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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES ROBERT GORTON,

NO. CIV. S-08-3069 LKK/GGH P

Plaintiff,

v.

O R D E R

TODD, et al.,

TO BE PUBLISHED

Defendants.

_____ /

Plaintiff, an indigent prisoner who was initially proceeding with limited representation for the purposes of this motion, brings claims against prison medical officers and U.C. Davis Medical Center physicians contending that their treatment of his kidney disorders fell below constitutional adequacy. Plaintiff requested appointment of a medical expert, which was denied by the Magistrate Judge. The Magistrate Judge subsequently recommended that this court grant summary judgment for the U.C. Davis defendants largely due to the lack of expert testimony supporting plaintiff's claims.

1 This court denied their motion for summary judgment without
2 prejudice and sought volunteer counsel to represent plaintiff on
3 the limited question of whether his constitutional rights were
4 offended by the Magistrate Judge's denial of his request for
5 appointment of a medical expert. At oral argument, counsel
6 appointed for plaintiff indicated that they intend to continue
7 representing him following resolution of this motion.

8 For the reasons discussed below, the court determines that the
9 Magistrate Judge's denial of plaintiff's request for appointment
10 of an impartial expert witness was clearly erroneous, but
11 nonetheless declines to appoint an impartial witness because
12 plaintiff's counsel can move for reimbursement of expert witness
13 costs from this court's non-appropriated fund.

14 I. BACKGROUND

15 On December 18, 2008, plaintiff Charles Robert Gorton
16 ("plaintiff" or "Gorton") filed a complaint against numerous
17 medical providers at Mule Creek State Prison ("state defendants")
18 and U.C. Davis Medical Center ("U.C. Davis defendants")¹ (Doc. No.
19 1.) Gorton alleged that these defendants violated his
20 constitutional rights under the Eighth Amendment by delaying
21 treatment and otherwise providing inadequate treatment of his
22 kidney disorders, which allegedly caused him pain and suffering as
23 well as permanent damage to his health. (Id.) Plaintiff also filed
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25 ¹ The court notes that the parties in plaintiff's original
26 complaint were adjusted through an amended complaint in order to
comply with pleading requirements.

1 an application to proceed in forma pauperis along with his
2 complaint. (Doc. No. 2.) He declared that he has minimal, if any,
3 assets and the California State Prison-LAC account clerk certified
4 that Gorton had no money in his account at the prison, his average
5 monthly balance over the last six months was \$32.48, and the
6 average of monthly deposits to his account was \$24.94. (Id.)
7 Gorton's request to proceed in forma pauperis was subsequently
8 granted. (Doc. No. 7.) On February 26, 2009, plaintiff filed his
9 amended complaint. (Doc. No. 10). This amendment corrected several
10 pleading errors in Gorton's original complaint and the Magistrate
11 Judge then ordered service upon defendants. (Doc. No. 11.)

12 On May 28, 2009, the Magistrate Judge entered a discovery and
13 scheduling order following an answer from four of the U.C. Davis
14 defendants. (Doc. No. 21.) Discovery was scheduled to close on
15 September 18, 2009. (Id.) The scheduling order made no reference
16 to expert discovery. (Id.) On August 4, 2009, the Magistrate Judge
17 entered an order setting the deadline for completion of discovery
18 between Gorton and a U.C. Davis defendant who had only recently
19 been served to November 6, 2009. (Doc. No. 28.)

20 On June 30, 2009, Gorton propounded his first set of
21 interrogatories on U.C. Davis defendants Dr. Andrew Chin,
22 Dr. Frazier Stevenson and Dr. Pappoe. (Exs. A, B, C to Pl. Mtn.
23 Reconsideration, Doc. No. 111-1.) Among several requests,
24 plaintiff propounded the following interrogatory on these
25 defendants:

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1 Suppose a person begins to exhibit the following
2 symptoms: [¶] (3+ pitting edema bilaterally in the
3 feet and legs; 3+ pitting edema up to the abdomen; 2+
4 pitting edema in the left arm and hand; shortness of
5 breath, orthopne and weakness; [lab results] = albumin
6 (serum) - 2.0 . . . UA [urinalysis] - 3+ proteinuria;
7 microalbumin - 2,311; microalbumin to creatinine ration
8 - 3,040.70). [¶] Considering these symptoms and in
9 your professional opinion, how soon (days/weeks) should
10 that person be referred to a Nephrologist for consult?

11 Plaintiff has represented that these symptoms were drawn from his
12 own medical file. (Pl.'s Mot. Recons., Doc. No. 111, at 10.) On
13 August 14, 2009, Dr. Chin, Dr. Stevenson, and Dr. Pappoe all
14 refused to answer this interrogatory on the grounds that it called
15 for expert testimony. (Exs. D, E, F to Pl. Mtn. Reconsideration,
16 Doc. No. 111-1.) On December 15, 2009, Gorton moved to compel Dr.
17 Chin's and Dr. Stevenson's responses to this interrogatory, among
18 other issues. (Doc. No. 58.) They argued that they should not be
19 compelled to answer the interrogatory because, "Plaintiff is
20 seeking expert opinion before the disclosure of expert [sic] and
21 is improperly asking an expert opinion from a person not disclosed
22 as an expert." (Id.) On January 14, 2010, the Magistrate Judge
23 denied plaintiff's motion to compel responses to this interrogatory
24 on the grounds that plaintiff is not permitted to ask Dr. Chin and
25 Dr. Stevenson "hypothetical expert questions." (Doc. No. 68.)

26 On August 27, 2009, plaintiff moved for appointment of
27 counsel. (Doc. No. 30.) He argued that appointment of counsel was
28 appropriate because, *inter alia*, (1) "The legal and medical issues
29 involved in this case are complex and involve medical knowledge and
30 expertise of which Plaintiff does not have. . . ;" (2) "The

1 Plaintiff has no formal legal or medical training, [and] therefore
2 lacks the necessary expertise to successfully litigate this degree
3 of case . . . ;" and (3) "*The Plaintiff does not have any financial*
4 *resources to secure the testimony of expert witnesses.*" (Id.
5 (emphasis added).) On September 14, 2009, the Magistrate Judge
6 denied plaintiff's motion. (Doc. No. 35.)

7 On September 21, 2009, plaintiff moved to compel discovery
8 from and impose sanctions against the U.C. Davis defendants. (Doc.
9 No. 36.) While that motion was pending, the U.C. Davis defendants
10 moved for summary judgment. (Doc. No. 41.) The U.C. Davis
11 defendants amended their motion on November 24, 2009. (Doc. No.
12 49.)

13 On December 15, 2009, plaintiff moved for a court appointed
14 medical expert witness under Fed. R. Evid. 706 ("Rule 706"). (Doc.
15 No. 53.)² Gorton indicated that he filed this motion in response
16 to the U.C. Davis defendants' argument that, "[U]nless plaintiff
17 can provide expert evidence that the treatment he received equated
18 with deliberate indifference thereby creating a material issue of
19 fact, summary judgment should be entered for defendants." (Id.)
20 Plaintiff explained that he is indigent and, thus, unable to afford
21 "the costs of retaining the services of a licensed medical expert,
22 trained in the field of nephrology." (Id.) While plaintiff
23 explicitly cited Rule 706, which only allows courts to appoint
24 impartial expert witnesses, the language of his request could be

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26 ² This motion was filed again on December 18, 2009. (Doc.
No. 61.)

1 interpreted as a request for appointment of an expert witness for
2 his benefit. (Id. ("In accordance with Rule 706, of the Federal
3 Rules of Evidence, Plaintiff hereby Motions the Court to provide
4 *him* with a medical expert") (emphasis added).)

5 On the same day, plaintiff filed his opposition to the U.C.
6 Davis defendants' motion for summary judgment. (Doc. No. 57.)
7 Gorton argued that,

8 Within the Defendant's Memorandum of Points and
9 Authorities . . . , they have established the
10 requirement to provide opposing Expert evidence such
11 that, "unless plaintiff can provide expert evidence . .
12 . summary judgment should be entered for defendants." [¶] If that is in fact the case of Law, then the Law has
13 reverted back towards tyranny against the poor, so the
14 rich can prevail.

13 (Id. at 1-2.) Plaintiff, noting his pending motion for appointment
14 of an expert witness, attempted to present several articles
15 concerning the diagnosis and treatment of his diseases as evidence
16 to counter the expert testimony from the U.C. Davis defendants.
17 (See id.) Specifically, he provided an entry from a medical
18 encyclopedia on nephrotic syndrome, which described the causes,
19 symptoms, exams and tests, and treatment of the disease. (Ex. A to
20 Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. ("Pl.'s Opp'n"), Doc. No.
21 57.) He likewise attached an entry from the same medical
22 encyclopedia on membranous nephropathy, which described the same
23 information for that disease. (Id.) Gorton provided additional
24 information on the causes and treatment of membranous nephropathy
25 from EdREN, a website of the Renal Unit of the Royal Infirmary of
26 Edinburgh. (Id.) This document also described factors that may

1 increase the chance of loss of kidney function. (Id.) While these
2 documents do not describe the standard of care, they do indicate
3 the seriousness of plaintiff's diagnoses and suggest the
4 possibility that defendants may have had knowledge from his test
5 results that he faced a serious risk of harm absent prompt
6 diagnosis and treatment.

7 On December 18, 2009, the U.C. Davis defendants filed an
8 opposition to plaintiff's motion for appointment of an expert
9 witness. (Doc. No. 60.) They contended that plaintiff's request
10 under Rule 706 was for an expert witness for his benefit as opposed
11 to the benefit of the court or the trier of fact. (Id.)
12 Alternatively, these defendants argued that, "The matters set forth
13 in this case are not so complex in that it would require a court
14 to have an expert to understand the issues at hand." (Id.)

15 On January 21, 2010, the Magistrate Judge denied plaintiff's
16 request for appointment of an expert witness. (Doc. No. 69.)

17 On April 30, 2010, the state defendants moved for summary
18 judgment. (Doc. No. 71.) On May 7, 2010, Gorton moved for a stay
19 of the motion on the grounds that no scheduling order had been
20 issued with respect to the state defendants. (Doc. No. 72.)
21 Plaintiff indicated that he had not sought discovery from these
22 defendants because no court order authorized him to do so. (Id.)
23 On May 21, 2010, the Magistrate Judge issued an order vacating the
24 state defendant's motion. The Magistrate Judge chastised plaintiff
25 for not earlier propounding discovery upon the state defendants and
26 for being unaware that he did not require permission from the court

1 to conduct discovery. (Doc. No. 74.) He, nonetheless, vacated the
2 summary judgment motion and permitted plaintiff and the state
3 defendants to conduct discovery until August 18, 2010. (Id.)

4 On August 11, 2010,³ the Magistrate Judge issued findings and
5 recommendations that this court grant the U.C. Davis defendants'
6 motion for summary judgment on the grounds that plaintiff had
7 failed to present a triable question on his claims against these
8 defendants because he did not produce expert witness testimony.
9 (Doc. No. 75.) On June 24, 2010, Gorton filed objections to the
10 findings and recommendations raising the same issues concerning
11 expert testimony that he argued in opposition to the motion for
12 summary judgment. (Doc. No. 78.) On August 11, 2010, this court
13 held that, "Given the legal complexity and the broad significance
14 of [the apparent inability of an indigent prisoner to ever
15 successfully litigate cases such as the instant case without an
16 expert witness], the court has determined that this case may be
17 appropriate for the limited appointment of counsel as to the
18 question of whether the denial of plaintiff's request for an expert
19 witness offends his constitutional rights." (Doc. No. 83.) In a
20 footnote, the court further explained that, "The court will invite
21 the parties to consider whether experts should be appointed as a
22 matter of course when these cases are brought as well as under what
23 conditions, if any, must a district court grant such a request for
24 appointment in accordance with the Constitution. Further, the court

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26 ³ The findings and recommendations were signed on June 7,
2010, but were filed on August 11, 2010.

1 will request briefing as to the anticipated scope of medical
2 testimony necessary, if any, and the administrative and financial
3 burdens appointment of expert witnesses in cases like these may
4 pose."⁴ (Id.) On September 29, 2010, this court denied the U.C.
5 Davis defendants' motion for summary judgment without prejudice as
6 it continued to seek volunteer limited counsel for plaintiff. (Doc.
7 No. 97.) On November 3, 2010, the court appointed Nicholas Short
8 and Dean Morehous as counsel for plaintiff to litigate the question
9 of whether Gorton is entitled to a medical expert. (Doc. No. 105.)

10 **II. STANDARDS**

11 **A. Motion for Reconsideration**

12 Under 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72(a), and
13 L.R. 303(f), parties may seek reconsideration of a magistrate
14 judge's non-dispositive order before a district judge. District
15 courts must "modify or set aside any part of the order that is
16 clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a).

17 **B. Deliberate Indifference to Serious Medical Need**

18 In Estelle v. Gamble, the Supreme Court held that an inmate
19 making a Eighth Amendment claim based on prison medical treatment
20 must show "deliberate indifference to serious medical needs."
21 429 U.S. 97, 104 (1976). In the Ninth Circuit, courts determine
22 whether such a showing has been met based on a two part test. The
23 plaintiff must first "show a serious medical need by demonstrating

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25 ⁴ All defendants contend that the subject matter discussed in
26 this footnote is outside the scope of the motion. Thus, only
plaintiff has provided any argument or discussion on these
questions.

1 that failure to treat a prisoner's condition could result in
2 further significant injury or the unnecessary and wanton infliction
3 of pain." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)
4 (internal quotations omitted). Such injuries include (1) those that
5 "a reasonable doctor or patient would find important and worthy of
6 comment or treatment; (2) the presence of a medical condition that
7 significantly affects an individual's daily activities; [and]
8 (3) the existence of chronic and substantial pain." McGuckin v.
9 Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1991).

10 After making a showing of a serious medical need, the
11 plaintiff must show that "the defendant's response to the need
12 was deliberately indifferent." Jett, 439 F.3d at 1096. This
13 requirement is "less stringent in cases involving a prisoner's
14 medical needs than in other cases involving harm to incarcerated
15 individuals because '[the] State's responsibility to provide
16 inmates with medical care ordinarily does not conflict with
17 competing administrative concerns.'" McGuckin, 974 F.2d at 1060
18 (quoting Hudson v. McMillian, 503 U.S. 1, 6 (1992)).

19 Accordingly, the Ninth Circuit has instructed courts to
20 consider two separate elements when determining whether defendants
21 were deliberately indifferent. First, the plaintiff must show "a
22 purposeful act or failure to respond to a prisoner's pain or
23 possible medical need." Jett, 439 F.3d at 1096. This element "may
24 be shown by the way in which prison physicians provide medical
25 care." Id. Plaintiff, however, must be able to show that defendants
26 were subjectively aware of the risk of serious harm. Toguchi v.

1 Chung, 391 F.3d 1051, 1057 (9th Cir. 2004). Subjective awareness
2 "may be shown by circumstantial evidence where the facts are
3 sufficient to demonstrate that a defendant actually knew of a risk
4 of harm." Lolli v. County of Orange, 351 F.3d 410, 421 (9th Cir.
5 2003). Second, the plaintiff must show that he was harmed by the
6 indifference. Jett, 439 F.3d at 1096.

7 **III. ANALYSIS**

8 The question before the court is under what conditions should
9 it appoint an impartial witness under Fed. R. Evid. 706 ("Rule
10 706") where a plaintiff alleges deliberate indifference to a
11 serious medical need in violation of the Eighth Amendment and
12 whether those conditions apply to Gorton's claims.⁵ While courts
13 infrequently appoint expert witnesses under Rule 706, see
14 29 Charles Alan Wright et al., Federal Practice and Procedure
15 § 6304 (3d ed. Supp. 2011), the court here finds that an impartial
16 expert witness should have been appointed to provide the trier of
17 fact with an unbiased review of plaintiff's medical care and that
18 costs for such a witness should have been paid by defendants. At
19 oral argument on this motion, plaintiff's counsel indicated that
20 they intend to continue their representation of Gorton. Counsel for
21 plaintiff, thus, may request reimbursement for expert witness fees
22 from the non-appropriated fund. Nonetheless, given the frequency
23 with which this court is presented with cases similar to the case

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25 ⁵ The court does not address the question of whether the
26 Constitution requires appointment because, under the doctrine of
Constitutional avoidance, it can resolve the question of whether
appointment is appropriate under Rule 706.

1 at bar, the court will discuss several matters that should be
2 considered under Rule 706.

3 **A. Rule 706**

4 **1. Appointment**

5 Under Rule 706, a district court may "on its own motion or on
6 the motion of any party enter an order to show cause why expert
7 witnesses should not be appointed." Fed. R. Evid. 706(a). The Rule
8 only allows a court to appoint a neutral expert.⁶ See In re High
9 Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 665 (7th
10 Cir. 2002). Courts of appeal review district court decisions under
11 Rule 706 for abuse of discretion. Walker v. Am. Home Shield Long
12 Term Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999) (finding
13 that district court did not abuse its discretion in appointing an
14 independent medical expert to help evaluate evidence).

15 **2. Compensation**

16 Rule 706 also specifies the means by which such experts must
17 be compensated. Fed. R. Evid. 706(b). Expert witnesses are entitled
18 to reasonable compensation, which, in civil cases not involving
19 just compensation under the Fifth Amendment, "shall be paid by the
20 parties in such proportion and at such time as the court directs,
21 and thereafter charged in like manner as other costs." Id. The

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23 ⁶ Defendants argued that plaintiff was seeking appointment of
24 an expert witness for his own benefit, which all parties agree is
25 not permitted under Rule 706 or 28 U.S.C. § 1915, the in forma
26 pauperis statute. Plaintiff, however, made clear that he was
seeking appointment of a neutral expert in his reply. While his
initial request to the Magistrate Judge may have been ambiguous,
the court nonetheless will proceed to solely consider whether an
impartial expert witness should have been appointed.

1 Ninth Circuit has interpreted the phrase, "such proportion as the
2 court directs" to permit a "district court to apportion all the
3 cost to one side" in an appropriate case. McKinney v. Anderson,
4 924 F.2d 1500, 1511 (9th Cir. 1991), affirmed on other grounds
5 Helling v. McKinney, 509 U.S. 25 (1993). The Circuit reasoned that
6 such an interpretation is necessary because, "Otherwise, we are
7 faced with an inflexible rule that would prevent the district court
8 from appointing an expert witness whenever one of the parties in
9 an action is indigent, even when the expert would significantly
10 help the court." Id.

11 **B. Standards Guiding Application of Rule 706**

12 The decision of whether to appoint an expert witness under
13 Rule 706 is discretionary. Consequently, the courts of appeals have
14 rarely identified circumstances under which a district court must
15 appoint a neutral expert. Rather, the cases interpreting Rule 706
16 typically explain why the district court did not abuse its
17 discretion when applying the rule. For this reason, the court now
18 considers the guideposts set forth by the appellate courts to
19 determine the factors district courts should consider when
20 determining if appointment of an expert witness is proper.

21 **1. Reasoned Explanation**

22 Several courts of appeal have determined that Rule 706
23 requires the district court, upon motion of a party, to "exercise
24 its discretion and expressly articulate a reasoned explanation for
25 its determination." Gaviria v. Reynolds, 476 F.3d 940, 945 (D.C.
26 Cir. 2007) (citing Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.,

1 326 F.3d 1333, 1348-49 (11th Cir. 2003) ("Where a party requests
2 the appointment of an expert to aid in evaluating evidence that is
3 relevant to a central issue in the case, the court is obligated to
4 fairly consider the request and to provide a reasoned explanation
5 for its ultimate decision on the matter."); Steele v. Shah, 87 F.3d
6 1266, 1270-71 (11th Cir. 1996) (remanding motion to appoint counsel
7 to district court where "district court gave no explanation for the
8 refusal to appoint"); see also Hannah v. United States,
9 523 F.3d 597, 601 (5th Cir. 2008) (finding that district court did
10 not abuse its discretion in denying motion for appointment of
11 expert witness where, *inter alia*, it "considered the request and
12 provided a reasoned denial."). The Eleventh Circuit remanded a
13 motion for appointment of an expert witness where no explanation
14 was given because absent an explanation it was, "unable to review
15 the[] denial[] for abuse of discretion." Steele, 87 F.3d at 1270.
16 No appellate court that has considered the issue has determined
17 that a unreasoned denial would be sufficient under the rule. While
18 the Ninth Circuit has not offered an opinion on this question, the
19 court nonetheless finds that it should follow the weight of
20 authority that requires a reasoned explanation for any decision
21 under Rule 706.

22 Here, the Magistrate Judge merely stated that, "On
23 December 15, 2009, and December 18, 2009, plaintiff filed motions
24 for the appointment of a court appointed medical expert. At this
25 time, appointment of a medical expert is not warranted. Fed. R.
26 Evid. 706. Accordingly, plaintiff's motions are denied." (Doc. No.

1 69.) This order failed to provide any reason for the denial aside
2 from a conclusory statement that appointment is not warranted. For
3 this reason, the court finds that the Magistrate Judge's ruling on
4 plaintiff's request for appointment of counsel was clearly
5 erroneous.

6 Defendants refer the court to Tuvulu v. Woodford, No. CIV.
7 S-04-1724 DFL KJM P, 2006 U.S. Dist. LEXIS 80642, at *12-13 (E.D.
8 Cal. Nov. 3, 2006) in support of their argument that the Magistrate
9 Judge's denial of the request was sufficient. There, plaintiff, a
10 prisoner proceeding pro se, sought appointment of a family
11 psychologist as an expert witness to testify about the harm caused
12 by denial of private visits between parents and children. Id. The
13 Magistrate Judge declined to exercise her discretion to appoint a
14 neutral expert witness because "it does not take any specialized
15 knowledge to evaluate the stress on plaintiff's parental
16 relationship caused by his incarceration and the resulting lack of
17 privacy." Id. at *13. Thus, the Magistrate Judge provided a
18 reasoned explanation for her decision to decline to appoint a
19 neutral expert. In sum, her order followed the unanimous weight of
20 authority demanding reasoned decisions and does not support a
21 contention that the decision in the instant case was sufficient.⁷

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25 ⁷ The court notes that the explanation need not be extensive.
26 At a minimum, however, it must explain why the court declined to
exercise its discretion under the facts and posture of the specific
case.

1 **2. Accurate Factfinding**

2 Ultimately, the most important question a court must consider
3 when deciding whether to appoint a neutral expert witness is
4 whether doing so will promote accurate factfinding. 29 Charles Alan
5 Wright et al., Federal Practice and Procedure § 6304 (3d ed. Supp.
6 2011) ("The policy goal of Rule 706 is to promote accurate
7 factfinding."). Accordingly, most courts considering appointment
8 of a neutral expert have focused their attention on this factor.
9 Upon review of these decisions, several themes become apparent.

10 In McKinney, a pro se inmate alleged that prison officials
11 were deliberately indifferent to his serious medical needs by
12 exposing him to environmental tobacco smoke ("ETS"). 924 F.2d at
13 1502. On appeal from a directed verdict, the Ninth Circuit
14 described scientific reports on the effects of cigarette smoke. Id.
15 at 1505-07. Following this analysis, the court first held that the
16 district court has the discretion to appoint expert witnesses in
17 this case under Rule 706 even though plaintiff cannot contribute
18 to the costs of such witnesses. Id. at 1511. Moreover, the Circuit
19 advised the district court that,

20 Considering the complexity of the scientific evidence in
21 the present case, we recommend that, on remand, the
22 district court consider appointing an expert witness or
23 witnesses who can provide the court with scientific
24 information on the health effects of ETS and on the
25 concentration levels of ETS in the Carson City prison.

24 Id.

25 In Smith v. Jenkins, 919 F.2d 90 (8th Cir. 1990), plaintiff
26 brought a claim of deliberate indifference to a serious medical

1 need on the grounds that a psychiatrist defendant denied him
2 necessary medical treatment for his mental illness. Id. at 91-92.
3 The plaintiff moved for appointment of an independent psychiatrist
4 to evaluate his condition and medical needs under Rule 706, but
5 that request was denied by the district court. Id. at 92. The
6 Eighth Circuit reversed the district court's grant of summary
7 judgment for the defendant on the grounds that plaintiff's medical
8 records were absent from the court record and that the record
9 contained "virtually no evidence of the appropriate standard of
10 care nor any indication whether [defendant]'s actions amounted to
11 deliberate indifference as measured by that standard." Id. at 93.
12 On remand, the Circuit instructed the district court "to review
13 [plaintiff]'s medical records. If a dispute still exists between
14 the diagnosis and treatment before and after incarceration, an
15 independent psychiatrist may be appointed to review all of
16 [plaintiff]'s medical records and provide an opinion as to the
17 proper diagnosis of [plaintiff] and the appropriate standard of
18 care for psychiatrists" Id. at 94. The court further
19 remarked that,

20 We note that under the Celotex standard, one might argue
21 that summary judgment may be granted without this proof
22 in light of the fact that Smith bears the burden of
23 proof on this issue at trial. See Celotex Corp. v.
24 Catrett, 477 U.S. 317, 324 (1986). However, we believe
25 it would be incongruous to deny the nonmoving party the
26 ability to present the necessary proof to withstand a
motion for summary judgment-as the district court did
here by denying the Rule 706 motion-and then grant
summary judgment against the nonmoving party simply
because the nonmoving party has failed to come forward
with such proof.

1 Id. at 93 n.4.

2 The Seventh Circuit also considered whether it was appropriate
3 to appoint a neutral expert witness in a claim alleging deliberate
4 indifference to a serious medical need. Ledford v. Sullivan,
5 105 F.3d 354, 359-60 (7th Cir. 1997). Plaintiff in Ledford alleged
6 that his Eighth Amendment rights were violated when prison
7 officials confiscated his psychotropic drugs upon transfer to a new
8 facility. Id. at 355-56. The Circuit concluded that the district
9 court did not abuse its discretion when it declined to appoint an
10 expert witness because, "The jury was capable of evaluating the
11 defendants' subjective belief in light of the court's deliberate
12 indifference definition without the aid of an expert." Id. at 359.
13 The court further concluded that the jury "could likewise
14 comprehend whether [plaintiff] had serious medical needs without
15 the aid of an expert." Id. at 359. The court reached this
16 conclusion because, under the facts of the case, the jury need not
17 consider "probing, complex questions concerning medical diagnosis
18 and judgment," as they would in a medical malpractice action. Id.
19 Rather, it held the jury was tasked with a subjective inquiry into
20 the state of mind of the defendants. Id. The Circuit also concluded
21 that an expert was not necessary to determine whether plaintiff had
22 serious medical needs because "[t]he symptoms which [plaintiff]
23 exhibited were not beyond a lay person's grasp." Id. at 359-60.

24 The Eleventh Circuit considered a similar case, yet decided,
25 under the facts of that case, that the district court should
26 consider whether appointment of an expert was appropriate.

1 Steele v. Shah, 87 F.3d 1266 (11th Cir. 1996). The plaintiff in
2 Steele was diagnosed with "Adjustment Disorder with Anxious Mood"
3 and was prescribed several psychotropic drugs. Id. at 1267. He was
4 transferred to a new facility where a physician discontinued his
5 medication, allegedly after one cursory exam and after receiving
6 notification from the physicians at the first facility concerning
7 plaintiff's diagnosis and need for aggressive treatment. Id. at
8 1267-68. The district court denied plaintiff's request for
9 appointment of an expert witness without any explanation. Id. at
10 1270-71. The Circuit remanded the issue of appointment of an expert
11 witness to the district court and suggested that expert opinion on
12 the standard of psychiatric care and its application "obviously
13 might be important to the finder of fact."⁸ Id. at 1271.

14 More recently, the Eleventh Circuit found that the district
15 court did not abuse its discretion when denying a request for
16 appointment of an expert witness in a case alleging deliberate
17 indifference to a serious medical need because the defendant moved
18 for summary judgment on the grounds that she did not have the power
19 to overrule a decision of a superior and not on the grounds the
20 plaintiff did not suffer from a serious medical need or that she
21 was deliberately indifferent to that need. German v. Broward County
22 Sheriff's Office, 315 Fed. Appx. 773, 778 (11th Cir. 2009)
23 (unpub.).

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25 ⁸ Also, as discussed in the following section, the court
26 considered plaintiff's indigency to be a factor weighing in favor
of appointment of an expert witness.

1 In Gavira v. Reynolds, 476 F.3d 940, 941 (D.C. Cir. 2007), the
2 plaintiff brought a medical malpractice claim against oral surgeons
3 who attempted to repair his jaw after it was broken during arrest.
4 Appointed trial counsel in Gavira consulted an expert who found no
5 likely fault in the surgeries. Id. at 945. Further, recent medical
6 tests indicated that plaintiff showed no continuing problems. Id.
7 Based on this evidence, the D.C. Circuit concluded that the
8 district court did not abuse its discretion when declining to
9 appoint an expert witness explaining that, "While it is true that
10 [plaintiff] cannot prevail under District of Columbia law without
11 an expert witness, it is fair to say that [plaintiff]'s claims fail
12 not because of the district court's refusal to appoint an expert
13 witness but because of his broader failure to adduce any evidence
14 that the claims have merit." Id. at 946 (citation omitted).

15 This case law provides some guidance as to the circumstances
16 under which a court should consider appointing an impartial expert
17 witness to promote accurate fact finding. The touchstone is that
18 expert witnesses should not be appointed under Rule 706 where not
19 necessary or significantly useful for the trier of fact to
20 comprehend a material issue in a case.⁹ Further, in order to

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22 ⁹ At oral argument, counsel for the U.C. Davis defendants
23 remarked that the case would likely proceed to trial if the court
24 were to appoint an expert or approve a request for payment of
25 expert fees. While counsel was attempting to dissuade the court
26 from allowing such testimony, it appears to this court that counsel
missed the point of Rule 706. The Rule is drafted to avoid such a
situation where the only reason why a case would not proceed to
trial is the presence or absence of an expert witness rather than
the merits of a plaintiff's claims. In effect, counsel's argument
provides significant support to the need for expert testimony in

1 demonstrate such necessity, there also must be some evidence,
2 admissible or otherwise, that demonstrates a serious dispute that
3 could be resolved or understood through expert testimony.¹⁰

4 **3. Ability of Party to Procure Expert Testimony**

5 It is clear that expert witnesses should only be appointed
6 where doing so is necessary to ensure accurate factfinding. Such
7 is the threshold issue. Nonetheless, courts consider other factors
8 when deciding if appointment is appropriate. The first, and most
9 obvious, is whether testimony from the parties' experts is
10 sufficient to reveal the facts. Federal Practice and Procedure
11 § 6304 (3d ed. Supp. 2011). Expert witnesses are rarely appointed

12 _____
13 this case.

14 ¹⁰ Defendants rely on Hannah v. United States, 523 F.3d 397
15 (5th Cir. 2008), for the proposition that the court may not appoint
16 an expert under Rule 706 just because plaintiff will lose without
17 expert testimony. In Hannah, a federal prisoner brought a medical
18 malpractice claim under the Federal Tort Claims Act for alleged
19 negligence arising out of treatment he received while suffering
20 from a sinus infection. Id. at 599. The Circuit concluded that the
21 district court did not abuse its discretion when denying
22 plaintiff's request for an expert witness and then granting summary
23 judgment to defendants because plaintiff failed to present expert
24 testimony on the standard of care. Id. at 601. The Circuit
25 explained that the district court provided a reasoned denial of the
26 request and that plaintiff's request failed to comply with its
scheduling orders. Id. at 601. The court makes no reference to the
evidence, if any, that plaintiff was able to produce in support of
his claim. Ultimately, this decision does not provide sufficient
detail or explanation for its finding that the district court did
not abuse its discretion. It could very well be that the plaintiff
was, like the plaintiff in Gavira, unable to produce any evidence
that demonstrated that an expert witness would actually reveal
something about the case. To the extent Hannah is in conflict with
the weight of appellate authority suggesting that courts should
consider appointing expert witnesses when, through the course of
litigation, it becomes apparent that unbiased expert testimony will
aid the trier of fact in making an accurate factual determination,
however, this court declines to follow its reasoning.

1 under Rule 706 because the adversary system is usually sufficient
2 to promote accurate factfinding. See id.

3 Where a plaintiff is an indigent prisoner proceeding pro se,
4 however, the adversary system is more likely to fail in its pursuit
5 of accurate factfinding. Several courts have considered these
6 issues. As discussed above, in Steele, the Eleventh Circuit
7 strongly suggested that the district court consider appointing an
8 expert witness on remand not only because the psychiatric standard
9 of care was at issue, but also because, "If, as he claims,
10 [plaintiff] is indigent, this could provide further reason to
11 appoint an expert to avoid a wholly one-sided presentation of
12 opinions on the issue." 87 F.3d at 1271. Further, in Smith, the
13 Eighth Circuit expressed some hesitance in denying the nonmoving
14 pro se prisoner the ability to present necessary proof and then
15 granting summary judgment for failure to present such proof. 919
16 F.2d at 93 n.4.

17 The D.C. District Court further expounded on this general
18 concept in Applegate v. Dobrovir, Oakes & Gebhardt. 628 F. Supp.
19 378 (D.D.C. 1984). While the court ultimately determined that
20 appointment of an expert witness was not warranted in that case,
21 the court's decision turned on findings that plaintiff was not
22 indigent, did not claim that he failed to obtain an expert because
23 he could not afford one, and did not demonstrate that his failure
24 to obtain an expert was due to factors outside the merits of his
25 case. Id. at 383. The court noted that, "It may well be that . .
26 . plaintiffs suing doctors have difficulty persuading other doctors

1 to testify against a colleague for fear of reprisal . . . ,” but
2 such factors were not present in that case. It is important to note
3 that the plaintiff in Applegate was not a prisoner, but rather a
4 former client suing his lawyer. Thus, the court’s observation about
5 fear of reprisal in the medical profession did not address the
6 impact of such a fear where the plaintiff was a convicted criminal.
7 One can only postulate how such a fear of reprisal would be
8 enhanced for a medical expert to testify against a colleague who
9 treated a patient belonging to a most unpopular class.

10 The U.C. Davis defendants repeatedly assert that if plaintiff
11 had a strong case, he would be able to obtain expert testimony on
12 a contingency fee basis. These defendants appear to be overlooking
13 several significant factors. First, successful Eighth Amendment
14 claims rarely generate large damage awards, as do some medical
15 malpractice claims brought by individuals who are not convicted
16 criminals. Second, the Prison Litigation Reform Act significantly
17 reduced the amount of attorneys’ fees recoverable by any actions
18 brought by prisoners. 42 U.S.C. § 1997e(d). Of note are
19 requirements that, (1) the amount of the fee is proportionately
20 related to the court ordered relief for the violation; (2) the
21 award of attorneys fees may be no greater than 150 percent of the
22 judgment; (3) the plaintiff must pay a portion of the judgment not
23 to exceed 25 percent as attorneys fees; and (4) hourly rates for
24 attorneys are limited to 150 percent of the hourly rate established
25 for court-appointed counsel. Id. In light of these barriers, it
26 appears quite likely that even a prisoner with the strongest claims

1 may nonetheless be unable to acquire counsel on a contingency
2 basis, who would then be able to hire an expert witness on his
3 behalf.

4 Further, incarceration places additional barriers upon a
5 plaintiff litigating deliberate indifference to a serious medical
6 need. For example, in Smith, the Eighth Circuit suggested that the
7 district court consider appointing an expert witness to opine on
8 the standard of care and its application to the case or "obtain an
9 additional opinion from . . . [plaintiff]'s previous physician .
10 . . . concerning the nature of his prior treatment and the necessity
11 of continuing an medication." 919 F.2d at 94. Ordinarily, an
12 individual who is not incarcerated can obtain such information from
13 prior medical providers or even seek a second opinion, which, in
14 some cases, can be sufficient to present a triable question and to
15 promote accurate factfinding.

16 Recently, this court considered such a case. In Nelson v.
17 Runnells, a prisoner brought a claim for deliberate indifference
18 to a serious medical need where the plaintiff alleged that he
19 received no care after a physical assault, which occurred in August
20 2005. No. 2:06-cv-1289 LKK KJN P, 2010 WL 3238925, at *13 (E.D.
21 Cal. Aug. 12, 2010) findings & recommendations adopted by 2010 WL
22 3745129 (E.D. Cal. Sept. 16, 2010). Specifically, he alleged that
23 the defendant medical providers were deliberately indifferent to
24 his serious medical need because of their failure to refer him for
25 x-rays to treat his broken nose, possibly cracked cheekbone, and
26 blurred vision. Id. On February 23, 2010, the plaintiff was able

1 to obtain an x-ray of his nose because he had earlier been released
2 from prison. Id. This report indicated that he suffered from a
3 deformity of the nasal bone, which "*may be from an old fracture.*"
4 Id. As a result of this report, the Magistrate Judge recommended,
5 and this court adopted, the following analysis:

6 There is no evidence that plaintiff suffered a serious
7 injury to his nose prior to the 2005 assault. Thus, the
8 2010 x-ray demonstrates that the injury plaintiff
9 sustained in the assault was "serious." Plaintiff
10 alleges that the injury caused him substantial pain,
11 which is supported by his prescriptions for tylenol and
12 ibuprofen, and the x-ray demonstrates permanent
13 disfigurement. Significantly, defendants have not
14 submitted any evidence or statement to refute
15 plaintiff's supported allegations that his nose was
16 broken in the assault and that defendants did not
17 respond appropriately. Plaintiff's 2010 x-ray thus
18 raises a material issue of fact whether defendants were
19 deliberately indifferent in failing to x-ray plaintiff's
20 nose and treat the injury differently. . . . For these
21 reasons, the court recommends denying defendants' motion
22 for summary judgment on the substance of plaintiff's
23 Eighth Amendment claim alleging deliberate indifference
24 to his serious medical needs.

16 Id. at *16.

17 While a party's ability to obtain independent opinion is not
18 determinative in and of itself under Rule 706, it nonetheless is
19 a factor that courts should consider when determining if
20 appointment of a neutral expert is appropriate. Courts should,
21 thus, also consider whether a party's capacity to acquire expert
22 testimony is limited due to factors outside of his control,
23 including whether he is indigent or incarcerated. Specifically,
24 courts should look to whether these factors prevent a party from
25 presenting a potentially meritorious case.

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1 **4. Due Process Concerns**

2 Another factor that appears to this court to be relevant to
3 a determination of whether appointment of an expert witness is
4 appropriate is the nature of the claim brought by a plaintiff. The
5 Supreme Court has recognized that due process requires the state
6 to provide prisoners with "[t]he tools . . . that the inmates need
7 in order to attack their sentences, directly or collaterally, and
8 in order to challenge the conditions of their confinement." Lewis
9 v. Casey, 518 U.S. 343, 355 (1996). These required tools are in
10 contrast to the "[i]mpairment of an *other* litigating capacity [such
11 as, the ability to bring shareholder derivative actions and slip-
12 and-fall claims as] simply one of the incidental (and perfectly
13 constitutional) consequences of conviction and incarceration." Id.
14 (emphasis in original). Appeals of criminal convictions and civil
15 rights actions are entitled to this privileged position because
16 fundamental, Constitutional rights are at stake. While clearly not
17 a necessary and sufficient factor under Rule 706, it appears to
18 this court that district courts should also consider the
19 significance of the rights at stake when deciding if appointment
20 of an expert is proper.¹¹

21
22 ¹¹ As discussed in footnote 6, the parties agree that the in
23 forma pauperis statute, 28 U.S.C. § 1915, does not authorize the
24 court to appoint an expert for plaintiff's benefit to be paid by
25 the court. See Hannah, 523 F. 3d at 601 (District courts do not
26 have the power to appoint expert witnesses under Section 1915.);
Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987), cert.
denied, 485 U.S. 991 (1988) (same). The reasoning behind these
decisions is that Section 1915 only authorizes the court to direct
payment for three specific expenses, which do not include expert
witness costs. 28 U.S.C. § 1915(c). As mentioned in footnote 5, the

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5. Summary

Foremost, it appears to this court to be required that any denial of an explicit request for appointment of an expert witness under Rule 706 requires a reasoned explanation for such a denial. The explanation need not be extensive. While it may be appropriate to deny a request made at a point in litigation where evidence is not being evaluated as not being necessary at the time,¹² when the court or the trier of fact is evaluating evidence,¹³ courts cannot rely on such a minimal explanation. Rather, in those circumstances where the timing is appropriate, the court should discuss the merits of the request.

The court now turns to the substantive factors that courts should consider when determining whether to appoint an expert witness under Rule 706. Neither the evidentiary rule nor the cases

court does not reach the question of whether the Constitution requires the appointment of expert witnesses in cases similar to the case at bar because it decides this case under the policies guiding Rule 706. Further, plaintiff does not argue that a neutral expert under Rule 706 would be inadequate to protect his Constitutional rights. The court similarly cannot envision any arguments in support of that proposition. Under these circumstances, the court does not determine whether any authority, including that derived from plaintiff's Constitutional rights, exists for it to appoint an expert for an indigent party's benefit.

¹² See Estrada v. Rowe, No. C 08-2801 MMC (PR), 2011 WL 249453, at *5 (N.D. Cal. Jan. 25, 2011) (finding that "until the Court has had the opportunity to review the arguments and evidence submitted by the parties on summary judgment, no determination can be made that the issues are so complex as to require the testimony of an expert to assist the trier of fact").

¹³ The most common examples of such periods of litigation arise are during motions for preliminary injunctions, motions for summary judgment, and trial.

1 interpreting it set forth a standard for application of the rule.
2 Instead, this court notes several concerns regularly discussed by
3 the Courts of Appeal on the application of Rule 706:

4 (1) Whether expert testimony is necessary or significantly
5 useful for the trier of fact to comprehend a material
6 issue in a case.

7 (2) Whether the moving party has produced some evidence,
8 admissible or otherwise, that demonstrates a serious
9 dispute that could be resolved or understood through
10 expert testimony.

11 (3) Whether certain circumstances or conditions of a party
12 limit the effectiveness of the adversary process to
13 result in accurate factfinding.

14 (4) Whether the legal basis of plaintiff's claim entitles
15 him to special consideration by the courts.

16 It is this court's opinion that these factors should be considered
17 by courts in exercising their discretion under Rule 706.

18 Moreover, it also appears that courts should consider
19 *sua sponte* whether an expert witness would promote accurate
20 factfinding at any stage of litigation where evidence is
21 evaluated.¹⁴ See Fed. R. Evid. 706(a) ("The court may on its own
22 motion . . . enter an order to show cause why expert witnesses
23

24 ¹⁴ The court declines to adopt plaintiff's proposal to conduct
25 such an evaluation at case management. This factually intensive
26 test is most appropriately applied when the court is determining
the sufficiency of evidence and not based upon the mere allegations
of a complaint.

1 should not be appointed"). While the court assumes such *sua*
2 *sponte* motions will be rare, they should not be nonexistent. Making
3 such evaluations does appear to comport with the purpose of Rule
4 706 in allowing motions to be brought by the court and its overall
5 goal to promote accurate factfinding.

6 **C. Burden to Defendants**

7 A common theme throughout defendants' briefs is that applying
8 Rule 706 to claims like Gorton's would be unduly burdensome to the
9 state and to private defendants performing state functions. While
10 the court cannot speak to every potential application of Rule 706,
11 it does refer defendants to the appendix in which the court has
12 attached a four-page declaration that was sufficient for a
13 plaintiff bringing a similar claim to survive summary judgment. See
14 Watson v. Torruella, No. CIV S-06-1475 LKK EFB P, 2009 WL 32246805
15 (E.D. Cal. Oct. 7, 2009). Regardless, however, any concerns that
16 defendants have with the costs of Rule 706 are problems with the
17 rule, which this court is in no position to ignore.

18 **D. Application to Instant Case**

19 Plaintiff has presented evidence of what appear to be
20 significant delays in the treatment of his kidney disorders. See
21 August 11, 2011 Findings and Recommendations (Doc. No. 75).
22 Plaintiff has diligently attempted to obtain and present evidence
23 of the appropriate standard of care and the application of that
24 standard to this case. (See Ex. A to Pl.'s Opp'n.) This includes
25 presentation of articles on the diagnosis and treatment of his
26 illnesses.

1 Moreover, the court is informed by its experience presiding
2 over Coleman v. Brown, 2:90-cv-520-LKK-JFM (E.D. Cal), and the
3 Three Judge Court convened in Coleman and Plata v. Brown, C01-1351
4 (N.D. Cal). The order of the Three Judge Court was recently
5 affirmed by the Supreme Court. Brown v. Plata, ___ U.S. ___,
6 131 S.Ct. 1910 (2011). The Supreme Court cited with approval
7 findings of the Three Judge Court concerning California's prison
8 health care during the very time that Gorton allegedly suffered
9 delays in medical treatment. Specifically, the Court concluded
10 that, "The number of staff is inadequate, and prisoners face
11 significant delays in access to care." Id. at 1925. It continued
12 to provide several examples of such delays.

13 A prisoner with severe abdominal pain died after a
14 5-week delay in referral to a specialist; a prisoner
15 with "constant and extreme" chest pain died after an
16 8-hour delay in evaluation by a doctor; and a prisoner
died of testicular cancer after a "failure of MDs to
work up for cancer in a young man with 17 months of
testicular pain."

17 Id. quoting California Prison Health Care Receivership Corp.,
18 K. Imai, Analysis of CDCR Death Reviews 2006, pp. 6-7 (Aug. 2007).
19 The Court continued to cite with approval testimony of "Doctor
20 Ronald Shansky, former medical director of the Illinois state
21 prison system, [who] surveyed death reviews for California
22 prisoners. He concluded that extreme departures from the standard
23 of care were 'widespread,' . . . and that the proportion of
24 'possibly preventable or preventable' deaths was 'extremely high.'"
25 Id. (citations to record omitted). It further referenced statistics
26 from 2006 and 2007 that "a preventable or possibly preventable

1 death occurred once every five to six days." Id. at 1926 n.4.
2 Finally, the Court affirmed that, "Many more prisoners, suffering
3 from severe but not life-threatening conditions, experience
4 prolonged illness and unnecessary pain." Id. at 1925-26. All the
5 above demonstrates that the claims of delayed or absent treatment
6 may well be justified and, in appropriate cases, may warrant
7 independent review. While none of the above demonstrates that a
8 case was below the level of adequate care, they, alone, suggest the
9 possibility. Taken with the evidence produced by plaintiff, they
10 demonstrate the need for an expert.

11 Thus, absent expert testimony, the court, as evaluator of fact
12 at summary judgment, cannot determine whether there is evidence
13 that defendant's treatment of plaintiff fell so far below the
14 standard of care that a jury could find that defendants were
15 subjectively aware of risk of harm to plaintiff. Accordingly, if
16 plaintiff were to proceed in pro per, the court would issue an
17 order to show cause on why an impartial expert witness should not
18 be appointed in this case under Rule 706.

19 At oral argument, however, counsel for plaintiff represented
20 that they intend to continue representing Gorton beyond their
21 limited appointment. Pursuant to General Order No. 230, appointed
22 counsel in section 1983 cases may move for reimbursement of expert
23 witness costs. Plaintiff's counsel further represented that they
24 would prefer to seek expert testimony under General Order No. 230
25 than under Rule 706. Thus, the court orders plaintiff to request

26 ///

1 reimbursement of expert fees under General Order No. 230 within
2 sixty (60) days.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the court ORDERS as follows:

5 (1) The court finds that the Magistrate Judge's order
6 denying plaintiff's request for appointment of an expert
7 witness under Rule 706 (Doc. No. 69) was clearly
8 erroneous.


9 (2) Plaintiff shall submit an *ex parte* request to incur
10 costs and request for payment of expert witness fees
11 pursuant to General Order No. 230 within sixty (60) days
12 of the issuance of this order. Plaintiff may file the
13 request under seal.

14 (3) The court no longer refers this case to the Magistrate
15 Judge. All future non-discovery motions shall be filed
16 before this court.

17 (4) The court vacates all previously scheduled dates and
18 sets a scheduling conference in the above captioned case
19 for September 19, 2011. The parties shall file status
20 reports fourteen (14) days prior to the conference.

21 IT IS SO ORDERED.

22 DATED: June 29, 2011.

23 
24 LAWRENCE K. KARLTON
25 SENIOR JUDGE
26 UNITED STATES DISTRICT COURT

APPENDIX

Declaration of James E. Daly, D.O., M.S., Retired in Support of
Opposition to Motion for Summary Judgment

Watson v. Torruella, 2:06-cv-1475 LKK EFB (E.D. Cal.)

1 **DECLARATION OF JAMES E. DALY, D.O., M.S., RETIRED**
2 **IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
3 **CASE NUMBER CV-S-06-1475 LKK EFB P**

4 I, James E. Daly, do hereby declare that the following statements,
5 1 through 20 inclusively, are true and correct based upon my personal
6 medical training and experience; my personal review of Mr. Watson's
7 medical records, as attached to defendants' Motion and my personal
8 consultation with Mr. Watson, and that:

9 1. I am over eighteen years of age and NOT a party to the above
10 entitled action.

11 2. I am a retired licensed medical doctor with 35 years experience
12 in Internal Medicine. I am Board Certified in Internal Medicine and
13 I have a Masters of Science Degree in Microbiology.

14 3. During 17 months, January 14, 2002 through May 28, 2003, on
15 no occasion did Dr. Torruella provide the minimum of standard community
16 medical care to Mr. Watson. Dr. Torruella failed to perform, consider
17 record or rule out any differential diagnosis, which would have
18 included actinic keratosis, cellulitus(skin infection), oncomyosis
19 (fungal infection) foreign body or early Bowen's disease (Squamous
20 Cell Cancer).

21 4. From January 14, 2002 through May 28, 2003, Dr. Torruella
22 did not collect any cultures or obtain a biopsy speciman from Mr.
23 Watson's right thumb to confirm or rule out his diagnosis of bacterial
24 infection, despite the persistence and worsening condition presented
25 by Mr. Watson's right thumb.

26 5. On May 28, 2003 when Mr. Watson presented an inflamed and
27 painful right thumb, which had not responded to any prior treatment,
28 Dr. Torruella prescribed 7 days of pain medication (Motrin) to treat

1 symptoms and grossly ignored standard diagnostic procedure available
2 to all General Practise Medical Offices to find the causation of Mr.
3 Watson's worsening medical malady.

4 6. On NO occasion did Dr. Torruella provide medical treatment
5 to Mr. Watson that was consistent with the standards of community
6 medical care or in compliance with CDC quality care standards.

7 7. It is disrespectful to the patient and undignified to the
8 reputation of the United States medical profession to deny, delay or
9 ignore the ongoing pain and suffering of the afflicted.

10 8. From January 14, 2002 through May 28, 2003, Dr. Torruella
11 knowingly failed to provide proper medical care and standard diagnostic
12 procedures to determine why Mr. Watson's right thumb lesion continued
13 to deteriorate. This extended absence of proper care of Squamous Cell
14 Cancer is gross medical negligence of a cancer that can, and did,
15 extend locally into adjacent tissue. Mr. Watson was, and still is, at
16 risk of Squamous Cell Cancer that may have matastisized to other organs
17 where it can lay dormant, only to reappear in subsequent years.

18 9. Mr. watson reports that in or about November 2003 at Mule
19 Creek State Prison, he was seen by Dr. Milliman regarding back pain.
20 At that time, he presented his inflamed, tender and painful thumb to
21 Dr. Milliman, who, without performing any differential diagnostic
22 testing, told him that the lesion on his right thumb was a "wart" and
23 that Mr. watson needed to learn to live with it.

24 10. For approximately 5 months between December 2003 and May 2004,
25 Mr. Watson reports that he attempted to self-treat his right thumb as
26 instructed by Mr. Milliman and not seek to bother the medical staff due
27 to their objectional indifference.

1 11. Between May 28, and July 28, 2004, Mr. Watson was seen by
2 Dr. Galloway on 3 occasions concerning his grossly deformed right
3 thumb. Dr. Galloway repeated his colleagues' improper diagnosis without
4 ant diagnostic testing being done and continued the same ineffective
5 and palliative treatments.

6 12. Again, absent any definitive medical treatment, Mr. Watson
7 reports that in or about June 2004, he attempted to alleviate the
8 severe and throbbing pain radiating from his right thumb by cutting
9 away some of his thumbnail.

10 13. Dr. Galloway neither performed or recorded any differential
11 diagnosis or collected any culture or specimen to confirm his diagnosis
12 or determine the persistent pathology of Mr. Watson's right thumb;
13 thereby refusing to detect or treat his cancerous growth.

14 14. On none of Mr. Watson's 3 medical appointments with Dr.
15 Galloway was he provided with health care consistent with community
16 medical care standards or compliant with CDC quality care standards.

17 15. On July 28, 2004, Dr. Galloway referred Mr. Watson to a staff
18 surgeon, Dr. Douglas, to excise a portion of his right thumbnail due
19 to a suspected intrusion of a "foreign body."

20 16. On August 31, 2004, Mr. Watson was seen by Dr. Douglas, who
21 declined to excise the thumbnail because he did not believe that to be
22 the cause of Mr. Watson's continuing problem. Dr. Douglas referred
23 Mr. Watson to an outside dermatologist for a consultive examination.

24 17. Mr. Watson states on about September 2, 2004, the request
25 for dermatological consult was changed to a general surgery consult
26 by Dr. Smith, Chief Medical Officer for Mule Creek State Prison.

27 18. On November 2, 2004 with the surgical referral pending, Mr.

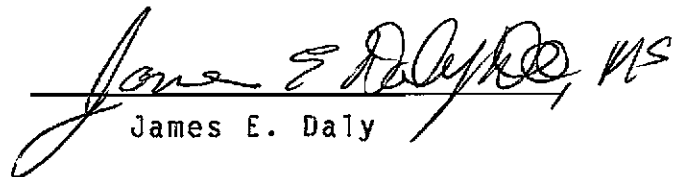
1 Watson's request for renewal of his pain medication, Vicoden, was
2 assigned to Dr. Milliman for treatment. Albeit Dr. Milliman described
3 Mr. Watson's history and pathology of the right thumb, he denied renewal
4 of his pain medication; diagnosed the thumb as an infection and
5 prescribed bandaids and antibiotic ointment instead.

6 19. Dr. Milliman's dismissive treatment of Mr. Watson's thumb
7 condition in November 2003 and his deprivation of pain medication in
8 November 2004, as well as his misdiagnosis and ineffective treatment
9 of metastatic skin cancer are not only professionally undignified and
10 disrespectfull, but manifestly consistant with gross negligence.

11 20. On none of the 3 contacts with Mr. Watson did Dr. Milliman
12 provide medical treatment that was consistent with the standards of
13 community medical care or in compliance with CDC quality care standards.

14
15 I am willing and able to testify competently concerning the
16 foregoing statements, which are made under penalty of perjury under
17 the laws of the United States.

18 EXECUTED: This 2nd day of March 2009 at Ione, California

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20
21  MS
22 James E. Daly