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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JAVON LAMAR TORBERT,  
  
Plaintiff,  
  
v.  
  
WILLIAM D. GORE, Sheriff of San  
Diego Sheriff Department; DEPUTY  
DAILLY, Sheriff of San Diego Sheriff  
Department; DEPUTY McMAHON,  
Sheriff of San Diego Sheriff Department;  
DEPUTY Y.G. GEBREBIORGIS, Sheriff  
of San Diego Sheriff Department;  
SERGEANT ESTRADA, Sheriff of San  
Diego Sheriff Department; COUNTY OF  
SAN DIEGO; and DOES 1-50,  
  
Defendants.

Case No.: 14cv2911 BEN (NLS)

**ORDER:**

- (1) DENYING THIRD MOTION FOR APPOINTMENT OF COUNSEL [Dkt. No. 82]; and**
- (2) DENYING SECOND MOTION FOR APPOINTMENT OF EXPERT WITNESS [Dkt. No. 84].**

1 Plaintiff Javon Lamar Tobert (“Plaintiff”), a prisoner proceeding *pro se* and *in*  
2 *forma pauperis*, filed this civil rights action on December 9, 2014. He alleges excessive  
3 force, cruel and unusual punishment and deliberate indifference claims arising from an  
4 alleged incident where one of the defendants slammed a metal door on Plaintiff’s left  
5 arm.

6 Plaintiff asks this court, for a third time, to appoint him counsel from the court’s  
7 pro bono panel, and asks again for appointment of an expert witness. He argues that the  
8 appointments are appropriate here because (1) Torbert is mentally impaired, suffering  
9 from serious mental health issues; (2) he lacks education and has limited access to the  
10 law library due to his housing assignment; (3) he will require the help of experts to prove  
11 his claims, which is complex and presents scientific issues outside Torbert’s scope of  
12 understanding; and (4) the parties dispute the facts and Torbert is not trained in how to  
13 present evidence.

14 Because there has not been a substantial change in circumstance from the previous  
15 requests, the court **DENIES** the motion for appointment of counsel and **DENIES** the  
16 motion for appointment of expert.

17 **I. MOTION FOR APPOINTMENT OF COUNSEL**

18 **A. Legal Standard.**

19 The Constitution provides no absolute right to the appointment of counsel in any  
20 civil proceeding. *Hedges v. Resolution Trust Corp.*, 32 F.3d 1360, 1363 (9th Cir. 1994).  
21 In *pro se* and *in forma pauperis* proceedings, district courts do not have the authority “to  
22 make coercive appointments of counsel.” *Mallard v. United States District Court*, 490  
23 U.S. 296, 310 (1989). But they do have the discretion to request that an attorney  
24 represent an indigent civil litigant upon a showing of “exceptional circumstances.” 28  
25 U.S.C. § 1915(e)(1); *Agyeman v. Corrections Corp. Of America*, 390 F.3d 1101, 1103  
26 (9th Cir. 2004).

27 A finding of exceptional circumstances “requires an evaluation of both the  
28 likelihood of success on the merits and the ability of the [plaintiff] to articulate his claims

1 *pro se* in light of the complexity of the legal issues involved.” *Wilborn v. Escalderon*,  
2 789 F.2d 1328, 1331 (9th Cir. 1986), *quoting* *Weygandt v. Look*, 718 F.2d 952, 954 (9th  
3 Cir. 1983). Neither of the *Wilborn* factors are dispositive, and they must be viewed  
4 together before the district court reaches its decision. *Id.*

5 **B. Likelihood of Success on the Merits.**

6 A plaintiff that provides no evidence of his likelihood of success at trial fails to  
7 satisfy the first factor of the *Wilborn* test. *Bailey v. Lawford*, 835 F. Supp. 550, 552 (S.D.  
8 Cal. 1993). Here, there is very little before the court regarding the merits of Plaintiff’s  
9 case, other than the assertions in the complaint. As a result, it is difficult at this time to  
10 determine the likelihood that Plaintiff will succeed on the merits. Therefore, Plaintiff  
11 fails to satisfy the first *Wilborn* factor.

12 **C. Plaintiff’s Ability to Articulate His Claims.**

13 Where a *pro se* civil rights plaintiff shows he has a good grasp of basic litigation  
14 procedure and has been able to articulate his claims adequately, he does not demonstrate  
15 the exceptional circumstances required for the appointment of counsel. *See Palmer v.*  
16 *Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). As another court in this district noted, there is  
17 “no doubt [that] most *pro se* litigants find it difficult to articulate their claims and would  
18 be better served with the assistance of counsel.” *Garcia v. Cal. Dep’t of Corrections &*  
19 *Rehab.*, 2013 WL 485756, at \*1 (S.D. Cal. Feb. 6, 2013). But it is for this reason that  
20 federal courts employ procedures that protect a *pro se* litigant’s rights. *See Haines v.*  
21 *Kerner*, 404 U.S. 519, 520 (1972). In *pro se* civil rights cases, a court must construe the  
22 pleadings liberally and afford the plaintiff any benefit of the doubt. *Karim-Panahi v. Los*  
23 *Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988). Thus, where a *pro se* plaintiff  
24 can articulate his claims in light of their relative complexity, there are no exceptional  
25 circumstances to justify appointment of counsel. *Garcia*, 2013 WL 485756, at \*1, *citing*  
26 *Wilborn*, 789 F.2d at 1331.

27 The purported complexity of this case, Torbert’s mental illness, and the presence  
28 of disputed facts have not prevented him from articulating his claims. This court has

1 reviewed Plaintiff's complaint and other pleadings and finds that the issues he raises are  
2 not particularly complex. The court understands Plaintiff's claims and the relief sought.  
3 Plaintiff has also demonstrated that he has a good grasp on basic litigation procedure, as  
4 evidenced by the pleadings and submissions he has filed with this court. Further, as to  
5 his claim of limited access to the law library, such an issue is common to most prisoners,  
6 and does not amount to exceptional circumstances. *See, e.g., Wood v. Housewright*, 900  
7 F.2d 1332, 1335-36 (9th Cir. 1990) (denying appointment of counsel where plaintiff  
8 complained that he had limited access to law library and lacked a legal education). The  
9 court finds that Plaintiff has sufficiently put on his case thus far in light of the complexity  
10 of the legal issues involved.

11 Viewing the *Wilborn* factors together, Plaintiff has not shown a likelihood of  
12 success on the merits of his case or that he cannot articulate his claims and litigate this  
13 action *pro se*. Therefore, Plaintiff has not established the exceptional circumstances  
14 required for the appointment of counsel pursuant to 28 U.S.C. Section 1915(e)(1).

## 15 **II. MOTION FOR APPOINTMENT OF EXPERT WITNESS**

16 Torbert asks this court to appoint an expert witness to help the trier of fact  
17 understand the evidence and determine the facts at issue regarding his excessive force,  
18 medical neglect and emotional distress claims. He also says that Defendants have a  
19 medical expert so any medical evidence will be biased toward the Defendants. He also  
20 says there is a conflict of interest with Defendants' expert, Dr. Alfred Joshua, because  
21 Plaintiff wrote several grievances against Dr. Joshua.

### 22 **A. Legal Standard.**

23 An expert witness may testify to help the trier of fact determine the evidence or a  
24 fact at issue. Fed. R. Evid. 702. A court has full discretion to appoint an expert witness  
25 either by its own motion or by a party's motion. Fed. R. Evid. 706(a); *McKinney v.*  
26 *Anderson*, 924 F.2d 1500, 1510-11 (9th Cir. 1991), overruled on other grounds by  
27 *Helling v. McKinney*, 502 U.S. 903 (1991). Appointment of an expert witness may  
28 generally be appropriate when "scientific, technical, or other specialized knowledge will

1 assist the trier of fact to understand the evidence or decide a fact in issue....” *Levi v. Dir.*  
2 *of Corr.*, 2006 U.S. Dist. LEXIS 18795, \*2 (E.D.Cal. 2006) (citation omitted).

3 The in forma pauperis (IFP) statute, 28 U.S.C. § 1915, does not waive the  
4 requirement of the payment of fees or expenses for witnesses in a § 1983 prisoner civil  
5 rights action. *Dixon v. Ylst*, 990 F.2d 478, 480 (9th Cir. 1993). “Reasonably construed,  
6 [Rule 706] does not contemplate the appointment of, and compensation for, an expert to  
7 aid one of the parties.” *Trimble v. City of Phoenix Police Dept.*, 2006 U.S. Dist. LEXIS  
8 13061, \*6 (D. Ariz. 2006) (citation omitted).

9 **B. Appointment of an Expert.**

10 Here, it is unclear whether Torbert has the means to retain and compensate an  
11 expert. Under the IFP statute he would have pay for his own expert.

12 Further, to prevail on his Eighth Amendment claim for deliberate indifference,  
13 Torbert must show that Defendants acted with deliberate indifference to his serious  
14 medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1983). Deliberate indifference  
15 has a subjective component because it requires the court to “consider the seriousness of  
16 the prisoner’s medical need and the nature of the defendant’s response to that need.”  
17 *Levi*, 2006 U.S. Dist. LEXIS at 3 (citation omitted). In the context of such a claim, “the  
18 question of whether the prison officials displayed deliberate indifference to [Plaintiff’s]  
19 serious medical needs [does] not demand that the jury consider probing, complex  
20 questions concerning medical diagnosis and judgment.” *Id.* Courts have declined to  
21 appoint an expert under such circumstances. *Id.* Therefore, Plaintiff’s request for  
22 appointment of a medical expert witness is **DENIED**.

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1        **III.    ORDER**

2            The court **DENIES without prejudice** Torbert’s motion for appointment of  
3 counsel and his motion for appointment of an expert witness.

4            **IT IS SO ORDERED.**

5 Dated: June 23, 2016



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7            Hon. Nita L. Stormes  
8            United States Magistrate Judge  
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