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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TRAVYON C. HARBOR,  
Plaintiff,  
v.  
CHERNISS, et al.,  
Defendants.

No. 2:15-cv-0705 TLN DB P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Pending is plaintiff’s second request for appointment of counsel or a guardian ad litem (“GAL”) based on post-traumatic stress disorder (“PTSD”). plaintiff’s first request was denied on April 13, 2017, for lack of evidentiary support. (ECF No. 29.)

Federal Rule of Civil Procedure 17(c) requires a court to “appoint a guardian ad litem-or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.” Fed. R. Civ. P. 17(c)(2). “A party proceeding pro se in a civil lawsuit is entitled to a competency determination when substantial evidence of incompetence is presented.” Allen v. Calderon, 408 F.3d 1150, 1153 (9th Cir. 2005). In determining whether substantial evidence of incompetence is presented, the district court may consider sworn declarations from the pro se party or other inmates, sworn declarations or letters from treating psychiatrists or psychologists,

1 and his medical history. Id. at 1152-54.

2 A person's capacity to sue is measured by the standard of the law of his domicile, Fed. R.  
3 Civ. P. 17(b)(1), here California state law. "In California, a party is incompetent if he or she lacks  
4 the capacity to understand the nature or consequences of the proceeding, or is unable to assist  
5 counsel in the preparation of the case." Golden Gate Way, LLC v. Stewart, 2012 WL 4482053, at  
6 \*2 (N.D. Cal. Sept. 28, 2012) (citing In re Jessica G., 93 Cal. App. 4th 1180, 1186 (2001); Cal.  
7 Civ. Proc. Code § 372; and In re Sara D., 87 Cal. App. 4th 661, 666-67 (2001)).

8 As with his first request for a GAL, plaintiff's pending request is premised on the post-  
9 traumatic stress disorder he claims to suffer following defendant Cherniss's August 5, 2014,  
10 alleged sexual assault. As a result of that conduct, plaintiff asserts that he is currently  
11 experiencing night terrors, isolation, anxiety, paranoia delusions, fear, and frustration.

12 Plaintiff's first request was denied for lack of evidence of his mental impairment and its  
13 effect on his ability to litigate this action. In support of his renewed motion, plaintiff submits a  
14 number of documents, including the following:

15 (1) An October 10, 2016, request submitted by plaintiff to see a clinician "about his  
16 Mental Health Condition and PTSD." (ECF No. 33 at 11);

17 (2) An October 13, 2016, psychologist's report noting plaintiff's complaints of anxiety  
18 and stress related to the August 2014 incident. The examining psychologist suggested a PTSD  
19 group, consultation with a psychiatrist, and a referral to "CCCMS LOC." (ECF No. 33 at 13);

20 (3) An October 27, 2016, Mental Health Placement Chrono by the same psychologist who  
21 examined plaintiff two weeks earlier, noting plaintiff's complaints of anxiety, stress, inability to  
22 sleep, and audio hallucinations ("I hear his voice, he is laughing"). This psychologist indicated  
23 that plaintiff meets the inclusion criteria for the Mental Health Services Delivery System  
24 ("MHSDS") because he is experiencing anxiety, inability to sleep and disruptive thoughts. (ECF  
25 No. 33 at 12);

26 (4) A November 4, 2016, Mental Health Evaluation completed by C. Montgomery, Ph.D.  
27 noting that plaintiff was sexually assaulted once when he was three years old. He also noted  
28 plaintiff's symptoms as a result of the August 2014 incident, including anxiety, nightmares,

1 depression, and weight loss. These notes indicated that plaintiff's "[f]ocus and concentration were  
2 adequate. There did not appear to be any memory problems." Following an examination, Dr.  
3 Montgomery concludes as follows: "Pt has PTSD from the incident and is developing a major  
4 depression as a result of having to stay in the setting. He had some timidity when very young  
5 from the 1<sup>st</sup> abuse but he overcame that [sic]. This assault has probably triggered the old  
6 emotional trauma as well." Dr. Montgomery then recommended a PTSD group one time per week  
7 for one month, a referral for a medication, and "CBT, grounding, exposure tx's." (ECF No. 33 at  
8 19);

9 (5) A November 14, 2016, Interdisciplinary Progress Note from General Psychiatry where  
10 plaintiff noted himself indicated that he did not want to start any psychiatric medications at that  
11 point. Plaintiff was diagnosed with an adjustment disorder, no psych medications were indicated  
12 at that point, and he was advised to continue with "Therapy from PC." (ECF No. 33 at 25.)

13 (6) A November 17, 2016, Interdisciplinary Progress Note from Dr. Montgomery  
14 indicating that plaintiff was still "struggling with the thoughts and anxiety when back on the  
15 unit." Plaintiff was advised to not withdraw into his cell but instead to continue his activities and  
16 try mindfulness, active distraction, and other anxiety-reducing techniques. Dr. Montgomery noted  
17 plaintiff to be "calm and cooperative" with "linear and coherent" thoughts and "intact" memory.  
18 (ECF No. 33 at 26.)

19 (7) A November 29, 2016, Interdisciplinary Progress Note from Dr. Montgomery noting a  
20 recent incident of anxiety while plaintiff was watching football. Plaintiff was described as "stable  
21 but struggling with the thoughts and anxiety when back on the unit." (ECF No. 33 at 28.)

22 (8) A December 6, 2016, Interdisciplinary Progress Note from Dr. Montgomery noted an  
23 incident when defendant Cherniss was present during chow time and stood right next to plaintiff's  
24 seat causing plaintiff to feel anxious. Dr. Montgomery reviewed anxiety-reducing techniques with  
25 plaintiff. (ECF No. 33 at 29.)

26 (9) A December 19, 2016, Interdisciplinary Progress Note from Dr. Montgomery noting  
27 that plaintiff felt like "a huge weight has been lifted off of his shoulders" due to an upcoming  
28 transfer to another institution. Plaintiff "is sleeping a little better but is still extreme [sic] anxious

1 walking in the halls and around guards and crowds.” (ECF No. 33 at 30.)

2 (10) Two recent Interdisciplinary Progress Notes from March 1 and 7, 2017, indicate that  
3 plaintiff “appears stable but still struggles with intrusive thoughts and anxiety.” (ECF No. 33 at  
4 31-32.)

5 The documentary evidence is helpful to establish that plaintiff suffers from anxiety and  
6 possibly PTSD as a result of defendant Cherniss’s alleged conduct. None of this information,  
7 however, even remotely suggests that plaintiff lacks “the capacity to understand the nature or  
8 consequences of the proceeding, or is unable to assist counsel in the preparation of the case.”  
9 Golden Gate Way, 2012 WL 4482053, at \*2. For this reason, his motion for appointment of a  
10 GAL will be denied.

11 Insofar as plaintiff seeks the appointment of counsel, district courts lack authority to  
12 require counsel to represent indigent prisoners in section 1983 cases. Mallard v. United States  
13 Dist. Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an  
14 attorney to voluntarily represent such a plaintiff. See 28 U.S.C. § 1915(e)(1). Terrell v. Brewer,  
15 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir.  
16 1990). When determining whether “exceptional circumstances” exist, the court must consider  
17 plaintiff’s likelihood of success on the merits as well as the ability of the plaintiff to articulate his  
18 claims pro se in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d  
19 965, 970 (9th Cir. 2009) (district court did not abuse discretion in declining to appoint counsel).  
20 The burden of demonstrating exceptional circumstances is on the plaintiff. Id.

21 Circumstances common to most prisoners, such as lack of legal education and limited law  
22 library access, do not establish exceptional circumstances that warrant a request for voluntary  
23 assistance of counsel. Additionally, plaintiff’s claim that he suffers from a mental health  
24 condition, while supported by some evidence, fails to show that plaintiff lacks the ability to  
25 articulate his claims pro se. Having considered the factors under Palmer, the court finds that  
26 plaintiff has failed to meet his burden of demonstrating exceptional circumstances warranting the  
27 appointment of counsel at this time.

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Based on the foregoing, IT IS HEREBY ORDERED that plaintiff's second request for appointment of counsel or a GAL is DENIED.

Dated: June 7, 2017



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DEBORAH BARNES  
UNITED STATES MAGISTRATE JUDGE

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