

RECEIVED

Plaintiff's Name Dana Penney
Inmate No. 07908-068
Address P.O. Box 01900

MAR 02 2009

FILED

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

MAR 02 2009

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE EASTERN DISTRICT OF CALIFORNIA
FOR THE EASTERN DISTRICT OF CALIFORNIA AT FRESNO

DEPUTY CLERK

Dana Penney

(Name of Plaintiff)

1:09 CV 00382 GSA PC

(Case Number)

vs.

COMPLAINT

Jon Franco

Lourdes Mettray

James Sorenson

Hector Rios Jr.

(Names of all Defendants)

Bivens Action [403 U.S. 388 (1971)]

I. Previous Lawsuits (list all other previous or pending lawsuits on back of this form):

A. Have you brought any other lawsuits while a prisoner? Yes ___ No ✓

B. If your answer to A is yes, how many? _____

Penney v. Franco et al Describe previous or pending lawsuits in the space below.
(If more than one, use back of paper to continue outlining all lawsuits.)

Doc. 13 Att. 1

1. Parties to this previous lawsuit:

Plaintiff _____

Defendants _____

2. Court (if Federal Court, give name of District; if State Court, give name of County) _____

3. Docket Number _____ 4. Assigned Judge _____

5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?) _____

6. Filing date (approx.) _____ 7. Disposition date (approx.) _____

II. Exhaustion of Administrative Remedies

A. Is there an inmate appeal or administrative remedy process available at your institution? _____

Yes ☒ No _____

B. Have you filed an appeal or grievance concerning ALL of the facts contained in this complaint? _____

Yes ☒ No _____

If your answer is no, explain why not _____

C. Is the process completed? The process is completed (exhausted) if: (1) your appeal was granted at one of the levels of review, or (2) you pursued your appeal to the final level of review available.

Yes _____ If your answer is yes, briefly explain what happened at each level.

No ☒ If your answer is no, explain why not.

Because I'm in need of immediate medical attention. Every grievance I filed they've asked for delaying further delaying my medical needs. I even wrote a sensitive administrative remedy to Western Regional Director Robert McFadden in hopes that he would grant immediate medical attention but was denied. See Exhibit E

NOTICE:

Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). If there is an inmate appeal or administrative remedy process available at your institution, you may not file a Bivens action, or an action under any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 121 S. Ct. 1819, 1825 (2001). Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit. Id. at 1821.

III. Defendants

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item B for the names, positions and places of employment of any additional defendants.)

A. Defendant Jon Franco is employed as Clinical Director
at Atwater United States Penitentiary

B. Additional defendants Hector Rios Jr. Warden at Atwater United States
Penitentiary, Lourdes Mettry Medical Administrator at Atwater
United States Penitentiary.

IV. Statement of Claim

(State here as briefly as possible the facts of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

During the lockdown (June - Nov.) in mid July (12) I became extremely ill. I put a sick-call slip in on the 12th 15th to my belief either on the 15th or 16th NP James Lorenson & clo Melero came to my door & checked my pulse. I described my symptoms fatigue, fever, extreme weakness, chills, vision problems (blurriness & flashing) but episodes & just a general feeling of sickness. He diagnosed my symptoms as the stomach flu & to just let it pass. On the 17th of July I personally handed NP James Lorenson a sick-call to take to medical upon him checking on me. That Monday I put another sick slip in after not seeing the doctor. In August my symptoms continued along with a swelling in between my legs (between rectum & rectum) & a numbing pain where the swelling was located. In Sept. my symptoms continued along with trouble defecating to not defecating at all, no doctor. Oct 3, 2008 Dr. Franco finally seen me after months. I described my symptoms, he checked my rectum & said he would have a colonoscopy done he said my symptoms were cancer like.

V. Relief.

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

I would like the court to take immediate action upon receiving this & force Atwater to treat plaintiff to receive proper medical care that means providing a competent doctor to diagnose or hospitalize to diagnose & treatment plaintiff's ailment adequately. Also reward plaintiff 1,000,000 from each defendant for deliberate indifference, inadequate medical care.

I declare under penalty of perjury that the foregoing is true and correct.

Date 2-23-09

Signature of Plaintiff



but doubted based on my age (26). October 5th & 6th I was feeling extremely ill (life threatening ill) so I asked c/o J. Garcia to call medical, they stated they knew about me & they were coming this was on the 5th on 6th the same thing happened & they informed c/o J. Garcia they would see me tomorrow, the 7th came & c/o Dewitt called medical during the 8-4pm shift & they stated they were coming. After his shift was over when administration leaves including medical staff c/o J. Garcia asked if medical came to see me, I told him no & he stated they were supposed to see me & that he didn't know what was going on. I asked c/o J. Garcia to call medical because I was feeling worse he called and they refused to see me so I flooded the cell to receive medical attention. I was escorted to medical by Lt. Lepe & other c/o's and seen by MLP Rodrigo Oguero. He did a standard check up & said every thing was fine regardless of the symptoms I described I was sent to the special housing unit for flooding the cell, October 9, a colonoscopy was performed the results were negative. October 16, I was seen by Dr. Jon Franco upon numerous occasions of still not feeling well & still not being able to defecate. (Note* during my visit on Oct 3 Dr. Franco prescribed laxatives, stool softener, & suppositories for the symptoms I'd been experiencing for the past 3 months rectal pains, swelling in between my leg numbing^{pain} sensations, visual problems, extreme weakness, fatigue, general feeling of sickness etc) The Dr. stated if I was still having problems he would see me. October 20, I was still feeling horrible I began to have these tingling sensations & this abnormal sensation throughout my body especially my genitals so I put another sick call slip in. November 18, I was seen by NP James Norrenson, I described my symptoms & that I was experiencing along with these white grooves forming in the lining of my mouth. He stated that the tingling sensation & the abnormal sensation I was feeling could be something growing on my nerves possibly cancer. He said he would do blood tests but to my belief the tests were done for, dyspnea not what he gave his opinion on about the tingling sensations. December 2, I filed a grievance against medical & was told I would be put on the

callout. December 24, I was seen by Dr. Jan Franco I described my symptoms explained that this has been going on for 5 months also I explained my hands & feet had been getting numb for no reason along with the tingling sensations, pins & needles sensations, white grooves wrapped around the lining of my mouth causing the inside of my lips to swell, 2 small lumps forming on each side of my cheeks, reoccurring sores in my mouth (blood blisters), ^{reverse} sharp pains in different parts of my body especially scrotum, general feeling of sickness off & on & spasms in my eyes, also heart palpitations in my penis, stomach, & lower back.

Note * Upon seeing NP James Sorenson, I stated that I had H.P.V. (St.D) since incarceration (6yrs) & that certain types go away on its own & certain strains can cause penile, oral, neck, throat, anal & cervical cancer for women. The doctor stated he would have blood work done for Lyme disease & anemia and if nothing came up an MRI would follow. January 13 2009 blood work was done Jan. 20, 2009 blood work was done again, one of the tubes messed up. Feb. 11, 2009 an MRI was done on my head, I asked RT Silva why just my head & not my whole body especially my scrotum, she stated they have something else for that. As of Feb 20, 2009 I haven't heard anything else as serious & life threatening as my symptoms have been medical has been excessively slow in seeing what is wrong & also stops testing after having one test done leaving me to fill out another sick-call slip for the same issue and waiting another 3 months to be seen. According to the Medical Administrator Lourdes Mettry there system is known as a triage & sees inmates according to the seriousness of the matter. Well this has been going on for 7 months & every day my health is deteriorating drastically yet there's no sense of urgency to see what's wrong & have even denied access altogether on several occasions. The doctor is either too competent to come up with a prognosis or he is purposely ignoring the symptoms I describe. The Warden (Rios) is aware of what's going on & supports medical's actions based on the "history of sick-call slips I put in since July, he states that he has to support medical staff & the Medical Administrators (Lourdes Mettry) decisions." I've been incarcerated since April 8, 2008 (6yrs).

and have never been sick. I was paroled from the state of PA from Forest Correction Facility in Marienville, PA 16239 Dec. 10, 2007 you can check my records the most serious problem I had was high cholesterol. I'm extremely ill & in severe pain; not receiving proper medical attention required violating the 8th amendment. The administrative remedies are not completed without the courts immediate intervention the Plaintiff Dana Penney may suffer irreparable harm or even death. Every defendant named are aware of my continuing health problems, Dr. Jon Franco is not competent enough to diagnose yet he disregards to bring a specialist to diagnose, refuses to send me to the hospital & stops testing after one test is completed. The medical administrator Lourdes Mettry disregards my symptoms as serious by refusing immediate attention upon signing up for sick-call, 2 & 3 month waits is excessively long for the existing health problems I'm experiencing. Nurse Practitioner James Sorenson failed to act on his opinion upon visiting Nov. 18, 2008 "he stated that the tingling sensations & the abnormal sensations your experiencing could be something growing on your nerves possibly cancer!" yet he failed to order tests in regards to his opinion. He is also not competent enough to diagnose ex. Sept 30, 2008 he prescribed suppositories for symptoms including chills, aight sweets, sharp pains in rectum, swelling in between the legs (between scrotum & rectum) & vision problems. See sick-call slips dated Sept 12 & 15, 2008 Exhibit C & Exhibit B. The Warden is condoning the violation of the 8th Amendment (deliberate indifference & inadequate medical care) by allowing it to continue. He is aware of my health problems & has made little to below minimum effort to assist me. Other symptoms include chest pain, constipation, waking up, in the middle of the night by tingling & pins & needle sensation & loss of weight, neck & throat problems (popping effect). It is to the belief based on length of and continuing of ongoing symptoms that the Plaintiff, Dana Penney has a life threatening illness.

v. Relief

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

I would like the courts to force Atwater to give me proper medical that includes producing a competent doctor to diagnose immediately & receiving proper care immediately. If the Penitentiary cannot produce this then I should be hospitalized immediately. Also I want to sue all parties named as defendants in their individual capacity. \$1,000,000 for each individual for deliberate indifference & inadequate medical care totalling \$4,000,000,000
A violation of the Eighth Amendment

I declare under penalty of perjury that the foregoing is true and correct.

2-23-09

(Date)

Dana Penney

(Signature of Plaintiff)

Memorandum of Law

The Eighth Amendment prohibits the unnecessary and wanton infliction of pain. Some courts have considered in determining whether a serious medical need is at issue are (1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment (2) whether the medical condition significantly affects daily activities; and (3) the existence of chronic and substantial pain. Additionally, courts will be likely to find a "serious medical need" if a condition has been diagnosed by a physician as mandating treatment or is so obvious that even a lay person would even recognize the necessity of a doctor's attention.

A serious medical need is present whenever the failure to treat a prisoners condition could result in further significantly injury or the unnecessary and wanton infliction of pain. Significant injury, pain or loss of function can constitute "serious medical needs" even if they are not life threatening. ^{see} *Green v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005) (severe heart burn with frequent vomiting); *Brock v. Wright* 315 F.3d 158, 163-64 (2nd Cir. 2003) (painful keratoids); *Bouchard v. Magnusson*, 715 F. Supp. 1146, 1148 (D. Me 1989) (persistent back pain). The Plaintiff meets the criteria of a serious medical need in describing symptoms that are even more serious than most stated in these cases: fever, chills, rectal pains, vision problems (blurriness & flashing), severe sharp pains in genitals & other body parts & etc, that have been ongoing for 7 months.

The Eighth Amendment requires that prison officials provide a system of ready access to adequate medical care. Prison officials show that deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to the medical staff or if the staff is not competent to examine the prisoners, diagnose illnesses

and then treat or refer treatment to patient. The prison must also provide and adequate system for responding to emergencies. If outside facilities are too remote or too inaccessible to handle emergencies promptly and adequately, then the prison must provide adequate facilities & staff to handle emergencies within prison. Examples of actionable harm from inadequate medical care include:

- Serious denial or delay in access to medical personnel,
- A denial of access to appropriately qualified health care personnel,
- A failure to inquire into facts necessary to make a professional judgement.

Liscio v. Warren, 901 F.2d 274, 276-277 (2nd Cir. 1990), physician (failed to inquire into cause of arrestee's delirium; thus failed to diagnose alcohol withdrawal) *Miltier v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990) (doctor failed to perform tests for cardiac disease in patient with symptoms that called for them. The Plaintiff meets the criteria of inadequate medical in that Dr. Franco fails to perform tests in regards to these white grooves developing in the lining of mouth that have caused my lips to swell (inside) along with reoccurring sores in my mouth & 2 small lumps forming on each side of my cheeks for the amount of 3 months. Upon visiting the doctor Dec. 24 he told me not to worry about my mouth. Also Dr. Jon failed to inquire about the swelling that occurred between my legs (between my genitals & rectum) that lasted from August to October but was not seen by the doctor until October 3rd 2008 see Health Activities Report Exhibit P. Also the doctor fails to inquire about a growth on my penis that has been there for (6 yrs), from H.P.V. that could possibly be a pre-cancerous growth. Seen Dec. 24, 2008 see Health Activities Report Exhibit D. Also failing to test or rather continuing to test after colonoscopy results were negative. Symptoms described had been going on for 3 months (July-Oct) sick-call slip dated Sept 28, 2008 Exhibit D. Had to file a grievance Dec. 2, 2008 to get tested again on Jan. 13, 2009 see callout for Jan. 20, 2009 Exhibit G

Temporary restraining order is only available in an emergency, when you can show that waiting for a preliminary injunction hearing will cause you great harm or immediate and irreparable loss, injury or damage. Purpose of Temporary injunction is to prevent destruction of plaintiffs rights until such time as a hearing upon the merits have been held. Webb v. Board of Ed. of City of Chicago D.C. Ill (1963), 223 F Supp 466 The Plaintiff meets criteria for temporary injunction in as to prevent Plaintiffs claim of violation of Eighth Amendment by defendants to discontinue immediately.

The purpose of an injunction pendente lite is not to determine any controverted right but to prevent threatened wrong or any further perpetration of injury or the doing of any act pending the final determination of the action where by rights maybe threatened or endangered. Doerskin Products, Inc. v. United Paper Co. CA Ill. (1952), 195 F.2d 156. The Plaintiff meets criteria for an injunction & would right a wrong by giving Plaintiff immediate medical attention & preventing future violations & present violations.

The purpose of a Temporary Restraining order is to prevent irreparable harm to complaining party during necessary period to conduct a hearing on preliminary injunction Dow Chemical Co. v. Blum, D.C. Mich 1979 469 F. Supp. 892; Toussaint v. Rusken D.C. Cal (1983) 553 Fd Supp 1465 affirmed 722 F.2d 1490 see 1370 18. "Prisoners often experience difficulty obtaining reasonably pre-empt access to necessary medical attention. A request for medical care must be made through Medical Technical Assistant who alone decides whether the prisoner will see a doctor (Hawthorne Decl. (6/3/80) 807, p 3: 25-9). Many inmates will see a doctor must wait weeks or even months before they are permitted to see a doctor or dentist (Hawthorne Decl (6/3/80) p. 3: 27-29; Olmes Decl. p. 2: 22-30). Access to psychiatric ward is even more difficult. Otis Smith Decl. p. 3: 26; Redd Decl. pp. 3: 18-32 4: 1-5

accord, (Honey Dec. pp. 11-12 ¶ 27). See 1385. Preliminary Injunction ordered, adjudged & decreed as follows ¶ 13. "Defendants shall provide adequate & competent medical, surgical & psychiatric & dental services to meet bona fide needs of prisoners. Defendants shall maintain adequate facilities & staff for such services. Emergency medical care shall be available at all times. Emergency ~~dental~~ & psychiatric care shall be available at all times. See 1381 Conclusion of law J. Medical, Dental, Psychiatric Care. (10)" The adequacy of all facets of medical care is clearly subject to Eighth Amendment scrutiny, *Estelle v. Gamble* (1976) 429 U.S. 97, 103, 97 S.Ct. 285, 290; 50 L.Ed.2d 251; *Hopwood v. Ray*, *Supra*, 682 F.2d at 1252-53; *Todaro v. Ward* (2 Cir. 1977) 565 F.2d 48; *Gates v. Collier* (5th Cir. 1974) 501 F.2d 1291, 1302. The threat which defendants practices pose to the physical emotional & mental well being of inmates in administrative segregation is plain. This court concludes that concurrent practices in defendants institutions conflict directly with notions of human decency. They also violate defendants own rules which are designed to provide timely medical care. CAL Admn. (3343(1) code)

Title 15 "Plaintiff meets criteria to grant temporary restraining in as defendants practices are posing a mental, physical & emotional well being of inmate as you can see in complaint & Exhibit J.

Also bona fide needs of prisoner are not being met as you can also see in the complaint & the amount of times in the Health Activities report the plaintiff complained of health problems. Last the Plaintiff is going through the exact same procedure in seeing doctor as described in *Toussaint v. Rusk* D.C. Cal (1983) 553 F.d Supp "1370". The Plaintiff ask that court grants TRU to force Atwater to give proper medical treatment immediately entailing competent doctor to diagnose & receive immediate treatment if cannot be produced than hospitalize immediately.

Hughes v. Joliet Correctional Ctr. 931 F.2d 425, 428 (7th Cir. 1991) (evidence that medical staff treated the plaintiff "not as patient, but as nuisance). The plaintiff fits the criteria of ^{being} considered a nuisance based on the amount of time it takes to see medical and always being last in line, regardless of the amount of people waiting for at least 2½ hours see Health Services Activities Report dated 1-9-09. on the callout for 12:15 arriving at 12:15 and leaving at 16:53 (4:53pm) also see Exhibit L callout for 7:30am. arrived at 7:30 and leaving at 10:20 with a total of 5 people in medical all having with 30-45 minutes. Also James Sorenson comments, (mocking) upon describing symptoms "yeah, yeah, yeah, yeah, yeah, ok. dated 2-26-09