

1 Plaintiff's claim against Defendant Patel for nominal, compensatory, and punitive damages
2 resulting from Defendant Patel's alleged violation of Plaintiff's Eighth Amendment rights. All
3 parties have consented to Magistrate Judge jurisdiction. (ECF No. 44.) This case is set for a jury
4 trial commencing February 14, 2022.

5 A telephonic trial confirmation hearing ("TTCH") was held on December 13, 2021.
6 Plaintiff, appearing *pro se*, and Robert M. Perkins III, Lucia Q. Li, and Sharon Garske,¹ counsel
7 for Defendant, attended the hearing. As discussed on the record and explained more fully below,
8 Plaintiff's motions requesting permission to resubmit his pretrial statement, for attendance of
9 incarcerated witnesses, and for appointment of counsel, (ECF Nos. 68, 69, 70), are denied.

10 During the TTCH, Plaintiff also notified the Court that he has recently been transferred to
11 California Correctional Institution. Accordingly, a courtesy copy of the instant order will be
12 served on Plaintiff at his current institution.

13 **II. Procedural Background**

14 Pursuant to the May 18, 2021, Second Scheduling Order, Plaintiff's pretrial statement,
15 motions for attendance of incarcerated witnesses at trial, and names and locations of
16 unincarcerated witnesses who refuse to testify voluntarily, were all due on or before October 6,
17 2021. (ECF No. 50.)

18 On September 30, 2021, Plaintiff filed a notice of change of address, (ECF No. 55), and
19 on October 18, 2021 Plaintiff filed a motion requesting an extension of time because he had
20 recently been transferred and had not received his property or been able to attend the law library,
21 (ECF No. 56). The Court construed the motion as requesting an extension of time to file
22 Plaintiff's pretrial statement, motion for incarcerated witnesses, and names and locations of
23 unincarcerated witnesses, and extended those deadlines to November 9, 2021. (ECF No. 57.)

24 On November 8, 2021, Plaintiff filed a brief pretrial statement and a motion indicating
25 that he would not be calling any witnesses. (ECF Nos. 62, 63.) Defendant Patel filed a pretrial
26 statement on November 18, 2021. (ECF No. 65.)

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28 ¹ Attorney Sharon Garske has not filed a notice of appearance on behalf of Defendant Patel. Ms. Garske should file a
notice of appearance as soon as feasible in this action.

1 Currently before the Court are Plaintiff's motion requesting permission to resubmit his
2 pretrial statement and the names of two incarcerated witnesses, both filed December 2, 2021,
3 (ECF Nos. 68, 69), and Plaintiff's motion to appoint counsel and proposed resubmitted pretrial
4 statement, both filed December 6, 2021, (ECF Nos. 70, 71). Defendant filed an opposition to
5 Plaintiff's resubmitted pretrial statement on December 7, 2021. (ECF No. 72.) The motions are
6 deemed submitted. Local Rule 230(l).

7 **II. Plaintiff's Motion Requesting Permission to Resubmit Pretrial Statement**

8 In his motion, Plaintiff states that he seeks permission to resubmit his pretrial statement to
9 correct the deficiencies in his previous pretrial statement. (ECF No. 68.) Plaintiff states that he is
10 a novice of the law and was not sure what a pretrial statement consisted of. (*Id.*) In the
11 resubmitted pretrial statement, Plaintiff sets forth his version of the undisputed and disputed facts,
12 but does not otherwise list any additional witnesses or exhibits he will present at trial. (ECF No.
13 71.)

14 Plaintiff's request is denied. The Court's May 18, 2021 Second Scheduling Order
15 included a copy of Local Rule 281, which sets forth in detail the form and contents of pretrial
16 statements. (ECF No. 50-1.) The Second Scheduling Order and Local Rule 281 were served on
17 Plaintiff at his address of record, and Plaintiff does not allege that he did not receive these
18 documents.

19 Further, Plaintiff was already granted an extension of time to file his pretrial statement.
20 (ECF No. 57.) In his motion requesting an extension of time, Plaintiff stated only that he did not
21 have his property and that he was unable to attend the law library. (*See* ECF No. 56.) At no time
22 did Plaintiff inform the Court that he did not understand how to file a pretrial statement or that he
23 did not understand what should be included therein.

24 Finally, Plaintiff's motion states that he wishes to resubmit his pretrial statement "to
25 correction the deficiencies" in his previous pretrial statement. (ECF No. 68.) However,
26 Plaintiff's proposed pretrial statement, which sets forth additional undisputed and disputed facts,
27 does not otherwise add additional information regarding what evidence or witnesses Plaintiff may
28 wish to call at trial, and therefore would not correct the deficiencies of the original pretrial

1 statement. In consideration of all of the above, the Court does not find that Plaintiff has presented
2 sufficient justification to allow him to resubmit his pretrial statement. Plaintiff's December 6,
3 2021 pretrial statement, (ECF No. 71), is therefore disregarded.

4 **III. Motion for Attendance of Incarcerated Witnesses**

5 Plaintiff has submitted the names of two incarcerated witnesses, Randolph Rachell
6 (CDCR #F-88709) and Martin Bibbs (CDCR #H-03951). (ECF No. 69.) Plaintiff has not
7 included any other information about these witnesses or their anticipated testimony. The Court
8 construes the filing as a motion for attendance of incarcerated witnesses.

9 In determining whether to grant Plaintiff's motions for the attendance of incarcerated
10 witnesses, the Court considers the following factors: (1) whether the inmate's presence will
11 substantially further the resolution of the case, (2) the security risks presented by the inmate's
12 presence, (3) the expense of transportation and security, and (4) whether the suit can be stayed
13 until the inmate is released without prejudice to the cause asserted. *Wiggins v. County of*
14 *Alameda*, 717 F.2d 466, 468 n.1 (9th Cir. 1983); *see also Walker v. Sumner*, 14 F.3d 1415, 1422
15 (9th Cir. 1994) (district court did not abuse its discretion when it concluded the inconvenience
16 and expense of transporting inmate witness outweighed any benefit he could provide where the
17 importance of the witness's testimony could not be determined), *abrogated on other grounds by*
18 *Sandin v. Conner*, 515 U.S. 472 (1995).

19 As explained in the Court's May 18, 2021 Second Scheduling Order, in order to obtain the
20 attendance of incarcerated witnesses, a party is required to serve a motion for a court order
21 requiring that the witness be brought to court at the time of trial. "The motion must: (1) state the
22 name, address, and prison identification number of each such witness; and (2) be accompanied by
23 declarations showing that each witness is willing to testify and that each witness has actual
24 knowledge of relevant facts." (ECF No. 50, p. 2.) If the witness is not willing to testify
25 voluntarily, the party must indicate in the motion that the incarcerated witness is not willing to
26 testify voluntarily. (*Id.* at 3.) Further, as discussed above, any such motion was due on or before
27 November 9, 2021, the extended deadline set by the Court's prior order. (ECF No. 57.)

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1 In his November 8, 2021 filing, Plaintiff originally stated that he would not be calling any
2 witnesses. (ECF No. 62.) Plaintiff now seeks to call two incarcerated witnesses, but has failed to
3 provide any explanation for the change or the late filing of his request.

4 Even assuming Plaintiff had timely filed his request for the attendance of these
5 incarcerated witnesses, Plaintiff has failed to include the required information regarding the
6 witnesses' addresses, their willingness to testify, or any showing that they have actual knowledge
7 of relevant facts. Furthermore, as discussed during the TTCH, Plaintiff does not appear to have
8 knowledge as to what information or events his proposed witnesses would testify to during trial.

9 Based on the minimal information provided, the Court cannot find that the presence or
10 testimony of these inmates will substantially further the resolution of the case such that the Court
11 can justify the security risks or expenses of their transport to court for this trial. Plaintiff's motion
12 for attendance of these incarcerated witnesses is therefore denied. *See Walker*, 14 F.3d at 1422
13 (district court did not abuse its discretion when it concluded the inconvenience and expense of
14 transporting inmate witness outweighed any benefit he could provide where the importance of the
15 witness's testimony could not be determined).

16 **IV. Motion to Appoint Counsel**

17 As explained during the TTCH, Plaintiff does not have a constitutional right to appointed
18 counsel in this action, *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *rev'd in part on*
19 *other grounds*, 154 F.3d 952, 954 n.1 (9th Cir. 1998), and the court cannot require an attorney to
20 represent plaintiff pursuant to 28 U.S.C. § 1915(e)(1). *Mallard v. U.S. Dist. Court for the S. Dist.*
21 *of Iowa*, 490 U.S. 296, 298 (1989). However, in certain exceptional circumstances the court may
22 request the voluntary assistance of counsel pursuant to section 1915(e)(1). *Rand*, 113 F.3d at
23 1525.

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

1 The Court has considered Plaintiff's request, but does not find the required exceptional
2 circumstances. Even if it is assumed that Plaintiff is not well versed in the law and that he has
3 made serious allegations which, if proved, would entitle him to relief, his case is not exceptional.
4 This Court is faced with similar cases filed by prisoners who are proceeding *pro se* almost daily.
5 These litigants also must represent themselves at trial without the assistance of counsel.

6 Furthermore, at this stage in the proceedings, the Court cannot make a determination that
7 Plaintiff is likely to succeed on the merits. Although Plaintiff's case is proceeding to trial, this
8 does not alone indicate a likelihood of success on the merits. Finally, based on a review of the
9 record in this case, the Court does not find that Plaintiff cannot adequately articulate his claims.

10 **V. Order**

11 Based on the foregoing, IT IS HEREBY ORDERED as follows:

- 12 1. Plaintiff's motion requesting permission to resubmit pretrial statement, (ECF No. 68), is
13 DENIED;
- 14 2. Plaintiff's resubmitted pretrial statement, (ECF No. 71), is DISREGARDED;
- 15 3. Plaintiff's witness list, (ECF No. 69), is CONSTRUED as a motion for attendance of
16 incarcerated witnesses;
- 17 4. Plaintiff's motion for attendance of incarcerated witnesses, (ECF No. 69), is DENIED;
- 18 5. Plaintiff's motion to appoint counsel, (ECF No. 70), is DENIED; and
- 19 6. The Clerk of the Court is DIRECTED to serve a copy of the instant order on Plaintiff at
20 his current address of record and to serve a courtesy copy to: **Elvis Venable, P32015,**
21 **P.O. Box 1031, Tehachapi, California 93581.**

22
23 IT IS SO ORDERED.

24 Dated: December 13, 2021

/s/ Barbara A. McAuliffe
25 UNITED STATES MAGISTRATE JUDGE