

WO

1

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9 Eulandas J. Flowers,

No. CV-14-08184-PCT-JAT

10 Plaintiff,

ORDER

11 v.

12 Sandra Lawrence, et al,

13 Defendants.

14

15

16

17

18

19

20

21

22

I.

23

24

25

26

27

28

Pending before the Court is Plaintiff Eulandas Flowers's Motion to Appoint Counsel pursuant to Title 28 U.S.C. § 1915(e)(1) (2012), (Doc. 112), his Declaration in Support of Motion to Appoint Counsel, (Doc. 113), and his Memorandum of Law in Support of Motion to Appoint Counsel. (Doc. 114). The Magistrate Judge has twice denied Plaintiff's motion to appoint counsel, finding that Plaintiff "failed to show that exceptional circumstances" were present in his case. (Doc. 18; Doc. 57). The Court now rules on the pending motion.

The instant matter is a prisoner civil rights case brought pursuant to 42 U.S.C. § 1983, alleging Eighth Amendment claims against Defendants for use of excessive force, failure to intervene, and deliberate indifference. (Doc. 109). On April 25, 2016, the Court found that there was a materially disputed issue of fact as to whether Plaintiff had exhausted available administrative remedies in accordance with the Prison Litigation Reform Act ("PLRA"), Title 42 U.S.C. 1997e(a) (2012), and set for June 16, 2016, the

1 exhaustion issue for bench trial. (Doc. 116). On May 5, 2016, Plaintiff filed the pending
2 motion for appointment of counsel.

3
4 **II.**

5 There is no constitutional right to the appointment of counsel in a civil case. See
6 *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009); *Johnson v. U.S. Dep’t of Treasury*,
7 939 F.2d 820, 824 (9th Cir. 1991). But the Court may appoint counsel for an indigent
8 civil litigant pursuant to 28 U.S.C. § 1915(e)(1) under “exceptional circumstances.”¹
9 *Palmer*, 560 F.3d at 970 (quoting *Agyeman*, 390 F.3d at 1103). “When determining
10 whether ‘exceptional circumstances’ exist, a court must consider ‘the likelihood of
11 success on the merits as well as the ability of the petitioner to articulate his claims pro se
12 in light of the complexity of the legal issues involved.’” *Id.* (quoting *Weygandt v. Look*,
13 718 F.2d 952, 954 (9th Cir. 1983)). These two considerations must be analyzed together;
14 neither is dispositive. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

15
16 **III.**

17 Plaintiff’s motion rests on the assertions that his case is complex, his ability to
18 investigate is extremely limited due to his segregated incarceration, there is conflicting
19 testimony present in the record, he is indigent, and that he has a likelihood of succeeding
20 on the merits of his case. (Doc. 114 3-6). The Court notes that Plaintiff’s supporting
21 memoranda is substantially similar—indeed identical in many respects—to the
22 memoranda filed previously. (See Doc. 52; Doc. 16). Twice before, the Magistrate Judge
23 found that Plaintiff failed to demonstrate a likelihood of success on the merits, and had
24 not shown that he was “experiencing difficulty in litigating this case because of the

25 _____
26 ¹ The Court has no power or authority “to make coercive appointments of
27 counsel.” *Mallard v. United States District Court*, 490 U.S. 296, 310 (1989). 28 U.S.C. §
28 1915(e)(1) gives the Court discretion “to ‘request’ that an attorney represent indigent
civil litigants upon a showing of ‘exceptional circumstances.’” *Dunsmore v. Paramo*,
2013 U.S. Dist. LEXIS 153656, at *2 (S.D. Cal. Oct. 22, 2013) (citing *Agyeman v. Corrs.*
Corp. of Am., 390 F.3d 1101, 1103 (9th Cir. 2004)).

1 complexity of the issues involved.” (Doc. 15 at 2; Doc. 53 at 2). At this stage of the
2 proceedings, the Court must more closely scrutinize Plaintiff’s inability to “handle issues
3 of conflicting testimony and credibility on his own,” particularly where Plaintiff’s claim
4 will be tried by a jury. *Eusse v. Vitela*, 2015 U.S. Dist. LEXIS 93441, at *6 (S.D. Cal.
5 July 16, 2015); *Morgai v. Maricopa County Board of Supervisors*, No. CIV 07-0670-
6 PHX-RCB, 2012 U.S. Dist. LEXIS 102432, at *10 (D. Ariz. July 24, 2012). Nonetheless,
7 having reviewed Plaintiff’s motion and supporting memorandum, the Court finds that
8 Plaintiff has failed to carry his burden under 28 U.S.C. § 1915(e)(1).

9 Even assuming that Plaintiff has demonstrated that he is likely to succeed on the
10 merits of his claim,² Plaintiff has yet to establish that he is unable to articulate his claims
11 “in light of the complexity of the legal issues involved,” and that “exceptional
12 circumstances exist.” To date, Plaintiff has shown that he is capable of intelligently
13 arguing his position and has demonstrated an understanding of the law and facts relating
14 to his claim against Defendants. For example, most recently, Plaintiff successfully
15 opposed Defendants’ motion for summary judgment on the issue of Plaintiff’s failure to
16 exhaust his administrative remedies. (Doc. 109). Plaintiff’s opposition included a
17 succinct recitation of the facts, presented clear and cogent arguments based on the
18 applicable law, and even included a contravening statement of facts complete with
19 attached contributions to the record for the Court to consider. (Doc. 81; Doc. 82). In
20 short, Plaintiff substantially complied with the requirements of Fed. R. Civ. P. 56, and
21 successfully argued that a genuine issue of material fact exists with respect to exhaustion
22 of available administrative remedies. Plaintiff’s successful opposition of Defendants’
23 dispositive motion continues the trend of Plaintiff submitting briefs and motions that
24 make clear points and present arguments effectively. The pending motion, while
25 substantially similar to prior motions to appoint counsel, still presents clear, sound
26 arguments and relies on newly cited and applicable persuasive authority.

27
28 ² Plaintiff has successfully shown that a genuine dispute exists as to whether he exhausted his available administrative remedies in accordance with the PLRA’s requirements.

1 As the Magistrate Judge previously noted, “[i]f all that was required to establish
2 successfully the complexity of the relevant issues was a demonstration of the need for
3 development of further facts, practically all cases would involve complex legal issues.”
4 Wilborn, 789 F.2d at 1331. The Court is cognizant of Plaintiff’s pro se status, and his lack
5 of experience in conducting cross examination and, generally, with in-court litigation.
6 But Plaintiff has “demonstrated sufficient writing ability and legal knowledge to
7 articulate his claim,” Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991), and has
8 “repeatedly proven himself to be an able litigant” through the submission of “well-
9 articulated motions to date.” Dunsmore, 2013 U.S. Dist. LEXIST 153656, at *4; see also
10 Palmer, 560 F.3d at 970 (finding no abuse of discretion where the district court refused to
11 appoint counsel in light of pro se prisoner’s ability to “present evidence effectively” and
12 to do “quite a good job” litigating his case); Agyeman, 390 F.3d at 1103; Terrell, 935
13 F.2d at 1017. Moreover, the issue of exhaustion will be adjudicated by a bench trial,
14 allowing the Court to take special precautions to “avoid undue prejudice to the pro se
15 litigant.” Abdullah v. Gunter, 949 F.2d 1032, 1036 (8th Cir. 1991).

16 In sum, Plaintiff has failed to differentiate himself from the position of many pro
17 se prisoner litigants, (Doc. 57), and has demonstrated that he is able to “articulate his
18 claims” in light of the relative complexity of the matter. See Morgai, 2012 U.S. Dist.
19 LEXIS 102432, at *11 (citation omitted) (noting that the traditional difficulties “which
20 any litigant would have proceeding pro se . . . do not indicate exceptional factors”);
21 Miller v. Lamontagne, 2012 U.S. Dist. LEXIS 66452, at *1 (S.D. Cal. May 11, 2012)
22 (noting that traditional access and logistical difficulties merely demonstrate the
23 difficulties any prisoner would have litigating pro se and do not constitute exceptional
24 circumstances). The exceptional circumstances that might require appointment of counsel
25 are not present, Wilborn, 789 F.2d at 1331, accord Palmer, 560 F.3d at 970, and the
26 Court will deny Plaintiff’s motion accordingly.

27
28 **IV.**

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

For the aforementioned reasons,

IT IS ORDERED that Plaintiff's Motion for Appointment of Counsel, (Doc. 112), is hereby **DENIED**.

Dated this 12th day of May, 2016.


James A. Teilborg
Senior United States District Judge