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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JAMES AUSTIN,
12 CDCR #AK-6078,

13 Plaintiff,

14 vs.

15 R. WALKER; M. GLYNN;
16 S. ROBERTS; JIN YU; J. LEWIS,

17 Defendants.

Case No.: 3:16-cv-02088-CAB-JLB

**ORDER RE-APPOINTING PRO
BONO COUNSEL PURSUANT
TO 28 U.S.C. § 1915(e)(1) AND
S.D. Cal. Gen. Order 596**

18 JAMES AUSTIN (“Plaintiff”), a prisoner proceeding *in pro se* and currently
19 incarcerated at Richard J. Donovan Correctional Facility in San Diego, California, was
20 granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a) on
21 September 1, 2016, in this civil rights action which he initiated on his own behalf
22 pursuant to 42 U.S.C. § 1983 (ECF No. 3).
23

24 **I. Procedural History**

25 On December 6, 2016, Defendants Glynn, Lewis, Roberts, Walker, and Yu filed an
26 Answer (ECF No. 8). On February 15, 2017, before discovery was complete, the Court
27 denied Plaintiff’s Motion for Appointment of Counsel because Plaintiff appeared able to
28 articulate his claims in light of their complexity, and he had not shown, based on the

1 allegations in his Complaint alone, that he was likely to succeed on the merits. *See* ECF
2 No. 22 (citing 28 U.S.C. § 1915(e)(1); *Palmer v. Valdez*, 560 F.3d 965 (9th Cir. 2009)).
3 After the completion of discovery, neither party moved for summary judgment.
4 On June 26, 2017, Plaintiff filed a Motion for Reconsideration of the Court’s previous
5 Order denying the appointment of counsel (ECF No. 30), and on July 6, 2017, a
6 mandatory settlement conference was held before Magistrate Judge Jill L. Burkhardt, but
7 the case did not settle (ECF No. 33).

8 Therefore, on August 17, 2017, the Court granted Plaintiff’s Motion and appointed
9 pro bono counsel pursuant to the Southern District of California’s Plan for the
10 Representation of Pro Se Litigants in Civil Cases as adopted by S.D. Cal. Gen. Order 596
11 (ECF No. 34). After Judge Burkhardt granted Defendants’ ex parte request to modify the
12 Court’s previously-filed scheduling order, Defendants filed a Motion for Summary
13 Judgment pursuant to FED. R. CIV. P. 56 (ECF No. 41). Because Plaintiff’s pro bono
14 counsel was then granted leave to withdraw (ECF No. 47), the Court suspended briefing
15 and vacated the date previously set for hearing Defendants’ Motion for Summary
16 Judgment (ECF No. 41), pending a renewed referral to the Court’s Pro Bono Panel for
17 potential appointment. *See* ECF No. 47 at 2.

18

19 **II. Plaintiff’s Motion for Reconsideration of Appointment of Counsel**

20 As Plaintiff knows, while there is no right to counsel in a civil action, a court may
21 under “exceptional circumstances” exercise its discretion and “request an attorney to
22 represent any person unable to afford counsel.” 28 U.S.C. § 1915(e)(1); *Palmer*, 560 F.3d
23 at 970. The court must consider both “the likelihood of success on the merits as well as
24 the ability of the [Plaintiff] to articulate his claims *pro se* in light of the complexity of the
25 legal issues involved.” *Id.* (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir.
26 1983)).

27 Plaintiff’s initial motion for appointment of counsel was denied, based on findings
28 that he, at least at those stages of the proceedings, had failed to show the “exceptional

1 circumstances” necessary to satisfy 28 U.S.C. § 1915(e)(1). *See* ECF No. 22 at 2-3;
2 *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

3 In light of Plaintiff’s Motion for Reconsideration, however, in which Plaintiff
4 claims he is no longer being assisted by a fellow inmate, *see* ECF No. 30 at 3, remains
5 indigent, incarcerated, and to be “suffer[ing] from memory loss” and “other symptoms of
6 Alzheimers/senility,” *see* ECF No. 30 at 3, and due to his previous counsel’s withdrawal,
7 the need to now oppose Defendants’ Motion for Summary Judgment and to present
8 evidence and testimony at a potential trial thereafter, the Court has again elected to
9 exercise its discretion pursuant to 28 U.S.C. § 1915(e)(1) and General Order 596, and has
10 concluded the ends of justice would be served by the re-appointment of pro bono counsel
11 under circumstances. Therefore, another volunteer member of the Court’s Pro Bono
12 Panel has been randomly selected and has graciously agreed to represent Plaintiff pro
13 bono during the course of all further proceedings held before this Court. *See* S.D. CAL.
14 GEN. ORDER 596.

16 **III. Conclusion and Order**

17 Accordingly, the Court hereby **APPOINTS** Peter B. Maretz, Esq. SBN 144826, of
18 Stokes Wagner, ALC, 600 W. Broadway, Suite 910, San Diego, California, 92101, as Pro
19 Bono Counsel for Plaintiff.

20 Pursuant to S.D. CAL. CIVLR 83.3.f.2, Pro Bono Counsel must file, within fourteen
21 (14) days of this Order, *if possible, and in light of Plaintiff’s incarceration*, a formal
22 written Notice of Substitution of Attorney signed by both Plaintiff and his newly
23 appointed counsel. This substitution will be considered approved by the Court upon its
24 filing, and Pro Bono Counsel will thereafter be considered attorney of record for Plaintiff
25 for all purposes *during further proceedings before this Court, in this matter only, and at*
26 *the Court’s specific request. See* S.D. CAL. CIVLR 83.3.f.1, 2.

27 The Court further **DIRECTS** the Clerk of the Court to serve Mr. Maretz with a
28 copy of this Order at the address listed above upon filing. *See* S.D. CAL. CIVLR 83.3.f.2.

1 As soon as the Notice of Substitution is filed, the Court will issue a briefing
2 schedule with regard to the pending Motion for Summary Judgment.

3 **IT IS SO ORDERED.**

4 Dated: December 22, 2017



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6 Hon. Cathy Ann Bencivengo
United States District Judge

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