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

JOHN TIMOTHY PEREZ,)	No. C 09-4939 JSW (PR)
)	
Plaintiff,)	ORDER OF SERVICE OF
)	EIGHTH AMENDMENT CLAIMS
v.)	
)	
D. NGUYEN, DR. BOWMAN, P. LA DUKE, S.S.A. JONES, B. FRINTZ,)	(Docket Nos. 2, 3)
)	
Defendants.)	
)	
_____)	

INTRODUCTION

Plaintiff, currently incarcerated at Pelican Bay State Prison in Crescent City, California, has filed this civil rights complaint regarding the conditions of his confinement at the prison. Plaintiff has also filed a motion to proceed *in forma pauperis*, which is GRANTED in a separate order. This Court now reviews the Complaint pursuant to 28 U.S.C. § 1915A and serves it as set forth below.

STATEMENT OF FACTS

In the complaint, Plaintiff alleges that prison officials refused to provide him with appropriate medical care for a broken finger and knuckle. Plaintiff seeks declaratory relief and damages.

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners

1 seek redress from a governmental entity or officer or employee of a governmental entity.
2 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the
3 complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or
4 fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a
5 defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be
6 liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
7 1990).

8 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:
9 (1) that a right secured by the Constitution or laws of the United States was violated, and
10 (2) that the alleged violation was committed by a person acting under the color of state
11 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

12 ANALYSIS

13 The Eighth Amendment requires that prison officials take reasonable measures to
14 guarantee the safety of prisoners. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994).
15 Deliberate indifference to serious medical needs violates the Eighth Amendment's
16 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97,
17 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*
18 *grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en
19 banc); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). A determination of
20 "deliberate indifference" involves an examination of two elements: the seriousness of the
21 prisoner's medical need and the nature of the defendant's response to that need. *See*
22 *McGuckin*, 974 F.2d at 1059.

23 A "serious" medical need exists if the failure to treat a prisoner's condition could
24 result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.*
25 (citing *Estelle v. Gamble*, 429 U.S. at 104). The existence of an injury that a reasonable
26 doctor or patient would find important and worthy of comment or treatment; the presence
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1 of a medical condition that significantly affects an individual's daily activities; or the
2 existence of chronic and substantial pain are examples of indications that a prisoner has a
3 "serious" need for medical treatment. *See id.* at 1059-60 (citing *Wood v. Housewright*,
4 900 F.2d 1332, 1337-41 (9th Cir. 1990)).

5 A prison official is deliberately indifferent if he knows that a prisoner faces a
6 substantial risk of serious harm and disregards that risk by failing to take reasonable
7 steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). In order for deliberate
8 indifference to be established, there must be a purposeful act or failure to act on the part
9 of the defendant and resulting harm. *See McGuckin*, 974 F.2d at 1060; *Shapley v.*
10 *Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985).

11 Liberally construed, Plaintiff has stated an Eighth Amendment claims with regard
12 to Defendants Nguyen, Bowman, La Duke, Jones and Frintz.

13 MOTION FOR COUNSEL

14 Plaintiff has filed a motion seeking appointment of counsel to represent him
15 (docket no. 3). However, there is no constitutional right to counsel in a civil case unless
16 an indigent litigant may lose his physical liberty if he loses the litigation. *See Lassiter v.*
17 *Dep't of Social Services*, 452 U.S. 18, 25 (1981); *Rand v. Rowland*, 113 F.3d 1520, 1525
18 (9th Cir. 1997) (no constitutional right to counsel in § 1983 action), *withdrawn in part on*
19 *other grounds on reh'g en banc*, 154 F.3d 952 (9th Cir. 1998) (en banc). A court “may
20 request an attorney to represent any person unable to afford counsel.” 28 U.S.C. §
21 1915(e)(1).

22 The decision to request counsel to represent an indigent litigant under § 1915 is
23 within “the sound discretion of the trial court and is granted only in exceptional
24 circumstances.” *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of
25 the “exceptional circumstances” of the plaintiff seeking assistance requires an evaluation
26 of the likelihood of the plaintiff’s success on the merits and an evaluation of the
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1 plaintiff's ability to articulate his claims pro se in light of the complexity of the legal
2 issues involved. *See Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103
3 (9th Cir. 2004); *Rand*, 113 F.3d at 1525; *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th
4 Cir. 1991); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of these
5 factors must be viewed together before reaching a decision on a request for counsel
6 under § 1915. *See id.* Plaintiff's motion is DENIED without prejudice, for want of
7 exceptional circumstances (docket no. 3).

8 CONCLUSION

9 For the foregoing reasons, the Court orders as follows:

10 1. Plaintiff states a cognizable claim against Defendants. The Clerk of the Court
11 shall issue summons and the United States Marshal shall serve, without prepayment of
12 fees, a copy of the second amended complaint and all attachments thereto, and a copy of
13 this order upon: **Defendants D. Nguyen, Dr. Bowman, P. La Duke, S.S.A. Jones and**
14 **B. Frintz at Pelican Bay State Prison.** The Clerk shall also serve a copy of this order
15 on Plaintiff.

16 2. In order to expedite the resolution of this case, the Court orders as follows:

17 a. No later than **sixty (60) days** from the date of this order, Defendant
18 shall either file a motion for summary judgment or other dispositive motion, or a notice
19 to the Court that they are of the opinion that this matter cannot be resolved by dispositive
20 motion. The motion shall be supported by adequate factual documentation and shall
21 conform in all respects to Federal Rule of Civil Procedure 56.

22 **Defendant is advised that summary judgment cannot be granted, nor**
23 **qualified immunity found, if material facts are in dispute. If Defendant is of the**
24 **opinion that this case cannot be resolved by summary judgment, they shall so**
25 **inform the Court prior to the date the summary judgment motion is due.**

26 All papers filed with the Court shall be promptly served on the Plaintiff.
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1 b. Plaintiff's opposition to the dispositive motion shall be filed with the
2 Court and served on Defendant no later than **thirty (30) days** from the date Defendant's
3 motion is filed.

4 c. In the event the Defendant files an unenumerated motion to dismiss
5 under Rule 12(b), Plaintiff is hereby cautioned pursuant to *Wyatt v. Terhune*, 315 F.3d
6 1108, 1119-20 & n.4 (9th Cir. 2003):

7 If defendants file an unenumerated motion to dismiss for failure to
8 exhaust, they are seeking to have your case dismissed. If the motion is
9 granted it will end your case.

10 You have the right to present any evidence you may have which
11 tends to show that you did exhaust your administrative remedies. Such
12 evidence may be in the form of declarations (statements signed under
13 penalty of perjury) or authenticated documents, that is, documents
14 accompanied by a declaration showing where they came from and why
15 they are authentic, or other sworn papers, such as answers to
16 interrogatories or depositions.

17 If defendants file a motion to dismiss and it is granted, your case
18 will be dismissed and there will be no trial.

19 d. In the event Defendant files a motion for summary judgment, the Ninth
20 Circuit has held that the following notice should be given to pro se Plaintiffs:

21 The defendants have made a motion for summary judgment
22 by which they seek to have your case dismissed. A motion for
23 summary judgment under Rule 56 of the Federal Rules of Civil
24 Procedure will, if granted, end your case.

25 Rule 56 tells you what you must do in order to oppose
26 a motion for summary judgment. Generally, summary
27 judgment must be granted when there is no genuine issue of
28 material fact--that is, if there is no real dispute about any fact
that would affect the result of your case, the party who asked
for summary judgment is entitled to judgment as a matter of
law, which will end your case. When a party you are suing
makes a motion for summary judgment that is properly
supported by declarations (or other sworn testimony), you
cannot simply rely on what your complaint says. Instead,
you must set out specific facts in declarations, depositions,
answers to interrogatories, or authenticated documents, as
provided in Rule 56(e), that contradict the facts shown in the
defendant's declarations and documents and show that there
is a genuine issue of material fact for trial. If you do not
submit your own evidence in opposition, summary judgment,
if appropriate, may be entered against you. If summary
judgment is granted in favor of defendants, your case will be

dismissed and there will be no trial.

Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).

Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim).

c. Defendant shall file a reply brief no later than **fifteen (15) days** after Plaintiff's opposition is filed.

d. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

3. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further Court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16 is required before the parties may conduct discovery.

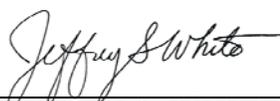
4. Extensions of time are not favored, though reasonable extensions will be granted. Any motion for an extension of time must be filed no later than **five** days prior to the deadline sought to be extended.

5. All communications by Plaintiff with the Court must be served on Defendant, or Defendant's counsel once counsel has been designated, by mailing a true copy of the document to Defendant or Defendant's counsel.

6. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court and Defendant or Defendant's counsel informed of any change of address by filing and serving a separate paper entitled "Notice of Change of Address" and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

DATED: April 16, 2010



JEFFREY S. WHITE
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOHN T. PEREZ,

Plaintiff,

v.

D. NGUYEN et al,

Defendant.

Case Number: CV09-04939 JSW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 16, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

John Timothy Perez
E5669
P.O. Box 7000
Crescent City, CA 95531

Dated: April 16, 2010



Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk