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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

HENRY A. JONES,  
Plaintiff,  
v.  
P. KUPPINGER, et al.,  
Defendants.

No. 2:13-cv-0451 WBS AC P

ORDER

I. Introduction

Plaintiff is a state prisoner who proceeds pro se in this civil rights action filed pursuant to 42 U.S.C. 1983. Presently pending is plaintiff’s third request for appointment of counsel, ECF No. 63; plaintiff’s motions filed against each defendant challenging their respective responses to plaintiff’s Second Set of Interrogatories, ECF Nos. 70-1; plaintiff’s renewed requests that the court set a mandatory settlement conference, see ECF Nos. 63, 70-1; and plaintiff’s renewed request for copies of court filings in this case, see ECF No. 64. For the reasons that follow, the undersigned grants plaintiff’s request for appointment of counsel for the limited purpose of participating in a mandatory settlement conference; denies plaintiff’s motions concerning discovery; and partially grants plaintiff’s request for copies of court filings.

This action proceeds on plaintiff’s claims set forth in his Second Amended Complaint (SAC), ECF No. 30, against two correctional officers, challenging their responses to plaintiff’s

1 suicide threats and attempt on May 13, 2013. The court has found that the SAC states cognizable  
2 claims against defendant Kuppinger for deliberate indifference to plaintiff's serious medical  
3 needs and excessive force; and against defendant Moore for deliberate indifference to plaintiff's  
4 serious medical needs and failure to protect plaintiff from excessive force. See ECF No. 46 at 5;  
5 ECF No. 62 at 1. Plaintiff is a three-strikes litigant, under 28 U.S.C. § 1915(g), who paid the  
6 filing fee to pursue this action.<sup>1</sup> See ECF Nos. 34-7.

7 The discovery deadline expired in this action on November 20, 2015, and the deadline for  
8 filing dispositive motions will expire on March 20, 2016. See ECF No. 62.

9 II. Plaintiff's Request for Appointment of Counsel

10 Plaintiff has submitted a third request for appointment of counsel. As plaintiff has  
11 previously been informed, the district court may request the voluntary assistance of counsel  
12 pursuant to 28 U.S.C. § 1915(e)(1) only in certain "exceptional circumstances." Terrell v.  
13 Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36  
14 (9th Cir. 1990); see also Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989) (district  
15 courts do not have authority to require attorneys to represent indigent prisoners in Section 1983  
16 cases). When determining whether "exceptional circumstances" exist, the court must consider  
17 plaintiff's likelihood of success on the merits as well as his ability to articulate his claims pro se  
18 in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th  
19 Cir. 2009). The burden of demonstrating exceptional circumstances is on the plaintiff. Id.  
20 Circumstances common to most prisoners, such as lack of legal education and limited law library  
21 access, do not establish exceptional circumstances supporting appointment of counsel. Id.

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22 <sup>1</sup> Notably, the three cases supporting the finding that plaintiff is a three-strikes litigant under 28  
23 U.S.C. 1915(g) were filed in 2004 and 2005. See ECF No. 34. Plaintiff has filed five cases in  
24 this court since 2010; all except the instant case are now closed. See Jones v. Sahota et al., Case  
25 No. 2:10-cv-03206 MCE EFB P (closed 02/26/13; summary judgment for defendants on the  
26 claim that defendants were deliberately indifferent in responding to plaintiff's chronic insomnia);  
27 Jones v. Jaffe et al., Case No 2:11-cv-02049 KJM DAD P (closed 01/21/15; summary judgment  
28 for defendant physician on plaintiff's claim that implantation of his cardiac defibrillator was  
unnecessary and therefore a violation of the Eighth Amendment); Jones v. Virga et al. (aka, Jones  
v. Whitted), Case No. 2:12-cv-02695 MCE KJN P (closed 06/30/14 pursuant to settlement;  
discussed and referenced herein as "Whitted"); and Jones v. Harris, Case No. 2:13-cv-00677  
DAD P (closed 02/12/14; dismissed without prejudice to plaintiff filing a habeas corpus action).

1 In denying plaintiff's initial request for appointment of counsel, on August 20, 2014, this  
2 court found that plaintiff's one-page request did not present the requisite exceptional  
3 circumstances. See ECF No. 42.

4 In his second, two-page, request for appointment of counsel, plaintiff stated that he was "a  
5 serious health care inmate with locognitive [sic] fun[c]tioning" and limited education, a mental  
6 health patient, disabled under the Americans with Disabilities Act (ADA), and dependent on the  
7 help of other inmates to pursue this action. ECF No. 55 at 1-2; see also ECF No. 56 at 1-2. This  
8 court again found that plaintiff had not met his burden of demonstrating exceptional  
9 circumstances, for the following reasons, ECF No. 62 at 6:

10 Circumstances common to most prisoners, such as a deficient  
11 general education, lack of knowledge of the law, mental illness and  
12 disability, do not in themselves establish exceptional circumstances  
13 warranting appointment of voluntary civil counsel. Moreover, the  
14 legal issues in this case are well established, and clearly set forth by  
15 the court's order filed February 5, 2015. See ECF No. 46. Also,  
16 plaintiff's current motions demonstrate that plaintiff (and/or his  
17 current inmate assistant) understands the discovery process and the  
18 principal legal issues to be resolved by this litigation. Significantly,  
19 plaintiff's initial discovery motion triggered the service of  
20 supplemental responses by defendant.

21 In his instant request, which is 35 pages in length, plaintiff (with the assistance of inmate  
22 R. Houston), has submitted a copy of a portion of plaintiff's successful request for appointment of  
23 counsel in another case before this court, see Case No. 2:12-cv-02695 MCE KJN P (ECF No. 25)  
24 (hereafter "Whitted"), see n.1, supra, and a copy of the court's order granting that request (ECF  
25 No. 30). In the Whitted matter, Magistrate Judge Newman initially denied a request for  
26 appointment of counsel on grounds similar to those relied on by the undersigned, but  
27 subsequently found appointment appropriate on the basis of an expanded showing:

28 Plaintiff's current request for appointment of counsel seeks to  
address the court's [previously] stated concerns. In addition to  
providing copies of his correspondence with the Prison Law Office  
demonstrating plaintiff's efforts to obtain counsel on his own,  
plaintiff has submitted recent mental health records that include  
Interdisciplinary Treatment Team 90-Day Reports, dated August  
29, 2013, November 14, 2013, and January 28, 2014. These reports  
indicate that plaintiff is assigned to the Enhanced Outpatient  
Program (EOP); that he is diagnosed with Major Depressive  
Disorder, Recurrent w/ Psychotic Features; Polysubstance  
Dependence, Institutional Remission; and Personality Disorder.

1 The reports also indicate that plaintiff experiences auditory  
2 hallucinations, engages in self-injurious behaviors, and poses an  
ongoing risk for assaultive and/or suicidal behaviors.

3 See Whitted, Case No. 2:12-cv-02695 MCE KJN P (ECF No. 30 at 2-3).

4 In the instant case, plaintiff has submitted copies of most of the above-referenced  
5 documentation in addition to copies of the following, see ECF No. 63:

6 (1) Interdisciplinary Progress Notes, dated February 17, 2015,  
7 noted that plaintiff had denied engaging in self-injurious behavior  
8 throughout the week despite passive suicidal ideations; stated that  
9 plaintiff would be retained in the EOP [Enhanced Outpatient  
Program]<sup>2</sup> level of care, and continue “weekly 1:1 mental health  
therapy and daily groups as available.” Id. at 18.

10 (2) Mental Health Treatment Plan, dated February 24, 2015, noted  
11 that plaintiff’s extensive history of suicide attempts, self-injurious  
12 behavior and suicidal ideation; feelings of depression/hopelessness/  
13 insomnia; experience of auditory hallucinations since age 13; and  
14 poor treatment compliance. Plaintiff’s psychiatric medications  
15 included Abilify, Remeron, Vistaril and Buspar.<sup>3</sup> It was the  
16 decision of the clinician that plaintiff be retained in the EOP  
17 program. Id. at 21.

18 (3) Treatment notes by the on-call case manager, dated April 17,  
19 2015, who noted plaintiff’s expressions of hopelessness and passive  
20 suicidal ideations, including “‘looking for a reason’ to actually  
21 commit suicide.” Id. at 19.

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24 <sup>2</sup> The California Department of Corrections and Rehabilitation defines its Enhanced Outpatient  
25 Program (EOP) mental health program as follows:

26 Enhanced Outpatient Program (EOP) – Inmates placed in this  
27 program include those with acute onset or significant  
28 decompensation because of a serious mental disorder and are  
unable to function in the prison general population, have  
demonstrated an inability to program in work, educational  
assignments, or other activities, have the presence of dysfunctional  
or disruptive social interaction including withdrawal or disruptive  
behavior as a result of serious mental disorder, or have an  
impairment in the activities of daily living including eating and  
grooming as a result of serious mental disorder.

29 See [www.cdcr.ca.gov/realignment/.../CDCRMentalHealthProgram.doc](http://www.cdcr.ca.gov/realignment/.../CDCRMentalHealthProgram.doc), at p. 2.

30 <sup>3</sup> These medications are prescribed to treat psychosis and mood disorders: Abilify is an  
31 antipsychotic; Remeron an antidepressant; and both Vistaril and Buspar are antianxiety  
32 medications. See Physicians’ Desk Reference (PDR), at [www.pdr.net](http://www.pdr.net).

1 (4) Mental Health Diagnosis,<sup>4</sup> dated July 21, 2015, which accorded  
2 plaintiff Axis I diagnoses of major depressive disorder with  
3 recurrent psychotic features, and polysubstance dependence (with  
4 institutional remission); Axis II diagnosis of personality disorder;  
5 several physical health issues under Axis III;<sup>5</sup> Axis IV notation of  
6 “Incarceration (LWOP);” and a Global Assessment of Functioning  
7 (GAF) of 50 (on a scale of 0 to 100). Id. at 20.

8 In addition, these documents indicate recent TABE (Test of Adult Basic Education) scores  
9 designating plaintiff’s educational level at or below Grade 4. See ECF No. 63 at 18, 19.

10 It is apparent that plaintiff is unable to articulate his claims pro se without significant  
11 assistance from others. Plaintiff’s current motion for appointment of counsel includes a sworn  
12 statement by inmate assistant R. Houston that he has prepared several pleadings for plaintiff,  
13 including plaintiff’s successful request for appointment of counsel in Whitted. Throughout the  
14 instant case, plaintiff has asserted that he had the assistance of other inmates, particularly  
15 Williams and Springfield. See, e.g. ECF Nos. 56, 64. This court’s prior finding that plaintiff’s  
16 filings “demonstrate that plaintiff (and/or his current inmate assistant) understands the discovery  
17 process and the principal legal issues to be resolved by this litigation,” ECF No. 62 at 6, clearly  
18 rested on the quality of plaintiff’s inmate assistance. Ongoing inmate assistance cannot be  
19 guaranteed, however, and in any event does not extend beyond the prison walls.

20 Additionally, while the undersigned previously found that “the legal issues in this case are  
21 well established, and clearly set forth by the court’s order filed February 5, 2015,” id. (citing ECF  
22 No. 46), the legal and factual questions presented by this case are inherently complex. Questions  
23 concerning the treatment of mentally ill prisoners, and the alleged use of excessive force against  
24 them, are always complicated. See e.g. Coleman v. Brown, 28 F. Supp. 3d 1068, 1109 (E.D. Cal.  
25 2014). Plaintiff’s well-documented mental illnesses and limited education limit his ability to

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26 <sup>4</sup> The American Psychiatric Association’s Diagnostic And Statistical Manual Of Mental  
27 Disorders, 5th ed. (DSM-5) sets forth a multi-axial system for diagnosing mental disorders. The  
28 Global Assessment of Functioning (GAF) represents the clinician’s judgment of the patient’s  
overall level of functioning.

<sup>5</sup> The following physical conditions are listed under Axis III: “Hx [history] of hypertension, hx  
of pacemaker (defibrillator for heart arrhythmia), hyperlipidemia, hx of gunshot to face, hx of  
kidney failure, hx of having one lung, hx of arthritis in R leg, hx of severe insomnia, hx of  
degenerative disk disease, hx of impacted bowels, obesity.” ECF No. 63 at 20. Plaintiff is 45  
years of age. Id.

1 advocate for himself against defendant correctional officers charged with deliberate indifference  
2 to plaintiff's serious medical and physical needs. Plaintiff's cognizable claims, premised on the  
3 serious factual allegations set forth in his SAC,<sup>6</sup> demonstrate a reasonable likelihood that plaintiff  
4 could prevail before a jury on the merits of this action.

5 The court also notes that review of defendants' discovery responses submitted to the court  
6 appear to reflect defendants' reluctance to consider the potential merit of plaintiff's allegations  
7 and claims. Had it not been for plaintiff's motion to compel further discovery responses filed  
8 June 15, 2015, defendant Kuppinger may not have supplemented his initial responses to  
9 plaintiff's Interrogatories, Set One, which contained only objections, or produced any documents  
10 responsive to plaintiff's Requests for Production, Set One. See ECF No. 62 at 2-3. Similarly, the  
11 court's review of each defendant's responses to plaintiff's Interrogatories, Set Two, demonstrates  
12 defendants' asserted lack of awareness or recollection concerning virtually every matter. See  
13 ECF No. 70, 71.

14 For these reasons, the undersigned is persuaded that plaintiff has now met his burden of  
15 demonstrating exceptional circumstances warranting the limited appointment of counsel in this  
16 case. Given the limited number of available volunteer counsel, this appointment will be for the  
17 purpose of conducting a mandatory settlement conference, as set forth below. Should this action  
18 fail to settle, the court will then inquire whether appointed counsel is willing to continue to  
19 represent plaintiff.

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23 <sup>6</sup> The SAC alleges that when plaintiff was previously incarcerated at California State Prison-  
24 Sacramento, he was placed in a cell soiled with feces; that defendant Moore and others ignored  
25 plaintiff's statements that he could not breath and his request to be moved to another cell, and  
26 ignored plaintiff's statements that he felt suicidal; that after plaintiff covered up his windows and  
27 threatened suicide, defendants (identified as defendant Kuppinger in the original complaint, ECF  
28 No. 1 at 6) told others that plaintiff was "just playing;" that later, defendant Moore asked plaintiff  
to remove the paper from his cell window and discovered that plaintiff had tied a noose and cut  
himself; that thereafter defendant Kuppinger used excessive force to push, slam and strike  
plaintiff while defendant Moore looked on but refused to intervene. See SAC, ECF No. 30.

1           III.     Plaintiff's Motions for an Order to Show Cause re Defendants' Discovery Responses

2           Plaintiff's moves for an "order to show cause" concerning the alleged bad faith,  
3 inconsistencies and false statements made in defendants' respective responses to plaintiff's  
4 Interrogatories, Set Two. See ECF Nos. 70-1. There is no authority for plaintiff's motion.  
5 Construing plaintiff's request as a motion to compel further responses to the interrogatories, the  
6 motion is denied. Although defendants' responses provide very little information, they conform  
7 to the requirements of Rule 33, Federal Rules of Civil Procedure, that each interrogatory be  
8 answered separately and fully, and any objection be stated with specificity. See Fed. R. Civ. P.  
9 33(b). Defendants' uninformative responses are due in part to the open-ended wording of many  
10 of plaintiff's interrogatories.

11           Accordingly, plaintiff's motions concerning defendants' respective responses to plaintiff's  
12 Interrogatories, Set Two, ECF Nos. 70-1, are denied.

13           IV.     Mandatory Settlement Conference

14           Plaintiff has repeatedly asked, and again asks, for a settlement conference in this action.  
15 See ECF Nos. 45, 61, 63, 64, 70, 71. Defendants have twice declined this option. See ECF No.  
16 47, 67. Defendants initially stated that they were investigating settlement possibilities but  
17 required additional time to conduct the investigation and invited plaintiff to send defendants'  
18 counsel a written settlement proposal. See ECF No. 47 at 2. Thereafter defendants stated only  
19 that they did "not believe a court-assisted settlement conference would be helpful at this time."  
20 ECF No. 67 at 1. Confronted with similar circumstances in Whitted, Magistrate Judge Newman  
21 convened a mandatory settlement conference, which settled the case. See Case No. 2:12-cv-  
22 02695 MCE KJN P.

23           In the present case, plaintiff would have difficulty opposing a dispositive motion pro se.  
24 Therefore, due to the limited availability of voluntary counsel to represent plaintiffs throughout  
25 an entire action, and in light of plaintiff's motivation to settle this case, the court will appoint  
26 counsel for the limited purpose of representing plaintiff in a mandatory settlement conference.  
27 The settlement conference will be scheduled after an attorney has been located and the  
28 appointment has been made.

1           V.     Copies of Court Filings

2           The court previously addressed plaintiff's prior request for the court's assistance in  
3 locating and retrieving (or providing duplicate copies of) his legal materials. See ECF No. 62 at  
4 5-6. Plaintiff then stated that the inmates previously assisting him in this case (Williams and  
5 Springfield) lost his materials. Because two months had passed, the court denied plaintiff's  
6 request without prejudice to filing a new request if plaintiff continued to be unable to obtain his  
7 materials.

8           In his present request, plaintiff seeks "all documents of file" (sic), without further  
9 description. See ECF No. 64. Review of the docket indicates that plaintiff should be in  
10 possession of all documents filed after his first request for assistance and related motions filed in  
11 June 2015, that is, beginning with ECF No. 54. The matters preceding that date are of little  
12 consequence in pursuing this action at this time. Moreover, the court record contains no  
13 discovery or other evidence in this case except that submitted by plaintiff himself in his motions  
14 to compel commencing in June 2015. In other words, the court has identified no documents on  
15 the docket that appear essential to plaintiff's current pursuit of this action, and plaintiff has not  
16 identified any. Therefore, plaintiff's request is again denied without prejudice.

17           Nevertheless, the Clerk of Court will be directed to provide plaintiff with a copy of the  
18 docket for his review. Should plaintiff require a specific court document in the future, he shall  
19 identify the document and explain why he needs a copy. However, in light of the court's decision  
20 to appoint counsel in this action, who will have access to the court's Case Management/Electronic  
21 Case Files system, plaintiff has no immediate need to request copies of filed documents.

22           VI.    Summary

23           Plaintiff's requests for appointment of counsel and for a mandatory settlement conference  
24 are granted. The court believes that a settlement conference may resolve the case. Plaintiff's  
25 mental health records and other documents persuade the court he cannot adequately represent  
26 himself at a settlement conference. Counsel is therefore appointed for purpose of a settlement  
27 conference.



1 Plaintiff's motions to require defendants to show cause in support of their responses to  
2 plaintiff's Interrogatories, Set Two, are denied because defendant's responses to the  
3 Interrogatories are acceptable under the Federal Rules of Civil Procedure.

4 Plaintiff's renewed request for copies of court filings is denied because plaintiff has not  
5 identified the documents that he is missing . Appointed counsel will have access to all court  
6 documents.

7 VII. Conclusion

8 In accordance with the above, IT IS HEREBY ORDERED that:

9 1. Plaintiff's request for appointment of counsel, ECF No. 63, is granted.

10 2. Plaintiff's renewed requests to convene a mandatory settlement conference in this  
11 action, ECF Nos. 61, 63-4, 70-1, are granted.


12 3. The Clerk of Court is directed to contact Sujean Park, Alternative Dispute Resolution  
13 Coordinator, for the purpose of locating an attorney admitted to practice in this court who is  
14 willing to accept appointment in this action for the limited purpose of representing plaintiff at a  
15 mandatory settlement conference.

16 4. Plaintiff's motions for court orders directing defendants to show cause in support of  
17 their responses to plaintiff's Interrogatories, Set Two, ECF No. 70-1, are denied.

18 5. Plaintiff's renewed request for copies of court documents, ECF No. 64, is denied  
19 without prejudice; the Clerk of Court is directed to send plaintiff a copy of the court's docket.

20 6. The March 20, 2016 deadline for filing dispositive motions, see ECF No. 62, is vacated  
21 pending further order of this court; no dispositive motions shall be filed prior to the settlement  
22 conference in this action.

23 DATED: December 2, 2015

24   
25 ALLISON CLAIRE  
26 UNITED STATES MAGISTRATE JUDGE  
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