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8	IN THE UNITED STATES DISTRICT COURT
9	FOR THE EASTERN DISTRICT OF CALIFORNIA
10	ROBERT HERRERA,
11	Plaintiff, No. CIV S-10-1280 GEB DAD P
12	VS.
13	B. WHEELER, et al.,
14	Defendants. <u>ORDER</u>
15	/
16	Plaintiff, a state prisoner proceeding pro se, is seeking relief pursuant to 42 U.S.C.
17	§ 1983. On June 2, 2010, the undersigned issued findings and recommendations, recommending
18	that this action be dismissed as duplicative of plaintiff's action in Case No. Civ. S-10-1181 JFM.
19	Pending before the court are plaintiff's objections to those findings and recommendations.
20	PLAINTIFF'S OBJECTIONS
21	In his objections, plaintiff concedes that his complaint in this action contains the
22	same claims as his complaint filed in Case No. Civ. S-10-1181 JFM. (Obj. at 2.) However,
23	plaintiff explains that in this case he has filed complete documents, whereas in his other case he
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has not. $(\underline{Id.} \text{ at } 1-2.)^1$ Accordingly, plaintiff requests that he be allowed to proceed with this action, while voluntarily dismissing the earlier filed action. (Id. at 2.)

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

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PLAINTIFF'S IN FORMA PAUPERIS APPLICATION

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

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PLAINTIFF'S MOTION FOR THE APPOINTMENT OF COUNSEL

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

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

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

1	The test for exceptional circumstances requires the court to evaluate the plaintiff's
2	likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in
3	light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,
4	1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances that
5	are common to most prisoners, such as lack of legal education and limited law library access, do
6	not establish exceptional circumstances that would warrant a request for voluntary assistance of
7	counsel. In the present case, the court does not find the required exceptional circumstances and
8	therefore will deny plaintiff's request for the appointment of counsel.
9	CONCLUSION
10	In accordance with the above, IT IS HEREBY ORDERED that:
11	1. The court's June 2, 2010 findings and recommendations (Doc. No. 5) are
12	vacated;
13	2. Plaintiff's May 25, 2010 motion to proceed in forma pauperis (Doc. No. 2) is
14	denied;
15	3. Plaintiff shall submit, within thirty days from the date of this order a properly
16	completed in forma pauperis application that includes a certified copy of plaintiff's prison trust
17	account statement for the six-month period immediately preceding the filing of the complaint in
18	this action and a prison official's certification; plaintiff is cautioned that failure to comply with
19	this order or seek an extension of time to do so will result in a recommendation that this action be
20	dismissed without prejudice;
21	4. The Clerk of the Court is directed to send plaintiff an Application to Proceed
22	In Forma Pauperis By a Prisoner for use in a civil rights action; and
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1	5. Plaintiff's May 25, 2010 motion for the appointment of counsel (Doc. No. 4) is
2	denied.
3	DATED: July 29, 2010.
4	DepD
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6	UNITED STATES MAGISTRATE JUDGE
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