

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 30 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEVEN DARBY McDONALD,

Plaintiff-Appellant,

v.

KENNETH LAUREN, M.D., Medical
Director, MCC/WSR; et al.,

Defendants-Appellees.

No. 19-35246

D.C. No.

3:17-cv-05013-RBL-DWC

Western District of Washington,
Tacoma

ORDER

The court's records reflect that the notice of appeal was filed during the pendency of a timely-filed motion listed in Federal Rule of Appellate Procedure 4(a)(4), and that motion is still pending in the district court. The April 2, 2019 notice of appeal is therefore ineffective until entry of the order disposing of the last such motion outstanding. *See* Fed. R. App. P. 4(a)(4). Accordingly, proceedings in this court are held in abeyance pending the district court's resolution of the pending April 2, 2019 motion. *See Leader Nat'l Ins. Co. v. Indus. Indem. Ins. Co.*, 19 F.3d 444, 445 (9th Cir. 1994).

Within 14 days after the district court's ruling on the pending motion, appellant shall file a written notice in this court: (1) informing this court of the district court's ruling; and (2) stating whether appellant intends to prosecute this appeal.

To appeal the district court's ruling on the post-judgment motion, appellant must file an amended notice of appeal within the time prescribed by Federal Rule of Appellate Procedure 4.

Appellant's motion for an extension of time to file the opening brief (Docket Entry No. 7) is denied as unnecessary. The briefing schedule will be re-set upon disposition of the April 2, 2019 motion.

The Clerk shall serve this order on the district court.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Corina Orozco
Deputy Clerk
Ninth Circuit Rule 27-7

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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
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8 In Re

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10 MANDATORY PRETRIAL
11 DISCOVERY IN PRO SE PRISONER
12 42 U.S.C. § 1983 CASES
13
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AMENDED GENERAL ORDER
NO. 09-16

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17 The United States District Court for the Western District of Washington (the Court) shall
18 participate in a one-year discovery pilot project, commencing December 1, 2016, in cases filed
19 by pro se prisoners alleging 42 U.S.C. § 1983 claim(s) brought against the Washington
20 Department of Corrections (DOC) or its employees, who are represented by the Washington
21 State Attorney General's Office. Because pro se prisoners are among the least likely litigants to
22 have access to material information required to properly litigate their cases, the Court, through
23 this pilot project, adopts a rule requiring mandatory initial disclosures¹ in these cases. The goal
24 of requiring mandatory initial disclosures is to help resolve pro se prisoner cases by reducing
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27 ¹ "Initial disclosure" as used in this rule applies only to the disclosures required herein. The initial disclosures set
28 forth in Rule 26(a)(1)(A)(i)-(iv) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") do not apply to cases,
like this one, that are brought by a person in custody without an attorney.

1 expenses associated with discovery disputes and discovery motions. The rule incorporates the
2 ideals that discovery should be proportional to the needs of the case, considering the importance
3 of the issues at stake, the amount in controversy, the parties' relative access to relevant
4 information, the parties' resources, the importance of the discovery in resolving the issues, and
5 whether the burden or expense of the proposed discovery outweighs its likely benefit.
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7 In consideration of the foregoing, **IT IS HEREBY ORDERED:**

- 8 1. The pilot project shall apply to (1) all prisoners who bring a 42 U.S.C. § 1983 action
9 without counsel, in which the events alleged in the complaint occurred while the
10 plaintiff was in the custody of the DOC, and (2) defendants are represented by the

11 Office of the Washington State Attorney General.

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13 2. The requirements of this rule shall be set forth by the Court in a pretrial scheduling
14 order, which shall be issued in the case only after the case has survived 28 U.S.C. §
15 1915 screening and any Fed. R. Civ. P. 12(b)(6) motions to dismiss.

16 A. The terms of the pretrial scheduling order as to the discovery are set forth as
17 follows: The parties are required to provide Initial Disclosure of
18 Documents and Other Materials, as set forth in subparagraph B., within
19 60 days after the Court issues a Mandatory Pretrial Discovery and
20 Scheduling Order.
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23 **B. Initial Disclosure of Documents and Other Materials:**

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25 1. Plaintiff(s) shall produce to defendant(s) copies of all documents
26 and other materials in plaintiff(s)'s care, custody, or control, which are related
27 to and support plaintiff(s)'s claims in the complaint. Plaintiff(s) shall also
28 produce:

1 a. Correspondence, grievances, grievance appeals, and other
2 documents related to requests for administrative remedies or the inability or
3 failure to exhaust such remedies; and

4 b. Complaints and petitions filed by plaintiff(s) in any other
5 cases in any court relating to the same issues raised in the complaint in this
6 action or, if such documents are not within the possession of plaintiff(s),
7 plaintiff(s) shall provide to counsel for defendants a list of each such case,
8 state the court in which each case is filed, and include each case's caption,
9 number, and disposition.

10 2. Defendant(s) shall produce to plaintiff(s) copies of all documents
11 and other materials in the care, custody, or control of any defendant or the
12 DOC related to the claims or defenses in the case. Where applicable, the
13 documents and materials shall include those described in Attachment A
14 hereto. In the cases listed in Attachment A, production of the documents and
15 materials described shall not constitute presumptive compliance with this
16 Order.

17 If a party requires initial disclosures before the 60day deadline, the
18 party shall file a motion to obtain initial disclosures on an expedited basis.
19 The motion must identify the nature and relevance of the documents and
20 materials sought and explain why expedited disclosure is required.

21 3. **Basis for Initial Disclosures.** A party must make these initial
22 disclosures based on the information then reasonably available to it. A lack of
23 investigation of the case or insufficiency of the other party's disclosures is not
24 an excuse from making these required disclosures. Fed. R. Civ. P.
25 26(a)(1)(E).

26 4. **Notice of Compliance.** Plaintiff(s) and defendant(s) shall certify
27 that they have completed the production mandated in Paragraphs A(1) and (2)
28 above by filing a notice of compliance with the Court and serving a copy on
the opposing party.

5. **Continuing Duty.** Plaintiff(s) and defendant(s) are reminded that
they have a continuing duty to disclose to opposing parties any documents and
information within the scope of this Order which are discovered or obtained
after any initial disclosures under this Order are made. Fed. R. Civ. P. 26(e).

6. **Protective Order.** If any document, or any portion thereof,
otherwise required to be disclosed is withheld for any reason defense counsel
shall (a) obtain a complete copy of any such document and retain the
document in counsel's office until the conclusion of litigation, and (b) serve a
log in conformity with Fed. R. Civ. P. 26(b)(5) identifying any withheld
document and the grounds upon which it has been withheld. If any withheld

document is not subject to the attorney-client or work-product privileges, then defendant(s) shall promptly move for a protective order within 30 days of producing the initial disclosures. If defendant(s) fail to move for a protective order within 30 days of producing the initial disclosures, the document(s) shall be deemed discoverable and must be promptly disclosed to plaintiff(s).

7. Discovery Demands. Any discovery request to be served on a party, such as an interrogatory, request for admission, or request for production, may not be served until 20 days after the party receives the opposing party's initial disclosures. If any discovery request is served prior to that time, the receiving party need not answer the discovery request because the serving party is to review the received initial disclosures before serving discovery requests to ensure the discovery request is not seeking documents or materials already provided.

A party (or attorney) must sign every discovery request, response, or objection. By signing, the person certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry that he has complied with Federal Rule of Civil Procedure 26(g)(1).

8. Motions to Compel Discovery. Before filing a discovery motion, the parties must confer and attempt to resolve their differences. If unable to resolve their differences, the party filing the discovery motion must, either within the motion to compel or in a separate affidavit attached to the motion to compel, list the date, manner, and participants to the conference. If the moving party fails to include such a certification, the court may deny the motion without addressing the merits of the dispute. See Fed. R. Civ. P. 37 and LCR 37(a)(1).

The motion to compel must: (1) list the matters on which the parties were unable to agree; (2) identify the nature and relevance of the documents and materials sought; (3) list the reason(s) why the mandatory initial disclosures were inadequate, and (4) explain why the discovery sought is proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

9. Filing Discovery. The parties shall not file discovery with the Court except those portions necessary to support a motion or objection.

10. Cooperation. The Court directs the attorneys and parties appearing pro se to cooperate with each other to reasonably limit discovery requests, to facilitate the exchange of discoverable information, and to reduce the costs of discovery.

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C. Copies.

Plaintiff(s) and defendant(s) shall send the documents and materials identified in paragraphs I.(A)(1) and I.(A)(2) above to the opposing party by mail within the time specified in this Order. If plaintiff does not have the funds required to make his/her required disclosures, plaintiff shall provide the opposing party with a list of the documents in his/her possession. If the total number of copies being produced by any party exceeds 50, the producing party may make such documents available to the discovering party for inspection upon reasonable notice. If, after such inspection, the discovering party wishes to obtain copies of any such documents, copies of the first 50 pages requested shall be provided at the expense of the producing party. Any pages in excess of 50 shall be produced only upon the prepayment by the discovering party of the costs of reproduction at the rate of \$.10 per page. Copies may be double-sided to reduce costs.

D. Medical and Mental Health Records.

If the documents which defendant(s) are required to produce in paragraph I(A)(2) above include a plaintiff(s)'s "protected health information" within the scope of the Federal Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 ("HIPAA") and 45 C.F.R. §§ 160.103 and 154.512(e)(1), the custodians of such medical records are hereby authorized to release "protected health information" and "protected mental health information" without an authorization from plaintiff(s) for the purpose of providing copies to plaintiff(s). Defendant(s) may use such documents in the defense of this action. The parties are referred to the Court's local civil rules governing the sealing and redacting of court records. See LCR 5(g).

ATTACHMENT A

The discovery ordered in paragraph I(A)(2) of the Mandatory Discovery and Pretrial Scheduling Order shall in all cases include reports of completed investigations by a defendant's employer such as the DOC or others relevant to the incident(s) alleged in the complaint. In addition, the following documents and materials relevant to the incident(s) alleged in the complaint shall be produced for the following types of claims:

1. **Excessive Force and Failure to Protect.** Photographs, incident reports, use-of-force reports, staff and inmate disciplinary charges, records (including transcripts) of staff and inmate disciplinary hearings, determinations of staff and inmate disciplinary charges and appeals, videotapes and/or audiotapes, and medical records concerning treatment for any injuries allegedly received by the plaintiff as a result of the incident(s) alleged in the complaint.

Copies of videotapes and audiotapes need not be provided to plaintiff(s) as long as defendant(s) provide plaintiff(s) with reasonable opportunities to review a videotape or audiotape and the videotape or audiotape is preserved by defense counsel for use by any party throughout the case.

Pursuant to paragraph I(C) of this Order, the DOC and its employees, agents, and representatives are hereby authorized to release a plaintiff's medical records to plaintiff without additional authorization from the plaintiff.

2. **Due Process and First Amendment/Retaliation.** Relevant staff and inmate disciplinary charges, records (including transcripts and audiotapes) of relevant disciplinary hearings, and determinations of disciplinary charges and appeals. See Paragraph 1 above regarding production of audio tapes.

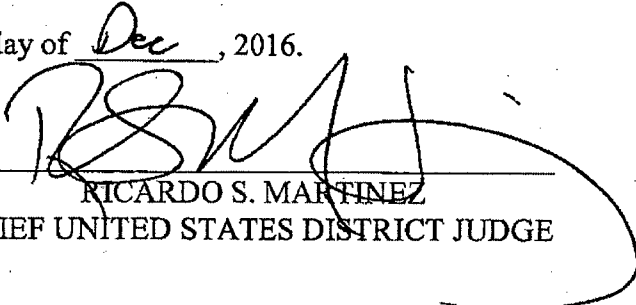
3. **Medical Indifference.** Medical records and documents related to the condition(s) alleged in the complaint or attempts to seek treatment for the condition(s). See Paragraph 1 above regarding production of medical records.

4. **Conditions of Confinement.** Documents and records regarding the condition(s) alleged in the complaint.

IT IS FURTHER ORDERED that this Standing Order shall become effective December 1, 2016, and shall remain in effect through November 30, 2017, subject to extension upon the agreement of the parties. Before November, 2017, the Court will evaluate the pilot project and determine whether it should be continued, terminated, modified, or expanded.

1 **IT IS SO ORDERED.**

2 **DATED** this 1 day of Dec, 2016.

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5 **RICARDO S. MARTINEZ**
6 **CHIEF UNITED STATES DISTRICT JUDGE**

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PETITIONER FOR WRIT OF MANDAMUS
STEVEN DARBY MCDONALD, PETITIONER

VS.

SIDNEY R. THOMAS, Chief Judge,
Ninth Circuit Court of Appeals, and,
KENNETH LAUREN, MD., et al., RESPONDENTS.


PROOF OF SERVICE

I, Steven Darby McDonald, do swear or declare that on this date, December 13, 2019, as required by Supreme Court Rule 29, I have served the enclosed Motion For Leave To Proceed In Forma Pauperis and Petition For Writ Of Mandamus, on each party to the above proceeding or that party's counsel as stated below, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them, and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 days.

1. Sidney R. Thomas, Chief Judge, Ninth Circuit Court of Appeals, PO Box 193939 San Francisco, CA 94119-3939; The Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001; 3. Timothy Feulner, Assistant Attorney General, PO Box 40116, Olympia, WA 98504.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 2019.


Steven Darby McDonald #703852

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEVEN DARBY MCDONALD,

Plaintiff,

v.

KENNETH B LAUREN, et al.,
Defendants.

No. 3:17-CV-05013-RBL-DWC

**ORDER ADOPTING REPORT AND
RECOMMENDATION**

THIS MATTER is before the Court the Report and Recommendation of Magistrate Judge David W. Christel [Dkt. #223], Plaintiff McDonald's Objections [Dkt. #226], and the underlying record.

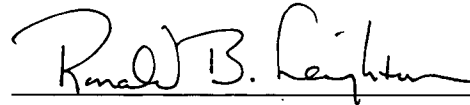
- (1) The Report and Recommendation is **ADOPTED**.
- (2) McDonald's Request for Preliminary Injunction [Dkt. # 99] is **DENIED** without prejudice.
- (3) McDonald's Motion to Modify Magistrate's Order [Dkt. # 215] is **DENIED**.
- (4) As McDonald has been granted *in forma pauperis*, *in forma pauperis* may continue on appeal. *See* Rule of Appellate Procedure 24(a)(3).

EXH - A

1 The Clerk shall send copies of this Order to McDonald's last known address and to
2 Magistrate Judge Christel.

3 IT IS SO ORDERED.

4 **DATED** this 14th day of March, 2019.

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7 Ronald B. Leighton
8 United States District Judge
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