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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 PLAINTIFF'S  
SECOND MOTION TO APPOINT  
COUNSEL**

[ECF No. 15]

14  
15 On July 10, 2017, Plaintiff filed with the Court a motion for appointment of counsel.  
16 (ECF No. 15.) This is Plaintiff's second motion for appointment of counsel. (*See* ECF  
17 No. 6.) Having reviewed Plaintiff's request for counsel in conjunction with the case record,  
18 and for the reasons below, the Court concludes that Plaintiff fails to meet the criteria for  
19 the Court to appoint him counsel at this time. Accordingly, Plaintiff's motion is **DENIED**  
20 **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  
24 held that "a court may under 'exceptional circumstances' appoint counsel for indigent civil  
25 litigants pursuant to 28 U.S.C. § 1915(e)(1)." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th  
26 Cir. 2009), *cert. denied*, 559 U.S. 906 (2010) (quoting *Agyeman v. Corrs. Corp. of Am.*,  
27 390 F.3d 1101, 1103 (9th Cir. 2004), *cert. denied sub nom.*, *Gerber v. Agyeman*, 545 U.S.  
28 1128 (2005)). "When determining whether 'exceptional circumstances' exist, a court must

1 consider ‘the likelihood of success on the merits as well as the ability of the petitioner to  
2 articulate his claims *pro se* in light of the complexity of the legal issues involved.’” *Id.*  
3 (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir.1983)). Neither of these  
4 considerations is dispositive and instead must be viewed together. *Id.* (quoting *Wilborn v.*  
5 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

## 6 **II. DISCUSSION**

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

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

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

25 To demonstrate that he has a likelihood of success at trial, Plaintiff must do more  
26 than merely allege that one of his constitutional rights was violated. He must provide  
27 evidence to the effect that he has a likelihood of success on the merits of his allegations.  
28 *See Torbert v. Gore*, No. 14-cv-2991 BEN (NLS), 2016 WL 1399230, at \*1 (S.D. Cal.

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

21 For the reasons above, the Court concludes that Plaintiff fails to satisfy the first  
22 “exceptional circumstances” factor that would support his request for counsel.

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27 <sup>1</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 argues in his motion that he should be appointed counsel because he “take[s]  
3 a lot of psych medication for his mental health problems” and is “not stable enough to  
4 defendant himself, especial[l]y against a professional like the DA.” (ECF No. 15 at 1.)  
5 Plaintiff states that he has “been taking medication since the age of 13 years and in and out  
6 of hospitals for suicidal attempts on [his] life.” (*Id.*) While the Court is sympathetic to  
7 Plaintiff’s situation, this factor, on its own and without a showing that Plaintiff is likely to  
8 succeed on the merits of his claims, is insufficient to demonstrate the type of exceptional  
9 circumstances that would necessitate the appointment of counsel. The Court has reviewed  
10 Plaintiff’s complaint and other filings on the docket and finds that any mental disability  
11 from which Plaintiff may suffer has not prevented him from effectively communicating  
12 with the Court. Plaintiff’s filings thus far are well written, organized, and clear, and the  
13 Court is able to understand Plaintiff’s claims and the relief that he seeks. In addition, this  
14 case is not extraordinarily complex. It involves excessive force Eighth Amendment claims  
15 against two defendants, and the facts are fairly straightforward. Thus, Plaintiff has shown  
16 that despite any mental disability that he may suffer, he has been able to articulate his  
17 claims in light of the complexity of his case.

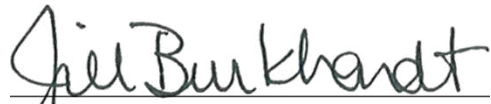
18           The Court does not doubt that Plaintiff, like most *pro se* litigants, finds it difficult to  
19 articulate his claims and would be better served with the assistance of counsel. It is for this  
20 reason that in the absence of counsel, federal courts employ procedures that are highly  
21 protective of a *pro se* litigant’s rights. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*per*  
22 *curiam*) (holding that the pleadings of a *pro se* inmate must be held to less stringent  
23 standards than formal pleadings drafted by lawyers). In fact, where a plaintiff appears *pro*  
24 *se* in a civil rights case, the court must construe the pleadings liberally and afford the  
25 plaintiff any benefit of the doubt. *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d  
26 621, 623 (9th Cir. 1988). Thus, as long as a *pro se* litigant is able to articulate his claims  
27 in light of the complexity of the issues involved, as Plaintiff is here, the exceptional  
28 circumstances that might support the appointment of counsel do not exist.

1 **III. CONCLUSION**

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

10 **IT IS SO ORDERED.**

11 Dated: July 21, 2017

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13 Hon. Jill L. Burkhardt  
14 United States Magistrate Judge