

## UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DANA PENNEY, CASE NO. 1:09-cv-00382-GSA PC

Plaintiff, ORDER DENYING MOTIONS FOR  
11 v. APPOINTMENT OF COUNSEL AND  
12 JON FRANCO, et al., ISSUANCE OF PRELIMINARY INJUNCTION,  
13 Defendants. (Docs. 2, 4, and 10)

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**I. Order on Motions for Appointment of Counsel and for Preliminary Injunction**

Plaintiff Dana Penney is a federal prisoner proceeding pro se and in forma pauperis in this civil action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which provides a remedy for violation of civil rights by federal actors. Plaintiff, who is currently housed at the United States Penitentiary-Atwater, filed this action on March 2, 2009, alleging an Eighth Amendment claim against Defendants Franco, Mettry, Sorenson, and Rios for deliberate indifference to his serious medical needs. In a separate order issued concurrently with this order, the Court screened Plaintiff's complaint pursuant to 28 U.S.C. § 1915A, and ordered that service of process was appropriate on Defendants.

On March 2, 2009, in conjunction with his complaint, Plaintiff filed a motion seeking the appointment of counsel, and a motion seeking a preliminary injunction mandating that Defendants provide Plaintiff with immediate medical attention. On April 1, 2009, Plaintiff filed a second motion seeking a preliminary injunction mandating he be hospitalized for testing and treatment.

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1                   **A.        Motion for Appointment of Counsel**

2                   Plaintiff does not have a constitutional right to appointed counsel in this action, Rand v.  
3 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), and the Court cannot require an attorney to represent  
4 Plaintiff pursuant to 28 U.S.C. § 1915(e)(1). Mallard v. United States District Court for the Southern  
5 District of Iowa, 490 U.S. 296, 298, 109 S.Ct. 1814, 1816 (1989). However, in certain exceptional  
6 circumstances the Court may request the voluntary assistance of counsel pursuant to section  
7 1915(e)(1). Rand, 113 F.3d at 1525.

8                   Without a reasonable method of securing and compensating counsel, the Court will seek  
9 volunteer counsel only in the most serious and exceptional cases. In determining whether  
10 “exceptional circumstances exist, the district court must evaluate both the likelihood of success of  
11 the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity  
12 of the legal issues involved.” Id. (internal quotation marks and citations omitted).

13                  In the present case, the Court does not find the required exceptional circumstances. Even if  
14 it is assumed that Plaintiff is not well versed in the law and that he has made serious allegations  
15 which, if proved, would entitle him to relief, his case is not exceptional. This Court is faced with  
16 similar cases almost daily. Further, at this early stage in the proceedings, the Court cannot make a  
17 determination that Plaintiff is likely to succeed on the merits, and based on a review of the record  
18 in this case, the Court does not find that Plaintiff cannot adequately articulate his claims. Id.

19                  **B.        Motions for Preliminary Injunction**

20                  The purpose of a preliminary injunction is to preserve the status quo if the balance of equities  
21 so heavily favors the moving party that justice requires the court to intervene to secure the positions  
22 until the merits of the action are ultimately determined. University of Texas v. Camenisch, 451 U.S.  
23 390, 395 (1981). A preliminary injunction is available to a plaintiff who “demonstrates either (1)  
24 a combination of probable success and the possibility of irreparable harm, or (2) that serious  
25 questions are raised and the balance of hardship tips in its favor.” Arcamuzi v. Continental Air  
26 Lines, Inc., 819 F. 2d 935, 937 (9th Cir. 1987). Under either approach the plaintiff “must  
27 demonstrate a significant threat of irreparable injury.” Id. Also, an injunction should not issue if the  
28 plaintiff “shows no chance of success on the merits.” Id. At a bare minimum, the plaintiff “must

demonstrate a fair chance of success of the merits, or questions serious enough to require litigation."

Id.

“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (quotations and citations omitted). Further, a mandatory preliminary injunction such as that sought by Plaintiff in the instant motion “is subject to heightened scrutiny and should not be issued unless the facts and the law clearly favor the moving party.” Dahl v. Hem Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir. 1993).

Plaintiff's motions are not accompanied by admissible evidence. Although Plaintiff attached medical records and documentation to his motions, the Court cannot interpret the records, as interpretation requires a medical expert. Further, because Plaintiff is not a medical expert, he is not qualified to offer an opinion that he has medical needs which require immediate treatment. Because Plaintiff has not supported his motion with any admissible evidence demonstrating a significant threat of irreparable injury, he has not met his burden and his motion must be denied. The denial shall be without prejudice to renewal.

### C. Order

For the reasons set forth herein, Plaintiff's motion for the appointment of counsel and motion for preliminary injunctive relief, filed March 2, 2009, and motion for preliminary injunctive relief, filed April 1, 2009, are HEREBY DENIED, without prejudice to renewal.

IT IS SO ORDERED.

**Dated: April 3, 2009**

/s/ **Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE