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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 TYUN SOCKEE DODSON,

12 Plaintiff,

13
14 v.

15 J. ROCHA, et al.,

16 Defendants.
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CASE NO: 07-CV-0869 W (RBB)

**ORDER(1) ADOPTING REPORT &
RECOMMENDATION [DOC. NO.
48]; (2) GRANTING IN-PART AND
DENYING IN-PART MOTION TO
DISMISS [DOC. 25] AND (2)
DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[DOC. NO. 41]**

18 On May 14, 2007, plaintiff Tyun Sockee Dodson, a state prisoner proceeding pro se
19 and in forma pauperis, filed this civil-rights lawsuit under 42 U.S.C. § 1983. Although
20 Dodson is currently incarcerated at Corcoran State Prison, this lawsuit arises from events
21 that occurred while he was an inmate at Calipatria State Prison.

22 On October 24, 2007, defendants Bell, Canada, Galvan, Nelson, Rocha, Santiago,
23 Silva, Swearingen and Tamayo (collectively, "Defendants") filed a motion to dismiss the
24 Complaint. (Doc. No. 25.) On January 7, 2008, defendant Barrios filed a joinder to the
25 motion. On February 15, 2008, defendants Arani and Mora also filed a joinder.

26 After briefing on Defendants' motion to dismiss was complete, Dodson filed a
27 motion for appointment of counsel (Doc. No. 41.)
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1 On June 6, 2008, United States Magistrate Judge Ruben B. Brooks issued a Report
2 and Recommendation (“Report” [Doc. No. 48]), recommending that the Court grant in-
3 part and deny in-part Defendants’ motion to dismiss, and deny Dodson’s motion for
4 appointment of counsel. On July 21, 2008, Dodson filed objections to the Report.¹ On
5 July 28, 2008, Defendants filed a reply to Dodson’s objections. Defendants did not file any
6 objections to the Report.

7 The matters being fully briefed, the Court decides the matter on the papers
8 submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the reasons outlined
9 below, the Court (1) **ADOPTS** the Report (Doc. No. 48), (2) **GRANTS IN-PART** and
10 **DENIES IN-PART** Defendants’ motion to dismiss (Doc. No. 25), and (3) **DENIES**
11 Dodson’s motion for appointment of counsel (Doc. No. 41).

12 13 **I. BACKGROUND**

14 The following facts are taken nearly verbatim from the Report, which in evaluating
15 the motion to dismiss, was required to accept as true the Complaint’s allegations.

16 On July 30, 2005, while incarcerated at Calipatria State Prison, Dodson was allegedly
17 beaten by several correctional officers. (*Compl.* at 1.) The altercation began when
18 defendant Rocha entered Dodson’s cell to collect his previous cellmate’s property. (*Id.* at
19 6.) After removing the property, Rocha reentered the cell holding his baton. (*Id.*) Dodson
20 alleges Rocha was angry that Dodson’s mother lodged a complaint against him, and Rocha
21 allegedly said: “You wanna cry to your mommy, I’ll give you something to cry about.” (*Id.*)
22 Dodson replied by saying, “whatever.” (*Id.*) Rocha then swung his baton at Dodson, who
23 lunged forward and punched Rocha in the face. (*Id.*)

24 The alarm was triggered, and responding officers arrived. (*Id.*) Defendant
25 Swearingen entered the cell and pepper sprayed Dodson, causing him to fall to the ground.

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27 ¹Included in the objections was a request for leave to amend the complaint. On August
28 6, 2008, Dodson withdrew his request in light of the Report’s recommendation. (See Doc. No.
55 at 1.)

1 (*Id.*) After defendant Mora placed Dodson in handcuffs, defendants Swearingen, Canada,
2 and Tamayo allegedly beat Dodson with their batons while he was lying on his stomach.
3 (*Id.*) Dodson crawled under his bunk after a blow to the head by Tamayo. (*Id.* at 7.)
4 Tamayo then sat on Dodson's legs and twisted his left foot. (*Id.*) Canada struck Dodson's
5 shin with his baton. (*Id.*) Rocha grabbed Dodson's left pinky and ring fingers and beat his
6 left hand with a baton. (*Id.*) Defendant Silva placed his knee at the base of Dodson's neck,
7 covered his nose and mouth with plastic, and tried to break his neck or suffocate him. (*Id.*)

8 The commotion caused other inmates in the building to yell for the correctional
9 officers to stop the abuse, although the view into Dodson's cell was blocked by the
10 officers. (*Id.*) Dodson was escorted from his cell by defendants Canada and Tamayo. (*Id.*
11 at 8.) When one of the other inmates asked, "You alright Sockee?", defendant Canada told
12 Dodson, "Tell him you're alright!", but Dodson said nothing. (*Id.*)

13 Dodson was escorted outside in the dark where numerous other officers were
14 present. (*Id.*) Dodson had heard rumors that an inmate was beaten in front of the
15 building, and fearing the worst, he began searching for officers' name tags. (*Id.*) Dodson
16 saw defendant Arani with a "6 shooter block gun." (*Id.*) Dodson asked him, "Arani, you
17 gone' [sic] let them do this to me man?" (*Id.*) Arani replied, "It's too late now man!" (*Id.*)
18 Dodson also saw defendant Galvan, who would not make eye contact with Dodson and
19 quickly walked away. (*Id.*)

20 Defendants Canada and Tamayo escorted Dodson to the Medical Technician
21 Assistant's ("MTA") office. (*Id.* at 8–9.) Dodson noticed defendant Silva speaking with
22 defendant Ruan. (*Id.* at 9.) Once Dodson was inside the MTA office's holding cage, Silva
23 entered the cage and told defendants Bell and Barrios to "clear out," which they did. (*Id.*)
24 Silva then asked, "You wanna hit my officers huh? You piece of shit! . . . Huh? You little
25 bitch!" (*Id.*) Dodson responded, "He hit me first." (*Id.*) Silva then struck Dodson in the
26 face, causing him to lose consciousness. (*Id.*) When he regained consciousness, defendants
27 Canada and Tamayo were kicking Dodson as he lay on the floor. (*Id.*) Defendants Canada
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1 and Tamayo then pulled Dodson up and held him while defendant Silva punched him in
2 the stomach. (*Id.*) Silva said, “You’re not so tough now are you? You little bitch!” (*Id.*)
3 Silva then spit on Dodson. (*Id.*)

4 Dodson was stripped and searched for contraband, and then handcuffed by
5 defendant Tamayo. (*Id.* at 10.) Defendants Bell and Barrios returned and started attending
6 to Dodson’s more serious wounds. (*Id.*) Bell and Barrios documented some, but not all,
7 of Dodson’s injuries. (*Id.*) Silva then entered the room and said to Dodson, “It was all
8 your fault and I better not hear anything different!” (*Id.*) Silva motioned to defendant Ruan,
9 who stopped short of the entrance and said, “Let me hear it.” (*Id.*) Dodson responded,
10 “It was all my fault.” (*Id.* at 10–11.)

11 Dodson was taken to the Outpatient Housing Unit (“OHU”). (*Id.* at 14.)
12 Defendant Santiago, a doctor, and an unnamed nurse treated him. (*Id.*) Santiago examined
13 Dodson’s wounds and determined that the wound to his hand needed to be sutured. (*Id.*)
14 When Santiago asked Dodson how he got the wound, Officer Rowe yelled, “This is the
15 bastard that knocked out the officer’s teeth you just saw in the other room!” (*Id.*) Dodson
16 had cut his hand on defendant Rocha’s teeth. (*Id.*) Santiago sutured the wound, ignoring
17 the advice of the unnamed nurse not to suture it because it was a teeth wound. (*Id.*) The
18 nurse gave Dodson a tetanus shot and said that he would need antibiotics. (*Id.*)

19 Dodson was then escorted to a shower for pepper-spray decontamination. (*Id.* at
20 15.) While in the shower, defendant Nelson arrived to place Dodson in Administrative
21 Segregation (“Ad-Seg”). (*Id.*) At the same time, the nurse arrived to give Dodson his
22 antibiotics and began instructing him on how to take them. (*Id.*) Nelson yelled, “Get the
23 fuck out of here! He doesn’t want your fucking meds!” (*Id.*) Nelson then threw the pills
24 to the ground at the nurse’s feet. (*Id.*) When Dodson asked, “What’s up with my
25 antibiotics?”, Nelson kicked the pills, causing them to go “all over the place.” (*Id.*)

26 Dodson was escorted to Ad-Seg, where he was held without a mattress, blanket,
27 eating utensils, or toiletries for two days. (*Id.* at 15–16.) Three days later, Dodson was
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1 examined by defendant Bell for complaints of a throbbing hand. (*Id.* at 16.) That evening,
2 Dodson had cold chills and was sweating all night. (*Id.*) Dodson was examined the next
3 day by Dr. Levine, who diagnosed him with an infection and told Dodson that the wound
4 should not have been sutured. (*Id.*) Dr. Levine milked the wound and admitted Dodson
5 to OHU, where he received intravenous medication for about four days. (*Id.*)

6 7 **II. LEGAL STANDARD**

8 **A. Review of Magistrate Judge's Report.**

9 A district court's duties concerning a magistrate judge's report and recommendation
10 and a respondent's objections thereto are set forth in Rule 72(b) of the Federal Rules of
11 Civil Procedure and 28 U.S.C. § 636(b)(1). The district court "must make a de novo
12 determination of those portions of the report . . . to which objection is made," and "may
13 accept, reject, or modify, in whole or in part, the findings or recommendations made by
14 the magistrate." 28 U.S.C. § 636(b)(1)(C); see also *United States v. Remsing*, 874 F.2d 614,
15 617 (9th Cir. 1989); *United States v. Raddatz*, 447 U.S. 667, 676 (1980).

16 When no objection is made, however, the district court is not required to review the
17 report and recommendation. See *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th
18 Cir. 2003)(holding that 28 U.S.C. 636(b)(1)(c) "makes it clear that the district judge must
19 review the magistrate judge's findings and recommendations de novo *if objection is made*, but
20 not otherwise")(emphasis in original); *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226
21 (D. Arizona 2003) (concluding that where no objections were filed, the District Court had
22 no obligation to review the magistrate judge's report). This rule of law is well established
23 within the Ninth Circuit and this district. See *Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13
24 (9th Cir. 2005)("Of course, de novo review of a R & R is *only* required when an objection
25 is made to the R & R.")(emphasis added)(citing *Reyna-Tapia*, 328 F.3d 1121); *Nelson v.*
26 *Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (Lorenz, J.) (adopted Report without
27 review because neither party filed objections to the Report despite the opportunity to do
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1 so, “accordingly, the Court will adopt the Report and Recommendation in its entirety.”);
2 see also Nichols v. Logan, 355 F. Supp. 2d 1155, 1157 (S.D. Cal. 2004) (Benitez, J.).

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4 **B. Motion to Dismiss.**

5 The court must dismiss a cause of action for failure to state a claim upon which
6 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests
7 the complaint’s sufficiency. See North Star Int’l. v. Arizona Corp. Comm’n., 720 F.2d 578,
8 581 (9th Cir. 1983). All material allegations in the complaint, “even if doubtful in fact,” are
9 assumed to be true. Id. The court must assume the truth of all factual allegations and must
10 “construe them in the light most favorable to the nonmoving party.” Gompper v. VISX,
11 Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also Walleri v. Fed. Home Loan Bank of Seattle,
12 83 F.3d 1575, 1580 (9th Cir. 1996).

13 As the Supreme Court recently explained, “[w]hile a complaint attacked by a Rule
14 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation
15 to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and
16 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
17 Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007). Instead, the allegations in the
18 complaint “must be enough to raise a right to relief above the speculative level.” Id. at
19 1964–65. A complaint may be dismissed as a matter of law either for lack of a cognizable
20 legal theory or for insufficient facts under a cognizable theory. Robertson v. Dean Witter
21 Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). Generally, the court may not consider
22 material outside the complaint when ruling on a motion to dismiss. Hal Roach Studios,
23 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, the court
24 may consider any documents specifically identified in the complaint whose authenticity is
25 not questioned by the parties. Fecht v. Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995).
26 Moreover, the court may consider the full text of those documents, even when the
27 complaint quotes only selected portions. Id. The court may also consider material
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properly subject to judicial notice without converting the motion into a motion for summary judgment. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994) (citing Mack v. South Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986) *abrogated on other grounds* by Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104 (1991)).

III. DISCUSSION

Having read and considered the Complaint, the Report, Dodson's objections, and Defendants' reply, the Court finds that the Report presents a well-reasoned analysis of the issues. Accordingly, the Court will accept the Report's recommendations.

A. Defendant Ruan.

According to the docket, defendant Ruan is deceased and was not served with the summons and complaint prior to his death. (See Doc. No. 14.) Additionally, the Report recommends dismissing Ruan because the Complaint fails to state a claim against him.

Dodson does not object to the Report's findings and recommendation regarding Ruan. The Court, therefore, adopts Judge Brooks' analysis and recommendation, and dismisses all claims against defendant Ruan.

B. Uncontested Recommendations.

Defendants did not file objections to the Report. Accordingly, the Court adopts the Report's analysis and recommendation regarding the following issues:

1. Dodson has stated a claim against defendants Arani, Galvan and Mora for deliberate indifference to Dodson's safety. Arani, Galvan and Mora's motion to dismiss Count 2 is, therefore, denied;
2. Dodson has stated a claim against defendant Santiago for medical negligence. Santiago's motion to dismiss Count 4 is, therefore, denied; and

- 1 3. Dodson has stated a claim against defendant Nelson for deliberate
2 indifference to Dodson's serious medical needs. Nelson's motion to
3 dismiss Count 5 is, therefore, denied.

4 Additionally, although Dodson filed objections to the Report, he did not object to
5 the following recommendations:

- 6 1. Grant, without leave to amend, defendants Arani, Barrios, Bell and
7 Galvan's motion to dismiss the first cause of action for cruel and
8 unusual punishment; and
9
10 2. Grant, without leave to amend, defendant Silva's motion to dismiss
11 the third cause of action for violation of Dodson's first amendment
12 right to free speech;

13 Accordingly, the Court also accepts these recommendations, and adopts the
14 Report's analysis on these issues claims.

15 **C. Dodson Failed to State a Claim Against Defendants Bell and Barrios**
16 **for Deliberate Indifference to Dodson's Safety .**

17 To state an Eighth Amendment claim for deliberate indifference to an inmate's
18 safety, a plaintiff must establish that the prison official is "both aware of the facts from
19 which the inference could be drawn that a substantial risk of serious harm exists, and he
20 must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). In short, the
21 official must have "know[n] that [the] inmate face[d] a substantial risk of serious harm and
22 disregarded that risk by failing to take reasonable measures to abate it." Id. at 847. "It is
23 not enough merely to find that a reasonable person would have known, or that the
24 defendant should have known. . . ." Id. at 843, n.8.

25 The allegations relevant to Dodson's claim against medical technicians Bell and
26 Barrios are as follows. Dodson alleges that after the initial incident, he was taken to "the
27 MTA's office. Once inside we entered the holding cage. Sgt. Silva comes in, as he enters
28 the holding cage he yells 'CLEAR OUT!' to MTA's [sic] Bell and Barrios. They
immediately comply, abandoning their post and duties, showing deliberate indifference as

1 they scurried to the door, securing it behind them, failing to protect me and my health.”
2 (*Compl.* 9.) After Bell and Barrios left the office, Dodson alleges that other defendants
3 proceeded to beat him. (*Id.* 9–10.)

4 Based on these allegations, the Report found that Dodson failed to allege facts
5 demonstrating that Bell and Barrios were aware of the incident in Dodson’s cell or that
6 they had any other knowledge that should have alerted them that Dodson faced a
7 substantial risk of harm. Dodson challenges this finding, urging that the claim is supported
8 by: 1) the “manner in which we arrived into the medical office gave notice of the
9 seriousness at hand.”; 2) the proximity of the holding cage to the MTA’s office; 3) because
10 Bell and Barrios left the office and shut the door after defendant Silva yelled “clear out”;
11 and 4) because it is not normal for medical staff to leave their post in response to an order
12 to “clear out.” (*Obj.* at 4–5.)

13 But as the Report points out, Dodson’s argument relies on factual allegations
14 outside the complaint that the Court may not consider in evaluating the motion to dismiss.
15 See Schneider v. Cal. Dep’t fo Corrs., 151 F.3d 1194, 1197, n.1 (9th Cir. 1998). For
16 example, there are no factual allegations in the Complaint relating to the holding cage’s
17 proximity to the MTA’s office, or about the custom and practice of medical staff in
18 responding to orders by correctional officers. And, as the Report correctly points out,
19 there are no factual allegations that even suggest Bell and Barrios had reason to know about
20 the incident in Dodson’s cell.

21 In short, Dodson’s claim against defendants Bell and Barrios is essentially based on
22 the allegation that they left the office and shut the door in response to defendant Silva’s
23 order to “clear out.” This allegation is insufficient to support a claim that Bell and Barrios
24 knew that Dodson faced a substantial risk of serious harm. Accordingly, the Court accepts
25 the Report’s recommendation to grant, with leave to amend, Bell and Barrios’ motion to
26 dismiss the Count 2.

1 **D. Dodson Failed to State a Claim for Cruel and Unusual Punishment for**
2 **Deprivation of Minimal Measures of Life's Necessities.**

3 In Count 6, Dodson sued unidentified doe defendants for cruel and unusual
4 punishment in violation of the Eighth Amendment for allegedly depriving Dodson of
5 “minimal measures of life’s necessities.” This claims was based on Dodson’s contention
6 that while in Ad-Seg, correctional-officer doe defendants refused to provide him with a
7 mattress, sheets, blankets and clothing. Dodson alleges that when he requested these
8 items, the officers responded by stating that “he had to earn whatever he needed, and that
9 if he did not cause any problems, he would ‘get the things [he would] need.’” (*Rpt.* at 29,
10 citing *Compl.* at 19.)

11 The Report recommends dismissing this claim based on two cases: Hernandez v.
12 Denton, 861 F.2d 1421, 1424 (9th Cir. 1988), where the Ninth Circuit held that a claim that
13 the inmate slept without a mattress for one night did not allege an Eighth Amendment
14 violation; and O’Leary v. Iowa State Men’s Reformatory, 79 F.3d 82 (8th Cir. 1996), which
15 found that depriving an inmate of underwear, blankets, a mattress, exercise or visits until
16 he regained the items with satisfactory behavior did not violate the Eighth Amendment.

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18 In his Objection, Dodson does not object to the Report’s analysis of this claim.
19 Instead, Dodson states that he now understands that he asserted the wrong cause of action,
20 and that he should have filed a claim for retaliation. Dodson , therefore, requests leave to
21 amend the complaint to allege the correct claim.

22 Because Dodson does not disagree with the Report’s finding, the Court accepts the
23 recommendation to dismiss without leave to amend the claim for cruel and unusual
24 punishment in violation of the Eighth Amendment for allegedly depriving Dodson of
25 “minimal measures of life’s necessities.”²

27 ²To the extent Dodson believes he has a retaliation claim, nothing in this Order should be
28 construed as precluding him from including that claim in his first amended complaint.

1 **E. Any State-law Claims for Emotional Distress are Dismissed.**

2 Count 7 in the Complaint is entitled “Emotional, and Mental/Psychological
3 Injuries.” Based on this title, Defendants construed the claim as a state-law based claim
4 for negligent and intentional infliction of emotional distress. And because Dodson did not
5 allege and provided no evidence that he complied with the California Tort Claims Act,
6 Government Code § 911.2 *et seq.*, the Report recommends dismissing the claim.

7 In his Objection, Dodson states that he was not attempting to assert state-law claims
8 for negligent and intentional infliction of emotional distress. (*Obj.* at 9.) Rather, Dodson
9 contends that he is pursuing damages for mental injuries under his federal claims.
10 Defendants did not raise the issue of whether Dodson is entitled to damages under his
11 federal claims, and the Report did not recommend dismissing such damages. Rather, the
12 Report correctly found that to the extent Dodson was attempting to assert state-law claims,
13 they must be dismissed because he failed to comply with the Tort Claims Act.
14 Accordingly, Dobson’s objection lacks merit.

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17 **IV. APPOINTMENT OF COUNSEL**

18 Dodson requests appointment of counsel.

19 As the Report correctly points out, there is no constitutional right to appointment
20 of counsel in a civil case. United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir.
21 1986). Nor is there a constitutional right to appointed counsel to pursue a section 1983
22 claim. Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997).

23 However, courts have discretion to request volunteer counsel for indigent plaintiffs
24 under exceptional circumstances. 28 U.S.C. § 1915(e); Wood v. Housewright, 900 F.2d
25 1332, 1335 (9th Cir. 1990). While courts may request volunteer counsel in exceptional
26 cases, it has no power to make a mandatory appointment. Mallard v. United States District
27 Court for Southern District, 490 U.S. 296, 301-308 (1989).

1 To determine whether exceptional circumstances exist, courts evaluate the plaintiff's
2 likelihood of success on the merits and the ability of the plaintiff to articulate his claim *pro*
3 *se* in light of the complexity of the legal issues. Richards v. Harper, 864 F.2d 85, 87 (9th
4 Cir. 1988); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). However, neither of
5 these factors are dispositive and both must be viewed together before reaching a decision
6 on request of counsel under [former] section 1915(d).” Willborn v. Escalderon, 789 F.2d
7 1328, 1331 (9th Cir. 1986); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991).

8 Here, the Report recommends at this time denying Dodson’s request for counsel
9 because (1) he has demonstrated the ability to articulate his claims, and (2) it is currently
10 difficult to evaluate the merits of Dodson’s claims. The Court agrees.

11 Dodson objects, however, and contends that counsel is needed because Defendants
12 have retaliated against him by perjuring themselves in front of the Imperial County Grand
13 Jury. Assuming this allegation is true, Dodson fails to explain how Defendants’ perjury
14 before the grand jury relates to his ability to articulate his claims in this case, and the
15 likelihood that Dodson will succeed in this case.

16 For the foregoing reasons, the Court adopts the Report’s recommendation and
17 denies Dodson’s motion for appointment of counsel at this time.

18 19 **V. CONCLUSION AND ORDER**

20 For the reasons stated above, the Court **ADOPTS** the findings contained in the
21 Report (Doc. No. 48), **GRANTS IN-PART** and **DENIES IN-PART** Defendants’
22 motion to dismiss (Doc. No. 25), **DENIES** the motion for appointment of counsel (Doc.
23 No. 41), and **ORDERS** as follows:

- 24 1. Defendant Ruan is dismissed with prejudice.
- 25 2. Plaintiff Dodson’s 1st Count for use of excessive force amounting to
26 cruel and unusual punishment is **dismissed without leave to amend**
27 **as to Defendants Arani, Barrios, Bell, and Galvan.**

