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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 DAMIEN DWAYNE OLIVE,

12 Plaintiff,

13 vs.

14 PRATAP LAKSHMI NARAYAN,

15 Defendant.
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1:15-cv-01645-GSA-PC

ORDER GRANTING MOTION TO
WITHDRAW AND DENYING MOTION FOR
APPOINTMENT OF COUNSEL
(ECF No. 28.)

ORDER WITHDRAWING PLAINTIFF'S
OPPOSITION FILED FEBRUARY 28, 2017
(ECF No. 20.)

19 **I. BACKGROUND**

20 Damien Dwayne Olive ("Plaintiff") is a state prisoner proceeding pro se and in forma
21 pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint
22 commencing this action on October 30, 2015. (ECF No. 1.) This action now proceeds with the
23 First Amended Complaint filed on April 28, 2016, against sole defendant Dr. Pratap Lakshmi
24 Narayan ("Defendant"), on Plaintiff's Eighth Amendment medical claim. (ECF No. 11.)

25 On January 26, 2017, Defendant filed a motion to dismiss, which is pending. (ECF No.
26 17.) On February 28, 2017, Plaintiff filed an opposition to the motion. (ECF No. 20.) On
27 April 13, 2017, the court issued an order permitting Plaintiff to withdraw his opposition and file
28 an amended opposition. (ECF No. 24.) On May 5, 2017, Plaintiff filed an amended

1 opposition, a motion to withdraw his previous opposition, and a motion for appointment of
2 counsel. (ECF No. 28.)

3 **II. MOTION TO WITHDRAW**

4 Pursuant to the court's order of April 13, 2017, Plaintiff has filed an amended
5 opposition to Defendant's motion to dismiss and a motion to withdraw his previous opposition
6 filed on February 28, 2017. The motion to withdraw is granted, and Plaintiff's previous
7 opposition shall be withdrawn.

8 **III MOTION FOR APPOINTMENT OF COUNSEL**

9 Plaintiff requests appointment of counsel. Plaintiff does not have a constitutional right
10 to appointed counsel in this action, Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), and
11 the court cannot require an attorney to represent Plaintiff pursuant to 28 U.S.C. § 1915(e)(1).
12 Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 298
13 (1989). However, in certain exceptional circumstances the court may request the voluntary
14 assistance of counsel pursuant to section 1915(e)(1). Rand, 113 F.3d at 1525.

15 Without a reasonable method of securing and compensating counsel, the court will seek
16 volunteer counsel only in the most serious and exceptional cases. In determining whether
17 "exceptional circumstances exist, the district court must evaluate both the likelihood of success
18 of the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the
19 complexity of the legal issues involved." Id. (internal quotation marks and citations omitted).

20 In the present case, the court does not find the required exceptional circumstances. At
21 this stage in the proceedings, the court cannot make a determination that Plaintiff is likely to
22 succeed on the merits; Defendant's motion to dismiss for failure to exhaust administrative
23 remedies and failure to state a claim is now pending and may dispose of the case. Moreover,
24 based on the record in this case, Plaintiff is able to adequately articulate his claims. Further, the
25 legal issue in this case – whether Defendant was deliberately indifferent to Plaintiff's medical
26 needs – is not complex. Therefore, Plaintiff's motion for counsel shall be denied without
27 prejudice to renewal of the motion at a later stage of the proceedings.

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1 **IV. CONCLUSION**

2 Based on the foregoing, it is HEREBY ORDERED that:

- 3 1. Plaintiff's motion to withdraw his opposition and file an amended opposition to
4 Defendant's motion to dismiss is GRANTED;
- 5 2. Plaintiff's opposition to Defendant's motion to dismiss, filed on February 28,
6 2017, is WITHDRAWN; and
- 7 3. Plaintiff's motion for appointment of counsel is DENIED, without prejudice to
8 renewal of the motion at a later stage of the proceedings.

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10 IT IS SO ORDERED.

11 Dated: May 8, 2017

/s/ Gary S. Austin
12 UNITED STATES MAGISTRATE JUDGE