case, to dismiss or to permit maintenance of a class action, to dismiss for failure
to state a claim upon which relief can be granted, and to involuntarily dismiss an
action." 28 U.S.C. § 636(b)(1)(A).

1 magistrate judge's order. Id. Correspondingly, 28 U.S.C.
2 § 636(b)(1)(B), permits a district court to designate a
3 magistrate judge to conduct hearings and submit proposed
4 findings of fact and recommendations to the district court on
5 the excepted motions listed in section 636(b)(1)(A). If written
6 objections are filed, the district court conducts a *de novo*
7 review of those proposed findings of fact and recommendations.
8 See 28 U.S.C. § 636(b)(1)(C).

9 To determine the scope of the magistrate judge's authority
10 and, in turn, the standard of review, it is not enough to
11 "simply look to the list of excepted pretrial matters" in
12 636(b)(1)(A). See United States v. Rivera-Guerrero, 377 F.3d
13 1064, 1068 (9th Cir. 2004). The court must look beyond the plain
14 language of that statute because the eight listed motions "are
15 not an exhaustive list of all the pretrial matters that are
16 excepted from the magistrate judge's authority." Id. at 1067.
17 Indeed, the Ninth Circuit has noted that "any motion not listed,
18 *nor analogous to a motion listed* in this category, falls within
19 the non-dispositive group of matters which a magistrate may
20 determine." Id. at 1067-68 (citation omitted) (emphasis added
21 by Rivera-Guerrero Court). Thus, a court also "must look to the
22 effect of the motion, in order to determine whether it is
23 properly characterized as dispositive or non-dispositive of a
24 claim or defense of a party." Id. at 1068 (citation and
25 internal quotation marks omitted).

26 **B. Discussion**

27 A motion for appointment of counsel is not among those
28 motions excepted from section 636(b)(1)(A). As just explained

1 though, that does not necessarily mean that such a motion is
2 dispositive. Indeed, courts routinely deem orders denying
3 appointment of counsel to be nondispositive, subject to review
4 under the clearly erroneous or contrary to law standard. See,
5 e.g., Tremblay v. Lapier, 2010 WL 3187456 (D.Mont. Aug. 10,
6 2010); McDonald v. Waddington, 2009 WL 302279, at *2-*3
7 (W.D.Wash. Feb. 6, 2009) (finding that a magistrate judge's
8 "non-dispositive order denying [a prisoner's] request for
9 appointment of counsel . . . was neither clearly erroneous nor
10 contrary to law[]"); and Nash v. Waddington, 2007 WL 2461774
11 (W.D.Wash. Aug. 27, 2007) (same). That is logical given that
12 such motions are not dispositive of a party's claim or defense.
13 Cf. Jones v. Vanderville, 2009 WL 4572880, at *2 (E.D.Cal. Dec.
14 1, 2009) (magistrate judge's order dismissing the complaint with
15 leave to amend was non-dispositive).

16 Based upon the foregoing, this court, too, considers the
17 Magistrate Judge's order denying plaintiff Jones' motion for
18 appointment of counsel to be non-dispositive. Bolstering this
19 conclusion is the fact that the Magistrate Judge explicitly
20 denied that motion "without prejudice." Ord. (Doc. 110) at
21 12:3. A denial without prejudice is different than a denial
22 with prejudice "in the sense that" the former "does not preclude
23 a subsequent motion based on the same argument." See Ross v.
24 Excel Group Flexible Benefit Plan, 2008 WL 4567229, at *3
25 (D.Ariz. Oct. 14, 2008). Therefore, the Magistrate Judge's
26 order also is non-dispositive "in the sense" that it does not
27 completely foreclose plaintiff from seeking appointment of
28 counsel at another point during this litigation. See id.

1 The determination that the Magistrate Judge's order is non-
2 dispositive means that it is subject to the clearly erroneous
3 or contrary to law standard of 28 U.S.C. § 636(b)(1)(A). See
4 also Fed.R.Civ.P. 72(a) (a district court "must consider timely
5 objections and modify or set aside any part of the order that
6 is clearly erroneous or contrary to law[]"). "The clearly
7 erroneous standard, which applies to a magistrate judge's
8 findings of fact, is significantly deferential, requiring a
9 definite and firm conviction that a mistake has been committed."
10 Patterson v. Ryan, 2010 WL 4136097, at *2 (D.Ariz. Oct. 13,
11 2010) (citations and internal quotation marks omitted). "By
12 contrast, the contrary to law standard . . . permits independent
13 review of purely legal determinations by the magistrate judge."
14 Id. (citations and internal quotation marks omitted). With
15 these standards in mind, the court will consider plaintiff's
16 objections to the order denying his motion for appointment of
17 counsel.

18 Those objections consist of a list of 13 statements, mostly
19 pertaining to plaintiff's complaint, although a few are germane
20 to his motion for counsel. Further, plaintiff asserts that the
21 Magistrate Judge did not rely upon current and applicable
22 Supreme Court case law. See Not. (Doc. 122) at 1, ¶ 2).
23 Plaintiff has utterly failed to show that any of the Magistrate
24 Judge's factual findings were clearly erroneous. Nor has he
25 shown that any of the Magistrate Judge's legal conclusions were
26 contrary to law. Plaintiff would be hard pressed to make
27 either showing given the Magistrate Judge's thoughtful and
28 careful review of plaintiff's motion for appointment of counsel,

1 the applicable law, and the relevant facts. Thus, there is
2 absolutely no basis for this court to reconsider any aspect of
3 the Magistrate Judge's order denying without prejudice
4 plaintiff's motion for appointment of counsel. Accordingly, the
5 court overrules plaintiff's objections and affirms that order.⁴

6 That ruling renders moot defendant's motion to strike
7 plaintiff's "Notice of Appeal." The court thus denies as moot
8 defendant's motion to strike (Doc. 126).

9 **II. Motions for a Stay**

10 **A. March Motion**

11 Prior to the Magistrate Judge issuing the subject order,
12 plaintiff filed a motion entitled "Stay of Proceedings to
13 enforce a Judgement Under Fed.R.Civ.P. 62 Physical and Mental
14 Examinations[] Under Fed.R.Civ.P. 35[.]" Mot. (Doc. 107). On
15

16 ⁴ The court is well aware that in this Circuit a magistrate judge has no
17 authority to issue a dispositive order denying in forma pauperis status unless
18 there has been written consent pursuant to section 636(c). Tripati v. Rison, 847
19 F.2d 548, 549 (9th Cir. 1988); see also Minetti v. Port of Seattle, 152 F.3d 1113,
20 1114 (9th Cir. 1998) (citation omitted) ("[A]n application to proceed in forma
21 pauperis is not a nondispositive matter under Rule 72(a)."); and LRCiv 72.2(a)(4)
22 ("[A] Magistrate Judge may not deny a request for in forma pauperis status unless
23 the person requesting such status has expressly consented in writing to Magistrate
24 Judge jurisdiction pursuant to 28 U.S.C. § 636(c).") There was no written consent
25 here.

26 The Magistrate Judge's order did invoke the IFP statute, 28 U.S.C. § 1915,
27 as discussed herein. Therefore, at first glance it might appear that the
28 Magistrate Judge exceeded the scope of his statutory authority in denying
29 plaintiff's request for counsel based upon subsection (e)(1) of that statute.
30 However, the Magistrate Judge clearly had the authority, as he did, to consider
31 whether plaintiff's request for counsel should be granted under that particular
32 statute. The Magistrate Judge had that authority because in contrast to the denial
33 of in forma pauperis status, as explained above, the denial of a request to appoint
34 counsel is non-dispositive.

35 Moreover, as noted at the outset, the transfer of this action from the United
36 States District Court, District of Alaska, that court granted plaintiff's
37 application for IFP status pursuant to 28 U.S.C. § 1915(b)(1) and (2). Especially
38 given that history, it is obvious that the issue of plaintiff's IFP status was not
39 before Magistrate Judge Irwin. Rather, he only properly considered the discrete
40 issue of whether the court should "request an attorney to represent" plaintiff
41 under section 1915(e)(1) because plaintiff is "unable to afford counsel." See 28
42 U.S.C. § 1915(e)(1).

1 April 20, 2011, the Magistrate Judge withdrew the referral order
2 as to that particular motion, so that motion is now properly
3 before this court for consideration.

4 Insofar as the court is able to discern, plaintiff's motion
5 actually seeks three separate forms of relief. First, plaintiff
6 is seeking a "stay [of] all proceedings[] until[] the motion
7 for counsel is 'resolved[.]'" Mot. (Doc. 107) at 1, ¶ 1).
8 Second, if his motion for appointment of counsel is denied,
9 plaintiff "asks this court for reconsideration of that denial."
10 Id. at 1, ¶ 2). Third, "at the defendant[']s expense[,]"
11 plaintiff is seeking a "private examination" as to his "mental
12 status" pursuant to Fed.R.Civ.P. 35. Id. at 2, ¶ 7).

13 Given the limited scope of the stay which plaintiff is
14 seeking, *i.e.*, "until[] the motion for counsel is resolved[,]"
15 his motion is moot because this court has resolved that issue.
16 Plaintiff's motion also is moot insofar as he is seeking
17 "reconsideration of th[e] denial" of his motion for appointment
18 of counsel because this court has found no basis for
19 reconsideration. See id. at 1, ¶ 2).

20 As to plaintiff's request for a private mental examination
21 at defendant's expense, Rule 35 simply does not encompass such
22 a request. To be sure, pursuant to Rule 35 a district court has
23 the discretion "under appropriate circumstances, [to] order a
24 party to submit to a physical examination at the request of an
25 opposing party[.]" Callegari v. Lee, 2011 WL 175927, at *7
26 (N.D.Cal. Jan. 19, 2011). However, "Rule 35 'does not vest the
27 court with authority to appoint an expert to examine a party
28 wishing an examination of himself.'" Id. (quoting Smith v.

1 Carroll, 602 F.Supp.2d 521, 526 (D.Del. 2009); see, e.g., Baker
2 v. Hatch, 2010 WL 3212859 at *3 (E.D.Cal. 2010) (finding no
3 authority under Rule 35(a) to grant pro se prisoner plaintiff's
4 request for medical examination); Adams v. Epps, 2008 WL 4861926
5 at *1 (S.D.Miss. 2008) (same); Cabrera v. Williams, 2007 WL
6 2682163 at *2 (D.Neb. Sept.7, 2007) (same)). Therefore, the
7 court denies plaintiff's motion insofar as he is seeking a
8 court-ordered physical examination at defendant's expense.

9 In short, the court denies in its entirety plaintiff's
10 motion for a stay (Doc. 107).

11 **B. April Motion**

12 Simultaneously with the filing of his "Notice of Appeal"
13 plaintiff filed a "Motion for Request for Stay[] Under Rule 24⁵
14 Intervention to Stop Al[1] Proceeding[]s [U]ntil[] 9th
15 Circu[i]t[] Court of Appeals Rules on Appeal from the Court's
16 Decision" (Doc. 123) at 1 (footnote added). The court *sua*
17 *sponte* withdraws the reference to the Magistrate Judge as to
18 this motion, and denies it as premature given that currently
19 there is nothing pending in the Ninth Circuit.

20 Based upon the foregoing, IT IS ORDERED that:

21 (1) Plaintiff's "Motion for Request for Stay[]" (Doc. 107)
22 is DENIED;

23 (2) Plaintiff's "Notice of Appeal" (Doc. 122), is
24 OVERRULED; and the Magistrate Judge's order denying plaintiff's
25 motion for appointment of counsel without prejudice (Doc. 110)

27 ⁵ Plaintiff's reliance upon FED.R.CIV.P. 24 as the basis for this motion
28 is misplaced. That Rule governs intervention in an action and has no relevance
whatsoever to this stay motion.

1 is AFFIRMED;

2 (3) Plaintiff's "Motion for Request for Stay[]" (Doc. 123)

3 is DENIED; and

4 (4) Defendant's "Request to Strike Notice of Appeal" (Doc.
5 126) is DENIED.

6 DATED this 5th day of May, 2011.

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13 copies to plaintiff *pro se* and all counsel of record

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Robert C. Broomfield
Senior United States District Judge