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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CLARENCE A. GIPBSIN,
Plaintiff,
v.
SCOTT KERNAN, et al.,
Defendants.

No. 2:12-cv-0556 KJM DB P
ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action under 42 U.S.C. § 1983. Plaintiff claims defendants violated his rights under the Eighth Amendment by failing to timely transfer him to a state hospital. Presently before the court are plaintiff’s motions requesting the appointment of counsel (ECF Nos. 278, 281, 285, 287, 291) and motions seeking miscellaneous relief (ECF Nos. 278, 282, 283, 290).

I. Motions Seeking the Appointment of Counsel

A. Plaintiff’s Motions

In support of his motions to appoint counsel plaintiff argues that his vision is declining, and he has been prescribed glasses. (ECF No. 278.) He also indicates that counsel should be Appointed because he is pursuing a motion pursuant to California Senate Bill 1437¹ in state court

¹ California Senate Bill 1437 changed the liability for felony murder and allows individuals convicted under the prior standard to petition the court that sentenced them to vacate the murder conviction and be resentenced on the remaining counts. Davis v. Munoz, No. 5:19-cv-0329 JAK SHK, 2019 WL 2424540, *4 (May 2, 2019); Cal. Penal Code § 1170.95.

1 and he will be released soon. (ECF Nos. 278, 281, 287.) Plaintiff also alleges that he cannot
2 afford counsel (ECF No. 291), has encountered issues obtaining writing supplies, and he is not
3 receiving his mail (ECF No. 285).

4 **B. Legal Standards**

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

10 The test for exceptional circumstances requires the court to evaluate the plaintiff's
11 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in
12 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,
13 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances
14 common to most prisoners, such as lack of legal education and limited law library access, do not
15 establish exceptional circumstances that would warrant a request for voluntary assistance of
16 counsel.

17 In the present case, the court does not find the required exceptional circumstances.
18 Among the reasons cited, plaintiff's need for glasses and the COVID-19 pandemic are nothing
19 more than circumstances common to most inmates are not grounds for the appointment of
20 counsel.

21 **C. Analysis**

22 In order to appoint counsel, the court must evaluate plaintiff's likelihood of success on the
23 merits. Because the undersigned has issued findings and recommendations currently with the
24 instant order recommending that summary judgment be granted in favor of defendants, the court
25 finds that plaintiff does not have a likelihood of success on the merits. Accordingly, the court
26 will deny the motions to appoint counsel.

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1 **II. Motions Seeking Miscellaneous Relief**

2 Plaintiff’s various motions often contain complaints regarding his current conditions of
3 confinement. For example, plaintiff states he has not received packages and he has filed a health
4 care grievance regarding dental issues. Plaintiff is advised that those issues are unrelated to his
5 underlying claim in this action. Therefore, the court cannot grant relief based on current issues in
6 this unrelated civil rights action. If plaintiff feels that his current conditions of confinement
7 violate his constitutional rights, he may file a separate § 1983 claim after exhausting
8 administrative remedies.

9 **A. Motion for Federal Investigation**

10 Plaintiff alleges he can show that correctional officers let inmates get hurt on the yard
11 without pressing their alarm and officers allow inmates to go into other inmates’ cells. (ECF No.
12 282.) He also claims he has seen inmates with drugs and weapons. Plaintiff seeks a federal
13 investigation into his allegations. However, these allegations do not relate to plaintiff’s
14 underlying claim in this action. Therefore, the court will deny plaintiff’s motion.

15 **B. Motion for Clarification of Scheduling Order**

16 Plaintiff seeks clarification of the schedule in this action. (ECF No. 283.) As the court
17 has recommended summary judgment be granted in this action, there are no pending deadlines
18 other than the time for filing objections to the findings and recommendations. Any future court
19 dates will depend on whether the findings and recommendations are adopted or rejected. Plaintiff
20 will be notified of any future proceedings in this action. The court will grant the motion to the
21 extent that this order shall serve as clarification of the schedule in this action.

22 **C. Motion for Pretrial Review**

23 Plaintiff seeks to set this matter for hearing. (ECF No. 290.) However, pursuant to Local
24 Rule 230(1) in matters where one party is incarcerated and proceeding pro se as plaintiff is in this
25 action, all motions shall be submitted on the record without oral argument unless otherwise
26 ordered by the court. Additionally, as set forth above, because findings and recommendations are
27 now pending there is no need for pretrial review at this time. Accordingly, the court will deny
28 plaintiff’s motion for hearing.

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III. Conclusion

For the reasons set forth above, IT IS HEREBY ORDERED that:

- 1. Plaintiff’s motions to appoint of counsel (ECF Nos. 278, 281, 285, 287, 291) are denied.
- 2. Plaintiff’s motion for federal investigation (ECF No. 282) is denied.
- 3. Plaintiff’s motion for clarification (ECF No. 283) is granted.
- 4. Plaintiff’s motion for hearing (ECF No. 291) is denied.

Dated: December 30, 2020


DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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DLB:1/Orders/Prisoner.Civil.Rights/gipb0556.var