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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MILTON SYKES,

Plaintiff,

No. 2:12-cv-2570 KJM KJN P

vs.

ATHANNASIOUS, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner, incarcerated at the California Medical Facility, in Vacaville, proceeding in forma pauperis and without counsel in this action brought pursuant to 42 U.S.C. § 1983. By order filed November 5, 2012, this court granted plaintiff’s application to proceed in forma pauperis, and found that plaintiff’s complaint appears to state potentially cognizable Eighth Amendment claims against medical defendants Athannasious, Weiland, Bick and Khaira. (Dkt. No. 7.) The court ordered service of process on these defendants; plaintiff is in the process of submitting the documents necessary for the United States Marshal to serve process. Pending is plaintiff’s motion requesting the appointment of counsel and a medical expert (Dkt. No. 12),<sup>1</sup> which the court addresses herein.

<sup>1</sup> It appears that plaintiff subsequently sought to file a duplicate copy of this motion. (See Dkt. No. 15.) However, the recently filed document is incomplete -- only the first page of

1 District courts do not have the authority to require counsel to represent indigent  
2 prisoners in Section 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989).  
3 However, in “exceptional circumstances,” the court may request that an attorney voluntarily  
4 represent an indigent civil rights plaintiff. See 28 U.S.C. § 1915(e)(1); Terrell v. Brewer, 935  
5 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).  
6 When determining whether “exceptional circumstances” exist, the court must consider plaintiff’s  
7 likelihood of success on the merits, as well as the ability of the plaintiff to articulate his claims  
8 pro se in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d 965,  
9 970 (9th Cir. 2009). The burden of demonstrating exceptional circumstances is on the plaintiff.  
10 Id. Circumstances common to most prisoners, such as lack of legal education and limited law  
11 library access, do not establish exceptional circumstances warranting the voluntary assistance of  
12 counsel.

13 Plaintiff also requests appointment of an expert medical witness pursuant to  
14 Federal Rule of Evidence 706. However, “[r]easonably construed, Rule 706 does not  
15 contemplate the appointment of, and compensation for, an expert to aid one of the parties.”  
16 Gamez v. Gonzalez, 2010 WL 2228427, \*1 (E.D. Cal. June 3, 2010) (internal quotations,  
17 punctuation and citations omitted). Rather, the principal purpose of a court-appointed expert,  
18 pursuant to Rule 706, is to assist the trier of fact, not to serve as an advocate for a party. Thus,  
19 pursuant to Rule 706, district courts may, sua sponte, appoint a neutral expert witness, whether or  
20 not either party agrees, and may assess the costs of the expert as the court deems appropriate.  
21 Students of California School for the Blind v. Honig, 736 F.2d 538, 549 (9th Cir. 1984) (citing  
22 Fed. R. Evid. 706), vacated on other grounds, 471 U.S. 148 (1985). The in forma pauperis  
23 statute, 28 U.S.C. § 1915, does not alter these basic principals. That statute “does not waive  
24 payment of fees or expenses for witnesses.” Dixon v. Ylst, 990 F.2d 478, 480 (9th Cir. 1993).

25 \_\_\_\_\_  
26 the motion is included, together with a proof of service. This motion must therefore be denied  
without prejudice.

1 Specifically, “[t]he plain language of section 1915 does not provide for the appointment of expert  
2 witnesses to aid an indigent litigant.” Pedraza v. Jones, 71 F.3d 194, 196 (5th Cir. 1995); accord,  
3 Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987), cert. denied, 485 U.S. 991 (1988)  
4 (district court has no authority under section 1915 to pay or waive expert witness fees in civil  
5 damage suits).

6           Nevertheless, where appointment of voluntary counsel is warranted, plaintiff’s  
7 appointed counsel assumes the costs of litigation, including expert witness fees, on a pro bono  
8 basis, and/or may seek the court’s approval for the advancement or reimbursement of such costs,  
9 which must be reimbursed to the court should plaintiff prevail or settle. See General Order No.  
10 510, U.S. District Court, Eastern District of California.

11           Plaintiff asserts, in support of his requests, that the allegations of his complaint  
12 present complex legal and medical issues requiring the assistance of experienced legal counsel  
13 and the testimony of an expert medical witness. The complaint alleges that defendants were  
14 deliberately indifferent to plaintiff’s serious medical needs concerning his diagnosed bladder  
15 cancer and removal of a fifteen-pound tumor from his bladder in 2005. The complaint alleges  
16 that, thereafter, plaintiff received treatments that were inappropriate and injurious, while  
17 appropriate treatment was unreasonably delayed or withheld. Plaintiff alleges that his resulting  
18 continuing injuries include (but are not limited to) constant urine leakage requiring that plaintiff  
19 wear diapers, blood in plaintiff’s semen and related difficulties during marital visits with his  
20 wife, kidney problems, and extreme weight loss attributable to daily vomiting.

21           Plaintiff cites case law that supports the notion that a prisoner plaintiff challenging  
22 such matters is unlikely to survive a summary judgment motion without the testimony of a  
23 medical expert, and without legal counsel to solicit such testimony, guide discovery, and file a  
24 brief in opposition to such motion. Plaintiff asserts that, to have a fair shot at prevailing in this  
25 case, he requires not only the appointment of legal counsel, but “the services of a licensed  
26 medical expert, trained in the field of bladder cancer and nephrology.” (Dkt. No. 12 at 3.)

1 Plaintiff further states that his complaint and the instant motion were prepared by another  
2 prisoner (name and ID provided), because plaintiff is “illiterate (sic) learning how to read and  
3 write. . . .” (Dkt. No. 12 at 7.) Exhibits attached to the motion indicate that plaintiff has a  
4 documented learning disability, with a combined language and math test score equivalent to  
5 Grade Level 2.9, in the 14th percentile nationwide. These exhibits indicate that, without outside  
6 assistance, plaintiff is unable to articulate and advocate his claims in light of the complexity of  
7 the legal and medical issues involved in this case.

8           Therefore, having considered plaintiff’s motion in light of the Palmer factors, the  
9 court finds that plaintiff has met his burden of demonstrating exceptional circumstances  
10 warranting the appointment of legal counsel pursuant to this court’s General Order No. 230  
11 (setting forth the criteria and procedure for appointment of counsel in Section 1983 cases).  
12 However, the court must deny plaintiff’s request for the appointment of a medical expert,  
13 without prejudice, for the reasons set forth above. Plaintiff may discuss this matter with  
14 appointed counsel who shall, in turn, be responsible for locating, and covering the costs of, any  
15 medical expert retained on behalf of plaintiff in this action.

16           Accordingly, IT IS HEREBY ORDERED that:

17           1. Plaintiff’s motion filed November 20, 2012 (Dkt. No. 12), is granted in part,  
18 and denied in part.

19           2. Plaintiff’s request for the appointment of counsel (Docket No. 12), is granted.  
20 The Clerk of Court is directed to contact Sujean Park, Alternative Dispute Resolution  
21 Coordinator, for the purpose of locating an attorney admitted to practice in this court who is  
22 willing to accept this appointment, for the purpose of pursuing this action on plaintiff’s behalf  
23 through all pretrial and trial proceedings.


24           3. Plaintiff’s request for appointment of a medical expert is denied without  
25 prejudice.

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1                   4. Plaintiff's motion filed December 4, 2012 is denied because incomplete and  
2 duplicative.

3                   SO ORDERED.

4 DATED: December 11, 2012

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7 KENDALL J. NEWMAN  
8 UNITED STATES MAGISTRATE JUDGE

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