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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT HERRERA,

Plaintiff,

No. CIV S-10-1280 GEB DAD P

vs.

B. WHEELER, et al.,

Defendants.

ORDER

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Plaintiff, a state prisoner proceeding pro se, is seeking relief pursuant to 42 U.S.C. § 1983. On June 2, 2010, the undersigned issued findings and recommendations, recommending that this action be dismissed as duplicative of plaintiff's action in Case No. Civ. S-10-1181 JFM. Pending before the court are plaintiff's objections to those findings and recommendations.

**PLAINTIFF'S OBJECTIONS**

In his objections, plaintiff concedes that his complaint in this action contains the same claims as his complaint filed in Case No. Civ. S-10-1181 JFM. (Obj. at 2.) However, plaintiff explains that in this case he has filed complete documents, whereas in his other case he

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1 has not. (Id. at 1-2.)<sup>1</sup> Accordingly, plaintiff requests that he be allowed to proceed with this  
2 action, while voluntarily dismissing the earlier filed action. (Id. at 2.)

3 In the interest of justice, the undersigned will honor plaintiff's request.<sup>2</sup> The court  
4 will vacate its June 2, 2010 findings and recommendations, and plaintiff is advised that if he  
5 wishes to proceed in the manner he has suggested he must file a request for voluntary dismissal  
6 pursuant to Federal Rule of Civil Procedure 41(a) in Case No. Civ. S-10-1181 JFM. Below, the  
7 court will evaluate plaintiff's in forma pauperis application and motion for the appointment of  
8 counsel.

9 **PLAINTIFF'S IN FORMA PAUPERIS APPLICATION**

10 Plaintiff's application to proceed in forma pauperis is incomplete. In particular,  
11 the certificate portion of plaintiff's request, which must be completed by his institution of  
12 incarceration, is absent. In addition, plaintiff has not filed a certified copy of his prison trust  
13 account statement for the six month period immediately preceding the filing of the complaint.  
14 See 28 U.S.C. § 1915(a)(2). Nevertheless, plaintiff will be provided with another opportunity to  
15 submit a complete in forma pauperis application.

16 **PLAINTIFF'S MOTION FOR THE APPOINTMENT OF COUNSEL**

17 The United States Supreme Court has ruled that district courts lack authority to  
18 require counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist.  
19 Court, 490 U.S. 296, 298 (1989). In certain exceptional circumstances, however, the district  
20 court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell  
21 v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36  
22 (9th Cir. 1990).

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23 <sup>1</sup> Plaintiff apparently is referring to the approximately ninety pages of documents  
24 attached to his complaint in this action made up of CDCR incident reports, rukles violation  
25 reports, prison administrative appeals and the responses thereto.

26 <sup>2</sup> The court notes that plaintiff's complaint has yet to be screened in his earlier filed  
action, Case No. Civ. S-10-1181 JFM.



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5. Plaintiff's May 25, 2010 motion for the appointment of counsel (Doc. No. 4) is denied.

DATED: July 29, 2010.

  
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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

DAD:sj  
herr1280.vac+3e+31