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6 UNITED STATES DISTRICT COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
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9 GARY DICKEY,

10 Plaintiff,

11 v.

12 D. STRAYHORN and D. PARAMO,

13 Defendants.

Case No.: 17-cv-546 JLS (JLB)

**ORDER DENYING WITHOUT  
PREJUDICE PLAINTIFF'S  
MOTION TO APPOINT COUNSEL**

[ECF No. 10]

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15 On April 11, 2017, Plaintiff filed with the Court a letter requesting that he be  
16 appointed counsel. (ECF No. 10.) Although not filed properly in the form of a motion, the  
17 Court construes Plaintiff's letter as a motion for appointment of counsel.<sup>1</sup> Having reviewed  
18 Plaintiff's request for counsel in conjunction with the case record, and for the reasons  
19 below, the Court concludes that Plaintiff fails to meet the criteria for the Court to appoint  
20 him counsel at this time. Accordingly, Plaintiff's motion is **DENIED without prejudice.**

21 **I. LEGAL STANDARD**

22 There is no constitutional right to the appointment of counsel in § 1983 cases.  
23 *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). However, the Ninth Circuit has  
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27 <sup>1</sup> In addition, Plaintiff submitted letters on April 24, 2017, and May 5, 2017, regarding his request  
28 for the appointment of counsel. (ECF Nos. 8, 10.) The Court construes these letters as supplements to  
Plaintiff's motion for appointment of counsel.

1 held that “a court may under ‘exceptional circumstances’ appoint counsel for indigent civil  
2 litigants pursuant to 28 U.S.C. § 1915(e)(1).” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th  
3 Cir. 2009), *cert. denied*, 559 U.S. 906 (2010) (quoting *Agyeman v. Corrs. Corp. of Am.*,  
4 390 F.3d 1101, 1103 (9th Cir. 2004), *cert. denied sub nom.*, *Gerber v. Agyeman*, 545 U.S.  
5 1128 (2005)). “When determining whether ‘exceptional circumstances’ exist, a court must  
6 consider ‘the likelihood of success on the merits as well as the ability of the petitioner to  
7 articulate his claims *pro se* in light of the complexity of the legal issues involved.” *Id.*  
8 (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir.1983)). Neither of these  
9 considerations is dispositive and instead must be viewed together. *Id.* (quoting *Wilborn v.*  
10 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

## 11 **II. DISCUSSION**

### 12 **A. Plaintiff’s Likelihood of Success on the Merits of His Claim**

13 Plaintiff’s complaint alleges claims of excessive force in violation of the Eighth  
14 Amendment prohibition of cruel and unusual punishment. (ECF No. 1.) Plaintiff alleges  
15 that Defendant Strayhorn, a clinic officer at the R.J. Donovan Correctional Facility where  
16 Plaintiff is incarcerated, used excessive force when he handcuffed Plaintiff, slammed  
17 Plaintiff to the ground, and then kicked Plaintiff above his right eye with his steel-toed  
18 boot without provocation. (*Id.* at 3–7.) Plaintiff alleges that Defendant Paramo, Warden  
19 of the R.J. Donovan Correctional Facility, violated his Eighth Amendment rights when  
20 he allowed Defendant Strayhorn to injure him in the way described above. (*Id.* at 2.)

21 When a prison guard stands accused of using excessive force in violation of the  
22 Eighth Amendment, “the core judicial inquiry is . . . whether force was applied in a good-  
23 faith effort to maintain or restore discipline, or maliciously and sadistically to cause  
24 harm.” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). In analyzing an Eighth Amendment  
25 excessive force claim, courts consider the following factors: (1) the need for application  
26 of force; (2) the relationship between the need and the amount of force used; (3) the extent  
27 of the injury inflicted; (4) the threat “reasonably perceived by the responsible officials”;  
28 and (5) “any efforts made to temper the severity of a forceful response.” *Id.*

1 To demonstrate that he has a likelihood of success at trial, Plaintiff must do more  
2 than merely allege that one of his constitutional rights was violated. He must provide  
3 evidence to the effect that he has a likelihood of success on the merits of his allegations.  
4 *See Torbert v. Gore*, No. 14-cv-2991 BEN (NLS), 2016 WL 1399230, at \*1 (S.D. Cal.  
5 Apr. 8, 2016) (“A plaintiff that provides no evidence of his likelihood of success at trial  
6 fails to satisfy the first factor of the [exceptional circumstances] test.”). Here, Plaintiff  
7 has not offered evidence that supports a likelihood of success on the merits of the  
8 allegations made in his complaint. Although the medical report that Plaintiff attached to  
9 his complaint is some evidence of the severity of the injury that Plaintiff suffered (ECF  
10 No. 1 at 19), the Court has no evidence before it as to how Plaintiff was injured in general,  
11 much less evidence specifically relating to the other factors relevant to an excessive force  
12 claim, such as any threat that Defendant Strayhorn reasonably perceived and any need for  
13 the application of force under the circumstances.<sup>2</sup> Without such evidence, the Court  
14 cannot make a determination that the force Defendant Strayhorn used on Plaintiff, if any,  
15 was not applied in a good-faith effort to maintain or restore discipline but was instead  
16 applied maliciously and sadistically to cause harm. *See Hudson*, 503 U.S. at 7. Thus, at  
17 this early stage of the case, when Defendants have not yet filed a response to Plaintiff’s  
18 complaint and the parties have not yet engaged in discovery, the Court cannot find that  
19 Plaintiff is likely to succeed on the merits of his claim. *See Garcia v. Smith*, No. 10-cv-  
20 1187 AJB (RBB), 2012 WL 2499003, at \*3 (S.D. Cal. June 27, 2012) (denying motion  
21 for appointment of counsel when it was too early to determine whether any of plaintiff’s  
22 claims would survive a motion for summary judgment).

23 For the reasons above, the Court concludes that Plaintiff fails to satisfy the first  
24 “exceptional circumstances” factor that would support his request for counsel.  
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27 <sup>2</sup> Plaintiff admits in the complaint to calling Defendant Strayhorn names and to standing up to face  
28 Defendant Strayhorn when he approached Plaintiff. (ECF No. 1 at 3–7.) Thus, without any evidence as  
to the extent of Plaintiff’s actions toward Defendant Strayhorn, the Court cannot make a determination as  
to whether any threat that Plaintiff made against Defendant Strayhorn, if any, was perceived reasonably.

1           **B. Plaintiff’s Ability to Articulate Claims Without the Assistance of Counsel**

2           Plaintiff also argues in his motion and supplemental documents that a number of  
3 circumstances demonstrate that he is unable to articulate his claims *pro se*. First, Plaintiff  
4 argues that the Court should appoint him counsel because he does not know how to  
5 represent himself (ECF No. 6 at 2), he cannot afford an attorney (ECF No. 8 at 1), and he  
6 is a layman with no legal experience or knowledge (*id.*). These burdens are common to  
7 most prisoners representing themselves *pro se* and do not establish the exceptional  
8 circumstances that would support the appointment of counsel. *See, e.g., Wood v.*  
9 *Housewright*, 900 F.2d 1332, 1335–36 (9th Cir. 1990) (denying appointment of counsel  
10 where plaintiff complained that he had limited access to law library and lacked a legal  
11 education).

12           Second, Plaintiff argues that the Court should appoint him counsel because he  
13 “take[s] a lot of psych medication” and is “not mentally stable too [sic] put up a fight to  
14 defendant.” (*Id.*) While the Court is sympathetic to Plaintiff’s situation, this factor, on its  
15 own and without a showing that Plaintiff is likely to succeed on the merits of his claims, is  
16 insufficient to demonstrate the type of exceptional circumstances that would necessitate  
17 the appointment of counsel. The Court has reviewed Plaintiff’s complaint and other filings  
18 on the docket and finds that any mental disability from which Plaintiff may suffer has not  
19 prevented him from effectively communicating with the Court. Plaintiff’s filings thus far  
20 are well written, organized, and clear, and the Court is able to understand Plaintiff’s claims  
21 and the relief that he seeks. In addition, this case is not extraordinarily complex. It involves  
22 excessive force Eighth Amendment claims against two defendants, and the facts are fairly  
23 straightforward. Thus, Plaintiff has shown that despite any mental disability that he may  
24 suffer, he has been able to articulate his claims in light of the complexity of his case.

25           The Court does not doubt that Plaintiff, like most *pro se* litigants, finds it difficult to  
26 articulate his claims and would be better served with the assistance of counsel. It is for this  
27 reason that in the absence of counsel, federal courts employ procedures that are highly  
28 protective of a *pro se* litigant’s rights. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per

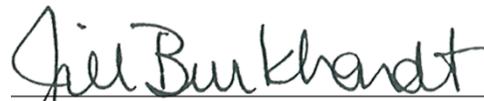
1 curiam) (holding that the pleadings of a *pro se* inmate must be held to less stringent  
2 standards than formal pleadings drafted by lawyers). In fact, where a plaintiff appears *pro*  
3 *se* in a civil rights case, the court must construe the pleadings liberally and afford the  
4 plaintiff any benefit of the doubt. *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d  
5 621, 623 (9th Cir. 1988). Thus, as long as a *pro se* litigant is able to articulate his claims  
6 in light of the complexity of the issues involved, as Plaintiff is here, the exceptional  
7 circumstances that might support the appointment of counsel do not exist.

### 8 **III. CONCLUSION**

9 Viewing the exceptional circumstances factors together, Plaintiff has not shown a  
10 likelihood of success on the merits of his case or that he cannot articulate his claims and  
11 litigate this action *pro se*. Accordingly, Plaintiff has not established the exceptional  
12 circumstances required for the appointment of counsel pursuant to 28 U.S.C. § 1915(e)(1),  
13 and Plaintiff's motion for appointment of counsel (ECF No. 10) is **DENIED**. This denial is  
14 **without prejudice**, however, and Plaintiff is therefore not precluded from requesting the  
15 appointment of counsel at a later stage in this case, should he be able to make the requisite  
16 showing of exceptional circumstances at that time.

17 **IT IS SO ORDERED.**

18 Dated: May 25, 2017

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20 Hon. Jill L. Burkhardt  
21 United States Magistrate Judge  
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