

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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BRIAN MAGUIRE,

Plaintiff,

v.

DR. RICHARD GARDEN et al.,

Defendants.

**MEMORANDUM DECISION &  
ORDER DIRECTING SERVICE OF  
PROCESS, ANSWER AND/OR  
DISPOSITIVE MOTION**

Case No. 2:10-CV-626 CW

District Judge Clark Waddoups

Plaintiff, Brian Maguire, an inmate at Utah State Prison (USP), filed this *pro se* civil rights suit. See 42 U.S.C.S. § 1983 (2011). Plaintiff was allowed to proceed *in forma pauperis*. See 28 *id.* § 1915.

Based on review of the Amended Complaint, the Court concludes that official service of process is warranted. The United States Marshals Service is directed to serve a properly issued summons and a copy of Plaintiff's Amended Complaint, along with this Order, upon the following individuals:

**Dr. Richard Garden  
P.A. Chris Abbott  
John Does 1-8, as possible, from descriptions provided  
within complaint**

Once served, Defendants shall respond to the summons in one of the following ways:

(A) If Defendants wish to assert the affirmative defense of Plaintiff's failure to exhaust administrative remedies in a grievance process, Defendants must,

- (i) file an answer, within twenty days of service;
- (ii) within ninety days of filing an answer, prepare and file a *Martinez* report limited to the exhaustion issue<sup>1</sup>;
- (iii) within ninety days of filing an answer, file a separate summary judgment motion, with a supporting memorandum; **and**
- (iv) within ninety days of filing an answer, submit a proposed order for dismissing the case based upon Plaintiff's failure to exhaust, in word processing

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<sup>1</sup> See *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978) (approving district court's practice of ordering prison administration to prepare report to be included in pleadings in cases when prisoner has filed suit alleging constitutional violation against institution officials).

In *Gee v. Estes*, 829 F.2d 1005 (10th Cir. 1987), the Tenth Circuit explained the nature and function of a *Martinez* report, saying:

Under the *Martinez* procedure, the district judge or a United States magistrate [judge] to whom the matter has been referred will direct prison officials to respond in writing to the various allegations, supporting their response by affidavits and copies of internal disciplinary rules and reports. The purpose of the *Martinez* report is to ascertain whether there is a factual as well as a legal basis for the prisoner's claims. This, of course, will allow the court to dig beneath the conclusional allegations. These reports have proved useful to determine whether the case is so devoid of merit as to warrant dismissal without trial.

*Id.* at 1007.

format, to:

utdecf\_prisonerlitigationunit@utd.uscourts.gov.

(B) If Defendants choose to challenge the bare allegations of the complaint, Defendants shall, within twenty days of service,

(i) file an answer; or

(ii) file a motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6), and submit a proposed order for dismissing the case, in word processing format, to:

utdecf\_prisonerlitigationunit@utd.uscourts.gov.

(C) If Defendants choose not to rely on the defense of failure to exhaust and wish to pierce the allegations of the complaint, Defendants must,

(i) file an answer, within twenty days of service;

(ii) within ninety days of filing an answer, prepare and file a *Martinez* report addressing the substance of the complaint;

(iii) within ninety days of filing an answer, file a separate summary judgment motion, with a supporting memorandum; **and**

(iv) within ninety days of filing an answer, submit a proposed order for dismissing the case based upon the summary judgment motion, in word processing format, to:

utdecf\_prisonerlitigationunit@utd.uscourts.gov.

Plaintiff is notified that if Defendants move for summary judgment Plaintiff cannot rest upon the mere allegations in the complaint. Instead, as required by Federal Rule of Civil Procedure 56(e), to survive a motion for summary judgment Plaintiff must allege specific facts, admissible in evidence, showing that there is a genuine issue remaining for trial.

**MOTIONS FOR APPOINTED PRO BONO COUNSEL**

Plaintiff has filed five motions for appointed pro bono counsel, which the Court now address. Plaintiff has no constitutional right to counsel. See *Carper v. Deland*, 54 F.3d 613, 616 (10th Cir. 1995); *Bee v. Utah State Prison*, 823 F.2d 397, 399 (10th Cir. 1987). However, the Court may in its discretion appoint counsel for indigent inmates. See 28 U.S.C.S. § 1915(e)(1) (2010); *Carper*, 54 F.3d at 617; *Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991). "The burden is upon the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel." *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985).

When deciding whether to appoint counsel, the district court should consider a variety of factors, "including 'the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's ability to present his claims, and the

complexity of the legal issues raised by the claims.'" *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (quoting *Williams*, 926 F.2d at 996); *accord McCarthy*, 753 F.2d at 838-39.

Considering the above factors, the Court concludes here that, at this time, Plaintiff's claims may not be colorable, the issues in this case are not complex, and Plaintiff is not at this time too incapacitated or unable to adequately function in pursuing this matter. Thus, the Court denies for now Plaintiff's motions for appointed counsel. Further motions for appointed counsel shall be returned to Plaintiff as unnecessarily repetitive and a drain on Court resources.

**ORDER**

Accordingly, **IT IS HEREBY ORDERED** that:

(1) Plaintiff's motions for service of process are GRANTED.

(See Docket Entry #'s 27 & 41.)

(2) The United States Marshals Service shall serve a completed summons, a copy of the Amended Complaint, (Docket Entry # 31), and a copy of this Order upon the above-listed defendants.

(3) Within twenty days of being served, Defendants must file an answer or motion to dismiss and proposed order, as outlined above.

(4) If filing (on exhaustion or any other basis) a *Martinez* report **with** a summary judgment motion and proposed order,

Defendants must do so within ninety days of filing their answer(s).

(5) If served with a *Martinez* report and a summary judgment motion or motion to dismiss, Plaintiff may file a response within thirty days.

(6) Summary-judgment motion deadline is ninety days from filing of answer.

(7) Plaintiff's motions for appointed counsel are DENIED, (see Docket Entry #'s 21, 23, 26, 34, & 44); however, if, after the case develops further, it appears that counsel may be needed or of specific help, without further prompting from Plaintiff, the Court will ask an attorney to appear pro bono on Plaintiff's behalf. No further motions for appointed counsel shall be accepted by the Court.

DATED this 26<sup>th</sup> day of July, 2011.

BY THE COURT:



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JUDGE CLARK WADDOUPS  
United States District Court