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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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| THOMAS GOOLSBY, |) | Civil No. 09cv02654 WQH (RBB) |
| |) | |
| Plaintiff, |) | ORDER DENYING PLAINTIFF'S |
| |) | MOTION FOR APPOINTMENT OF |
| |) | COUNSEL [ECF NO. 8] |
| v. |) | |
| |) | |
| |) | |
| NEAL RIDGE, M.D.; M. MARTINEZ, |) | |
| M.D.; C. WILSON, correctional |) | |
| officer, |) | |
| |) | |
| Defendants. |) | |

Plaintiff Thomas Goolsby, a state prisoner proceeding pro se and in forma pauperis, filed a Complaint on November 23, 2009 [ECF No. 1] and a First Amended Complaint¹ on March 24, 2010 [ECF No. 5], pursuant to 42 U.S.C. § 1983. Plaintiff alleges that his constitutional rights to adequate medical care and to be free from cruel and unusual punishment were violated when Defendants Ridge and Martinez denied Plaintiff medical care for his torn rotator cuff. (Am. Compl. 3, 11.) He also complains that Defendant Wilson

¹ Because Goolsby's First Amended Complaint is not consecutively paginated, the Court will use the page numbers assigned by the electronic case filing system.

1 interfered with Plaintiff's medical care when Wilson took
2 Plaintiff's medically prescribed walker from him. (Id. at 12-15.)
3 Further, Goolsby alleges that Wilson failed to protect him "from
4 painful and unsafe activities" when Wilson took Plaintiff's walker,
5 forced him to live on the top tier, and handcuffed him while
6 knowing these actions caused Plaintiff severe pain. (Id. at 16.)

7 On July 14, 2010, Goolsby filed this Motion for Appointment of
8 Counsel (ECF No. 8).² In support of his request for appointment of
9 counsel, Plaintiff asserts the following: (1) He is unable to
10 afford an attorney; (2) his imprisonment limits his ability to
11 litigate; (3) the issues are complex and require significant
12 research; (4) Goolsby has limited law library access and knowledge
13 of the law; (5) a trial will likely involve conflicting testimony;
14 and (6) Goolsby has attempted but failed to secure counsel. (Mot.
15 Appointment Counsel 1-2.)

16 28 U.S.C. § 1915(e)(1) provides: "The court may request an
17 attorney to represent any person unable to afford counsel." 28
18 U.S.C.A. § 1915(e)(1) (West 2010). But "it is well-established
19 that there is generally no constitutional right to counsel in civil
20 cases." United States v. Sardone, 94 F.3d 1233, 1236 (9th Cir.
21 1996) (citing Hedges v. Resolution Trust Corp., 32 F.3d 1360, 1363
22 (9th Cir. 1994)). There is also no constitutional right to
23 appointed counsel to pursue a § 1983 claim. Rand v. Rowland, 113
24 F.3d 1520, 1525 (9th Cir. 1997) (citing Storseth v. Spellman, 654
25 F.2d 1349, 1353 (9th Cir. 1981)); accord Campbell v. Burt, 141 F.3d
26 927, 931 (9th Cir. 1998). Federal courts do not have the authority

27
28 ² The Court will also cite to Goolsby's Motion for Appointment
of Counsel using the page numbers assigned by the Court's
electronic case filing system.

1 "to make coercive appointments of counsel." Mallard v. United
2 States Dist. Court, 490 U.S. 296, 310 (1989) (discussing §
3 1915(d)); see also United States v. \$292,888.04 in U.S. Currency,
4 54 F.3d 564, 569 (9th Cir. 1995).

5 Nevertheless, district courts have discretion, pursuant to 28
6 U.S.C. § 1915(e)(1), to request attorney representation for
7 indigent civil litigants upon a showing of exceptional
8 circumstances. See Agyeman v. Corrs. Corp. of Am., 390 F.3d 1101,
9 1103 (9th Cir. 2004) (citing Franklin v. Murphy, 745 F.2d 1221,
10 1236 (9th Cir. 1984)); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th
11 Cir. 1991); Burns v. County of King, 883 F.2d 819, 824 (9th Cir.
12 1989). "A finding of the exceptional circumstances of the
13 plaintiff seeking assistance requires at least an evaluation of the
14 likelihood of the plaintiff's success on the merits and an
15 evaluation of the plaintiff's ability to articulate his claims 'in
16 light of the complexity of the legal issues involved.'" Agyeman,
17 390 F.3d at 1103 (quoting Wilborn v. Escalderon, 789 F.2d 1328,
18 1331 (9th Cir. 1986)). "'Neither of these factors is dispositive
19 and both must be viewed together before reaching a decision.'" Terrell,
20 935 F.2d at 1017 (quoting Wilborn, 789 F.2d at 1331).

21 **I. Likelihood of Plaintiff's Success on the Merits**

22 To receive court-appointed counsel, Goolsby must present a
23 nonfrivolous claim that is likely to succeed on the merits.
24 Wilborn, 789 F.2d at 1331. The Amended Complaint purports to state
25 causes of action arising under the Constitution for deliberate
26 indifference to Plaintiff's serious medical needs and violations of
27 his right to be free from cruel and unusual punishment. (Am.
28 Compl. 3, 13-16.)

1 Plaintiff contends that his constitutional rights were
2 violated while he was incarcerated at Richard J. Donovan State
3 Prison ("Donovan") between December 16, 2008, and February 11,
4 2009. (Id. at 3.) Goolsby claims that when he was transferred to
5 Donovan from San Diego County Jail, he was suffering from the
6 following injuries: a potentially torn rotator cuff, sprained or
7 strained back and neck muscles, possible strictures (intestinal
8 cuts), a human bite on his right hand, and damaged back muscles.
9 (Id. at 4-5.) The doctors at county jail had given Plaintiff a
10 neck brace, a walker, muscle relaxants, and pain medication for
11 these injuries. (Id. at 5.) The doctors had also ordered several
12 tests to be performed on Plaintiff, such as a magnetic resonance
13 imaging test ("MRI") to determine whether Goolsby's rotator cuff
14 was torn, an endoscopy, and a colonoscopy. (Id.) Plaintiff claims
15 that he was never seen by a doctor during his two months at
16 Donovan. (Id. at 3.)

17 In count one of the Amended Complaint, Goolsby states that
18 Defendants Ridge and Martinez, both medical doctors at Donovan,
19 were deliberately indifferent to his serious medical needs because
20 they did not examine Plaintiff's injuries, order medication, or
21 ensure that the MRI, the endoscopy, and the colonoscopy were
22 performed on Goolsby. (Id. at 11.) Nor did Defendants order
23 Plaintiff's walker to be returned to him after it was improperly
24 taken. (Id. at 9, 11.) Goolsby alleges that doctors Ridge and
25 Martinez violated his constitutional rights to receive adequate
26 medical care and be free from cruel and unusual punishment. (Id.
27 at 3; id. Attach. #1 Mem. P. & A. 1-2.)

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1 In counts two and three, Goolsby makes similar Eighth
2 Amendment claims regarding Defendant Wilson's deliberate
3 indifference to serious medical needs and failure to protect
4 Plaintiff from the use of excessive force. (Am. Compl. 15-16; id.
5 Attach. #1 Mem. P. & A. 7 (citing Jett v. Penner, 439 F.3d 1091,
6 1096 (9th Cir. 2006)).) Goolsby alleges in count two that Wilson
7 acted with deliberate indifference to Plaintiff's severe neck,
8 back, and shoulder pain when Wilson took Plaintiff's walker from
9 him, forced him to live in a top tier cell, and handcuffed his arms
10 behind his back. (Am. Compl. 13-15; id. Attach. #1 Mem. P. & A. 5-
11 6.) Plaintiff contends in count three that Wilson's actions failed
12 to protect Plaintiff from "painful and unsafe activities." (Am.
13 Compl. 16; id. Attach. #1 Mem. P. & A. 6-7).

14 Two elements comprise an Eighth Amendment claim for deliberate
15 indifference to serious medical needs. Jett, 439 F.3d at 1096
16 (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). "First, the
17 plaintiff must show a 'serious medical need' by demonstrating that
18 'failure to treat a prisoner's condition could result in further
19 significant injury or the "unnecessary and wanton infliction of
20 pain.'" Id. (citation omitted). "Second, the plaintiff must show
21 the defendant's response to the need was deliberately indifferent."
22 Id. (citation omitted). The second prong "is satisfied by showing
23 (a) a purposeful act or failure to respond to a prisoner's pain or
24 possible medical need and (b) harm caused by the indifference."
25 Id. (citation omitted).

26 A plaintiff claiming excessive force under the Eighth
27 Amendment must "allege . . . the unnecessary and wanton infliction
28 of pain" Whitley v. Albers, 475 U.S. 312, 320 (1986).

1 Plaintiff "is required to allege overt acts with some degree of
2 particularity such that his claim is set forth clearly enough to
3 give defendants fair notice of the type of claim being pursued."
4 Ortez v. Washington County, 88 F.3d 804, 810 (9th Cir. 1996)
5 (citing Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir.
6 1984)). "A prison official may be liable for failure to protect an
7 inmate from a use of excessive force if he is deliberately
8 indifferent to a substantial risk of serious harm to an inmate."
9 Estate of Davis v. Delo, 115 F.3d 1388, 1395 (8th Cir. 1997)
10 (citations omitted); see also Cunningham v. Gates, 229 F.3d 1271,
11 1289-90 (9th Cir. 2000).

12 Although Plaintiff's allegations are sufficient to state a
13 claim for relief, it is too early for the Court to determine
14 Goolsby's likelihood of success on the merits. Without additional
15 factual information, the Court cannot conclude that Plaintiff is
16 likely to succeed. See Bailey v. Lawford, 835 F. Supp. 550, 552
17 (S.D. Cal. 1993).

18 **II. Plaintiff's Ability To Proceed Without Counsel**

19 To be entitled to appointed counsel, Goolsby must also show he
20 is unable to effectively litigate the case pro se in light of the
21 complexity of the issues involved. See Wilborn, 789 F.2d at 1331.

22 Courts have required that "indigent plaintiffs make a
23 reasonably diligent effort to secure counsel as a prerequisite to
24 the court's appointing counsel for them." Bailey, 835 F. Supp. at
25 552. Plaintiff has contacted nine attorneys in an attempt to
26 secure counsel. (Mot. Appointment Counsel 3-12.) He has made a
27 reasonably diligent effort to secure counsel prior to seeking an
28 order appointing counsel.

1 Goolsby claims he is unable to afford legal counsel. (Id. at
2 1.) This argument is not compelling because indigence alone does
3 not entitle a plaintiff to appointed counsel.

4 Plaintiff raises other grounds for the appointment of counsel.
5 He asserts that his imprisonment will limit his ability to
6 litigate. (Id.) He claims the issues involved in the case are
7 complex and will require significant research. (Id.) Goolsby also
8 states that he has limited access to the law library and knowledge
9 of the law. (Id.) Finally, Plaintiff contends an attorney would
10 help him present evidence and cross-examine witnesses at trial due
11 to the likelihood of conflicting testimony. (Id. at 1-2.) Based
12 on these facts, Goolsby requests a court-appointed attorney. (Id.)

13 Although Plaintiff asserts that his access to legal materials
14 is limited, he has not demonstrated that he is being denied
15 "reasonable" access. See Lindquist v. Idaho State Bd. of Corrs.,
16 776 F.2d 851, 858 (9th Cir. 1985). "[T]he Constitution does not
17 guarantee a prisoner unlimited access to a law library. Prison
18 officials of necessity must regulate the time, manner, and place in
19 which library facilities are used." Id. (citation omitted).

20 Goolsby has not shown that he does not have reasonable access to a
21 law library or other means of conducting legal research, or that he
22 is subjected to burdens beyond those ordinarily experienced by pro
23 se plaintiffs.

24 Plaintiff's Amended Complaint is adequate in form. Goolsby
25 was also able to file a Motion for Appointment of Counsel,
26 suggesting an ability to navigate the legal process. See Plummer
27 v. Grimes, 87 F.3d 1032, 1033 (8th Cir. 1996) (finding the district
28 court did not abuse its discretion in denying plaintiff counsel, in

1 part because plaintiff adequately filed a complaint and other pre-
2 trial materials).

3 "[A]ny pro se litigant certainly would be better served with
4 the assistance of counsel." Rand, 113 F.3d at 1525; see also
5 Wilborn, 789 F.2d at 1331 (explaining that "a pro se litigant will
6 seldom be in a position to investigate easily the facts necessary
7 to support the case[]"). But Plaintiff is only entitled to
8 appointed counsel if he can show "that because of the complexity of
9 the claims he [is] unable to articulate his positions." Rand, 113
10 F.3d at 1525. Goolsby has not shown anything in the record that
11 makes this case "exceptional" or the issues in it particularly
12 complex.

13 Additionally, factual disputes and anticipated cross-
14 examination of witnesses do not indicate the presence of complex
15 legal issues warranting a finding of exceptional circumstances.
16 See id. (holding that while the appellant might have fared better
17 with counsel during discovery and in securing expert testimony,
18 this is not the test). Accordingly, the "exceptional
19 circumstances" required for appointment of counsel pursuant to 28
20 U.S.C. § 1915(e)(1) are absent.

21 Because Plaintiff has failed to demonstrate either a
22 likelihood of success on the merits or an inability to represent

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1 himself (beyond the ordinary burdens encountered by prisoners
2 representing themselves pro se), Plaintiff's motion is **DENIED**
3 without prejudice.

4 **IT IS SO ORDERED.**

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DATE: August 25, 2010



Ruben B. Brooks
United States Magistrate Judge

cc: Judge Hayes
All Parties of Record