

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONNIE CHEROKEE BROWN,
Plaintiff,
v.
C. REIF, et al.,
Defendants.

No. 2:18-cv-01088 KJM CKD P

ORDER AND
FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se in this civil rights action filed pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). Currently pending before the court are five separate motions for the court to contact the warden, a motion to amend plaintiff’s August 8, 2018 motion for a preliminary injunction, a new motion for a preliminary injunction/temporary restraining order filed on October 25, 2018, and a second request for the appointment of counsel. ECF Nos. 34-38. The court will address each motion in turn.

I. Motions to Contact the Warden

In each of his motions for the court to contact the warden, plaintiff complains that prison officials are interfering with his receipt of the court’s orders. See ECF Nos. 34-36, 40, 42. Plaintiff requests another copy of the court’s September 14, 2018 order since he did not receive the complete document. In response to plaintiff’s first three motions, the court re-served him with

1 a copy of the September 14, 2018 Order and Findings and Recommendations as well as the
2 service forms to be completed and returned to the court. Before he could receive these
3 documents, however, plaintiff filed two more duplicative motions. ECF Nos. 40, 42.¹ In light of
4 the re-service of the prior court order, all of plaintiff's motions for the court to contact the warden
5 will be denied as moot. Additionally, plaintiff is advised that his thirty days to return the service
6 forms did not commence until October 29, 2018 when the court re-served these documents on
7 plaintiff. Therefore, plaintiff has until November 28, 2018 to complete and return these service
8 documents to the court for defendants J. Gomez, S. Overby, and C. Reif.

9 **II. Motion to Amend Preliminary Injunction Motion**

10 Plaintiff's October 24, 2018 motion to amend his motion for a preliminary injunction is
11 nothing more than a duplicative motion for the court to contact the warden about interference
12 with his legal mail. ECF No. 37. For the reasons explained above, this motion will also be
13 denied as moot.

14 **III. Motion for Preliminary Injunction/Temporary Restraining Order**

15 In his October 25, 2018 motion for a preliminary injunction and temporary restraining order,
16 plaintiff alleges that "several correctional officers here at Corcoran State Prison has [sic]
17 threaten[ed] my life several times telling me that if I do not drop my 1983 law suit I may be killed
18 by my fellow-inmates...." ECF No. 38 at 2. Plaintiff then goes on to identify three specific
19 prison guards at Corcoran State Prison who made these threats. *Id.* at 2-3. He also complains that
20 two of these prison guards have spit in his food. *Id.* at 3. A fourth officer also threw away a pair
21 of plaintiff's tennis shoes in alleged retaliation for the instant lawsuit. *Id.*

22 A preliminary injunction should not issue unless necessary to prevent threatened injury that
23 would impair the court's ability to grant effective relief in a pending action. "A preliminary
24 injunction... is not a preliminary adjudication on the merits but rather a device for preserving the
25 status quo and preventing the irreparable loss of rights before judgment." Sierra On-Line, Inc. v.

26
27 ¹ The court notes that the last two pages of the November 6, 2018 motion are a pleading involving
28 a different prisoner in a different civil action. For this reason, the court has disregarded the last
two pages. See ECF No. 42 at 8-9.

1 Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). A preliminary injunction represents
2 the exercise of a far reaching power not to be indulged except in a case clearly warranting it.
3 Dymo Indus. v. Tapeprinter, Inc., 326 F.2d 141, 143 (9th Cir. 1964). “The proper legal standard
4 for preliminary injunctive relief requires a party to demonstrate ‘that he is likely to succeed on the
5 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
6 balance of equities tips in his favor, and that an injunction is in the public interest.’” Stormans,
7 Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing Winter v. Natural Res. Def. Council,
8 Inc., 555 U.S. 7, 22 (2008) (internal quotations omitted). In cases brought by prisoners involving
9 conditions of confinement, any preliminary injunction “must be narrowly drawn, extend no
10 further than necessary to correct the harm the court finds requires preliminary relief, and be the
11 least intrusive means necessary to correct the harm.” 18 U.S.C. § 3626(a)(2).

12 With respect to plaintiff’s new allegations of threats on his life by Corcoran prison guards, the
13 undersigned recommends denying the motion for a preliminary injunction based on lack of
14 jurisdiction. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 112 (1969). This
15 court is unable to issue an order against non-parties to this action which would include Corcoran
16 State Prison officials. Id.; see also ECF No. 31 at 4.

17 **IV. Motion for the Appointment of Counsel**

18 Plaintiff filed a second request for the court to appoint counsel to represent him. District
19 courts lack authority to require counsel to represent indigent prisoners in section 1983 cases.
20 Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the
21 court may request an attorney to voluntarily represent such a plaintiff. See 28 U.S.C. §
22 1915(e)(1); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900
23 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether “exceptional circumstances”
24 exist, the court must consider plaintiff’s likelihood of success on the merits as well as the ability
25 of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues
26 involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court did not abuse
27 discretion in declining to appoint counsel). The burden of demonstrating exceptional
28 circumstances is on the plaintiff. Id. Circumstances common to most prisoners, such as lack of

1 legal education and limited law library access, do not establish exceptional circumstances that
2 warrant a request for voluntary assistance of counsel.

3 Having considered the factors under Palmer, the court finds that plaintiff has failed to meet
4 his burden of demonstrating exceptional circumstances warranting the appointment of counsel at
5 this time.

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. Plaintiff's motions for the court to contact the warden (ECF Nos. 34, 35, 36, 40, 42)
8 are denied as moot.
- 9 2. Plaintiff's motion to amend his motion for a preliminary injunction (ECF No. 37) is
10 also denied as moot.
- 11 3. Plaintiff's motion for the appointment of counsel (ECF No. 41) is denied without
12 prejudice.
- 13 4. In light of plaintiff's history of filing repetitious motions, plaintiff shall hereinafter be
14 limited to filing the following documents:
 - 15 a. One dispositive motion, limited to one memorandum of points and authorities in
16 support of the motion and one reply to any opposition;
 - 17 b. One set of objections to these and any future findings and recommendations.
- 18 5. The failure to comply with this order shall result in improperly filed documents being
19 stricken from the record and may result in a recommendation that this action be
20 dismissed.
- 21 6. With the exception of objections to the findings and recommendations and any non-
22 frivolous motions for emergency relief, the court will not entertain or respond to any
23 additional motions filed by plaintiff until the court has received the completed service
24 forms for defendants C. Reif, S. Overby, and J. Gomez.

25 IT IS FURTHER RECOMMENDED that plaintiff's motion for a preliminary injunction
26 and temporary restraining order (ECF No. 38) be denied.

27 These findings and recommendations are submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

1 after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
4 objections shall be served and filed within fourteen days after service of the objections. The
5 parties are advised that failure to file objections within the specified time may waive the right to
6 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7 Dated: November 9, 2018

8 
9 _____
10 CAROLYN K. DELANEY
11 UNITED STATES MAGISTRATE JUDGE

12
13
14
15 12/brow1088.tro#2.docx
16
17
18
19
20
21
22
23
24
25
26
27
28