

1 & Co., 571 F.3d 873, 880 (9th Cir. 2009). The Local Rules of this court require that a motion for
2 reconsideration identify “what new or different facts or circumstances are claimed to exist which
3 did not exist or were not shown upon such prior motion, or what other grounds exist for the
4 motion,” and must explain “why the facts or circumstances were not shown at the time of the
5 prior motion.” Local Rule 230(j)(3), (4) (emphasis added). Because defendants had no
6 opportunity to dispute plaintiff’s factual representations prior to the court’s action on the motion
7 for appointed counsel, the court will consider defendants’ information now. Upon
8 reconsideration, the order appointing counsel is affirmed.

9 The federal in forma pauperis statute confers on district courts the discretion to designate
10 counsel to represent indigent civil litigants. Franklin v. Murphy, 745 F.2d 1221, 1236 (9th Cir.
11 1984). Although the court cannot require an attorney to represent an indigent prisoner in a civil
12 rights action, Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989), it may request the
13 voluntary assistance of counsel when a case presents exceptional circumstances. Terrell v.
14 Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991). The test for exceptional circumstances requires an
15 evaluation of plaintiff’s likelihood of success on the merits of his claims and plaintiff’s ability to
16 articulate his claims pro se in light of the complexity of the legal issues involved. See Wilborn v.
17 Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir.
18 1983). “Neither of these factors is dispositive and both must be viewed together before reaching
19 a decision on request of counsel under section 1915(d).” Wilborn, 789 F.2d at 1331.

20 Plaintiff’s motion for appointment of counsel was filed on his behalf by another inmate,
21 on the ground that plaintiff had suffered a traumatic brain injury on July 12, 2018 and could no
22 longer represent himself. ECF No. 42. In finding that extraordinary circumstances supported the
23 appointment of pro bono counsel, the court noted the representations that plaintiff remained in
24 administratively segregated medical facilities following his hospital release; was experiencing
25 ongoing symptoms including confusion, visual impairment and impaired concentration; was
26 physically infirm; and had limited access to the law library and legal assistance from other
27 inmates due to his medical housing assignment. See ECF No. 43 at 1-2. Plaintiff had provided
28 medical documentation of his traumatic brain injury diagnosis. ECF No. 42 at 5. The medical

1 records also demonstrate that petitioner suffered multiple, severe fractures to the bones of his
2 face. Id. at 3-4. Inmate Santiago provided a sworn statement attesting to the other circumstances
3 upon which plaintiff relied. Id. at 1-2.

4 Defendants do not dispute that plaintiff suffered a traumatic brain injury last July. Rather,
5 they dispute Mr. Santiago's claims that plaintiff "cannot read, comprehend, or navigate a civil
6 suit" and "has no access to the law library or other inmates because he is in 'medical/ad-seg.'" ECF No. 47 at 6. Defendants emphasize that prior to the filing of plaintiff's motion for
7 appointment of counsel, but after his traumatic brain injury on July 12, 2018, plaintiff signed and
8 submitted two coherent documents to the court, apparently without assistance, wherein he failed
9 to mention his injury; defendants assert these filings contradict plaintiff's current contention he
10 cannot navigate this law suit on his own. Id. at 6-7 (citing ECF Nos. 40 & 41). Moreover, assert
11 defendants, "plaintiff appears to have written and signed the proof of service attached to his
12 motion to appoint counsel, under the penalty of perjury." Id. (citing ECF No. 42 at 6).

13
14 In support of their motion for reconsideration, defendants have submitted the declaration
15 of J. Pasion, the CSP-COR Litigation Coordinator. Pasion states that plaintiff is housed in CSP-
16 COR's Outpatient Housing Unit (OHU), which is located in the D-Wing of CSP-COR's
17 Correctional Treatment Center (CTC). Pasion Decl., ECF No. 47 at 9, ¶ 3. Pasion avers in full,
18 id. at 10, ¶¶ 4-5:

19 Mr. Turner has access to the law library resources via a computer
20 database located in the dayroom of the CTC D-Wing. Additionally,
21 the law librarian assigned to Facility 4B visits the inmate-patients in
22 OHU and the TC approximately once a week to ensure they have the
resources they need. [¶] Mr. Turner also has access to his legal
property while housed in OHU.

23 Defendants rely on Pasion's declaration to argue that plaintiff "has access to the law library
24 resources, and his legal property." Id. at 6.

25 Defendants have also submitted the declaration of F. Hernandez, a Nurse Practitioner
26 providing care to patients in CSP-COR's OHU. Hernandez describes the OHU as follows:

27 The OHU is a designated housing area within COR designed to
28 provide supportive services for inmate-patients who may require
limited assistance with activities of daily living (ADLs), such as

1 getting dressed, bathing, and grooming, or short-term observations.
2 The inmate patients do not require an acute level of care, and are in
a stable condition.

3 Hernandez Decl., ECF No. 47 at 12, ¶ 3.

4 Hernandez continues:

5 I have provided care to Mr. Lafonzo Turner [] for approximately the
6 past month while he has been housed in OHU. [¶] Mr. Turner is
7 able to complete his ADLs independently. He is alert and oriented,
8 aware of his surroundings, and has engaged in conversations with
9 me. [¶] I have observed Mr. Turner with paperwork next to him in
his cell. During a recent conversation with Mr. Turner, he went
through some of his paperwork to show me documents that were
related to our conversation.

10 Id. at 13, ¶¶ 4-6:

11 Hernandez has submitted two recent progress notes concerning plaintiff's status and care,
12 dated September 10, 2018 and September 25, 2018. See ECF No. 47 at 15-8. The first note lists
13 plaintiff's ongoing medical challenges, including "Fracture of temporal bone; Fracture of
14 zygomatic complex; Fracture, orbital; and Traumatic intracranial extradural hematoma." Id. at
15 15. The note recounts the examination of plaintiff's traumatic orbital fracture by the on-site
16 ophthalmologist, who diagnosed "history of left orbit fractures myopia early cataracts lattice
17 degeneration gurney and presbyopia." Id. The other functional assessments, including activities
18 of daily living (ADLs), provided in the note are as follows: "Alert and oriented x 3; Antral
19 gastritis; Difficulty chewing; Dizziness; Left foot drop; Mild Asthma; Lumbago," and ability to
20 exercise ten minutes a day. Id. at 15-6. Also listed is "Antisocial personality disorder; Paranoid
21 personality disorder." Id.

22 The second progress note, prepared two weeks later, reflects the results of a "routine OHU
23 round," which include: "Currently, the patient has no complaints of chest shortness of breath. No
24 headache occasional dizziness no blurry vision. No fevers or chills. No nausea vomiting diarrhea
25 constipation or abdominal pain." Id. at 17. The treatment plan lists plaintiff's orbital, temporal
26 and zygomatic complex fractures; his traumatic intracranial extradural hematoma; and plaintiff's
27 dizziness, difficulty chewing, left foot drop, urinary incontinence, and mild asthma. Id. The note
28 also orders additional physical therapy. Id.

1 Defendants rely on Hernandez’ declaration to argue that plaintiff “is able to complete his
2 ADLs independently, he is alert and oriented, aware of his surroundings, and has engaged in
3 conversation with [Hernandez].” ECF No. 47 at 6. Defendants contend, “[f]urthermore, during a
4 recent conversation with Plaintiff, the nurse practitioner observed Plaintiff go through his
5 paperwork to locate documents related to a conversation they were having, demonstrating the
6 Plaintiff has documents and can locate relevant documents when needed. Contrary to statements
7 in Plaintiff’s motion for appointment of counsel, it appears that Plaintiff is stable and functioning
8 independently.” Id. at 7 (internal citations omitted).

9 Defendants’ new information does not contradict Mr. Santiago’s statement and supporting
10 exhibits demonstrating that plaintiff had a traumatic brain injury on July 12, 2018 and, as a result,
11 suffers “effects of confusion, sight impairment, ability to concentrate, with the additional
12 impingements of ongoing migraines 24/7 headaches and dizziness when sitting up; among other
13 things plaintiff has been confined to a wheelchair with incontinence.” See ECF No. 42 at 1-2.
14 Additionally, although defendants’ new information makes it clear that plaintiff has access to his
15 legal documents and a shared computer with a legal database, and may request resources from the
16 prison law library each week, neither the Pasion nor Hernandez declarations indicate that plaintiff
17 is actually reading, understanding and preparing his legal papers, using the computer, or knows
18 what resources to request from the law library. Although Hernandez indicates that plaintiff “went
19 through some of his paperwork to show me documents that were related to our conversation,”
20 Hernandez does not identify the documents or the subject of conversation and there is no
21 indication either was related to plaintiff’s legal proceedings.

22 Hernandez’ statements that plaintiff was “aware of his surroundings,” “engaged in
23 conversations,” and had “paperwork next to him in his cell” also do not undermine the grounds
24 for appointment of counsel. Even if inmate Santiago went too far in suggesting that plaintiff is
25 entirely incapacitated, complete mental incapacitation is not the standard for appointment of
26 counsel.

27 The undersigned has reviewed the two post-injury filings identified by defendants, both
28 filed by plaintiff prior to the request for appointment of counsel, and finds that they do not

1 demonstrate plaintiff's ability to navigate this law suit on his own. The document filed August 3,
2 2018 is a half-page notice of plaintiff's change of address to CSP-COR, submitted in both of his
3 cases pending in this court.¹ ECF No. 40. Such notices are required by pro se litigants; failure to
4 timely provide a change of address risks dismissal, see Local Rule 183. Plaintiff filed four
5 previous change-of-address notices in this case. See ECF Nos. 7, 10, 20, 29. His continued
6 adherence to this rule with his simple filing three weeks after his injury demonstrates no more
7 than practiced caution.

8 Plaintiff's second filing, on August 8, 2018, less than one page in length, seeks the
9 dockets in both of plaintiff's pending cases and seeks to clarification that the correct case number
10 was provided on plaintiff's one-page motion for "default hearing" entered in his other case. The
11 referenced motion reflected the Clerk's entry of default against the sole defendant two months
12 earlier, on June 18, 2018. Again, this limited filing does not demonstrate plaintiff's ability to
13 effectively proceed pro se in the instant action.

14 Defendants also note that plaintiff's "virtual identical motion for the appointment of
15 counsel was denied in Turner v. Byer, No. 2:17-cv-01869 EFB (E.D. Cal.) on September 14,
16 2018." ECF No. 47 at 4 n.3. The undersigned has reviewed that order, and notes that the judge in
17 that case made no findings regarding plaintiff's medical condition, cognitive abilities, or other
18 circumstances. Moreover, because case complexity is central to the "extraordinary
19 circumstances" inquiry, the denial of appointment in another case has no bearing on this court's
20 analysis.

21 In sum, having considered defendants' evidence, the court reaffirms its previous finding
22 that plaintiff's ability to articulate his claims pro se, in light of the complexity of the legal issues
23 involved, supports the appointment of counsel at this time. The court also finds sufficient
24 potential merit in the case to warrant the appointment of pro bono counsel. At the very least,
25 plaintiff has presented a plausible Eighth Amendment claim. The Ninth Circuit has indicated that
26 the articulation of a cognizable claim for relief may itself be sufficient to satisfy the "merit"

27 ¹ Also pending in this court is plaintiff's case entitled Turner v. Byer, Case No. 2:17-cv-1869
28 EFB P.

1 analysis on a motion for appointment of counsel. See Tilei v. McGuinness, 642 Fed. Appx. 719,
2 722 (9th Cir. 2016) (finding that plaintiff’s “complaint states a claim for relief, and therefore
3 suggests that he may succeed on the merits”).

4 This action proceeds on plaintiff’s Eighth Amendment “failure to protect” claims that
5 each of the defendants, all medical providers fully apprised of plaintiff’s medical conditions and
6 accommodation needs, denied or failed to endorse plaintiff’s requests to obtain reinstatement of a
7 lower-tier chrono limiting his use of stairs. Plaintiff alleges that his medical records demonstrated
8 permanent “drop foot” in his left foot, neuropathy, knee and back problems, which together
9 impaired his ability to walk and to negotiate stairs. Due to defendants’ deliberate indifference,
10 plaintiff alleges he fell down several steel stairs on June 29, 2015, and was injured. The progress
11 notes recently submitted by defendants continue to note plaintiff’s left foot drop. For present
12 purposes, the court concludes that plaintiff has a reasonable likelihood of success on the merits of
13 his claims.

14 Appointment of counsel is also appropriate because deliberate indifference claims involve
15 an interplay of factual and legal issues that is inherently complex. As noted by another district
16 court in considering a request for appointment of counsel, “[p]laintiff’s claims of deliberate
17 indifference to medical needs and failure to protect based on medical status will turn on standards
18 of care, causation, and medical treatment issues that may require the testimony of expert
19 witnesses, necessitating expert discovery, a task that is undoubtedly complex.” Cataldo v.
20 Madox, 2017 WL 2733924, at *2, 2017 U.S. Dist. LEXIS 98521, at *5 (S.D. Cal. June 26, 2017).
21 The district court in Cataldo also found that plaintiff therein had suffered “a traumatic brain
22 injury, requiring constant attention, which “alone is sufficient to support his argument that he is
23 incapable of articulating his claims.” Id.

24 For these several reasons, the court affirms its previous ruling.

25 Accordingly, IT IS HEREBY ORDERED that:

26 1. Defendants’ motion for reconsideration (ECF No. 47) is granted to the limited extent
27 that the court has reconsidered its order appointing counsel (ECF No. 43) in light of defendants’
28 arguments and evidence, and is otherwise DENIED;

1 2. The order dated September 20, 2018, ECF No. 43, remains in full force and effect.
2 The Clerk of Court is directed to contact Ms. Sujean Park, Alternative Dispute Resolution
3 Coordinator, for the purpose of locating an attorney admitted to practice in this court who is
4 willing to accept this appointment.

5 3. The deadline for filing dispositive motions remains vacated until further order of this
6 court.

7 DATED: November 13, 2018

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9 ALLISON CLAIRE
10 UNITED STATES MAGISTRATE JUDGE
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