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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CESAR RIVERA,

12 Plaintiff,

13 v.

14 SAN DIEGO SHERIFF'S  
15 DEPARTMENT,

16 Defendant.

Case No.: 17cv1848-LAB (AGS)

**ORDER DENYING AS MOOT  
MOTION TO CORRECT ERRORS;  
AND**

**ORDER DENYING MOTION FOR  
APPOINTMENT OF COUNSEL**

17 In an earlier case, 16cv2979-LAB (JLB), *Rivera v. Murillo*, the Court screened and  
18 dismissed Plaintiff Cesar Rivera's complaint for failure to state a claim. When he failed  
19 to file an amended complaint as directed, the case was dismissed for failure to prosecute.  
20 He then initiated this new case by filing a complaint and a motion to proceed *in forma*  
21 *pauperis*. The Court granted him leave to proceed *in forma pauperis*, conducted the  
22 mandatory screening required under 28 U.S.C. § 1915(e)(2)(B), and dismissed his  
23 complaint for failure to state a claim. If he thought he could successfully amend, Rivera  
24 was ordered to file an amended complaint no later than October 2, 2017.

25 Rivera's claims arise from a time when he was in jail. The facility where he was  
26 being held was put on lockdown for 20 days. Instead of being provided with regular  
27 showers and hygiene packs as required under the California Penal Code, Rivera alleges  
28 they had only a little soap and had to wash in their cells. In the earlier case, Rivera

1 alleged that they were not allowed to shower for a 96-hour period (*i.e.*, four days). He  
2 now alleges they were not allowed access to the showers for the entire 20-day period.  
3 For purposes of the screening, the Court accepted his new allegations. Rivera has since  
4 been released from custody.

5 Rivera has now filed a motion, styled “Motion to Correct Errors and Amendment.  
6 Request for Appointment of Counsel.” His motion begins by asking the Court to amend  
7 and correct his complaint. After this, Rivera says the Sheriff’s department “did not give  
8 me the right paper work to state my claim.” (Docket no. 4 at 2:1–2.) He then says he is  
9 attaching a form “to request to motion to vacate, set aside, or correct sentence” and also  
10 one for appointment of counsel. This is followed by a few allegations about his claim.

11 Rivera is not a prisoner, and is not entitled to have Defendant provide him with  
12 legal forms. In spite of his remarks about vacating his sentence, he is attempting to bring  
13 a civil rights action based on the temporary showering restrictions while he was in  
14 custody. He adds a handful of allegations, most of which are repeated from the  
15 complaint the Court dismissed earlier. Rivera then asks the Court to “accept my  
16 documents as corrections to my case.” The Court construes the first part of Rivera’s  
17 motion as his attempt to amend. This is unacceptable for two reasons.

18 First, Rivera was ordered to file an amended complaint, not just to write down  
19 some allegations and ask the Court to add them for him. Second, even if the allegations  
20 were added to Rivera’s complaint, they would not change anything. Most of the  
21 allegations he mentions were already included in his dismissed complaint, and the  
22 Court’s earlier order explains why those are not enough. The only new allegation he  
23 mentions is that restricting access to showers put him at risk of getting a skin infection.  
24 But he does not allege he got a skin infection. And because he is no longer in custody,  
25 there is apparent risk of any future harm. To the extent Rivera believes these additional  
26 allegations would salvage his claims, he is mistaken. His request to have the Court add  
27 these allegations to his complaint for him is **DENIED**.

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1 Rivera also asks the Court to appoint an attorney for him. He attaches a form  
2 saying he contacted three attorneys while his earlier case was pending. Two of them said  
3 they could not handle his case and one never called him back. His form says he is  
4 convinced he has a good case but can't successfully represent himself because he doesn't  
5 understand the law.

6 There is generally no right to appointed counsel in civil cases. *Palmer v. Valdez*,  
7 560 F.3d 965, 970 (9th Cir. 2009). But under exceptional circumstances, the Court may  
8 request an attorney to represent an indigent party in a civil action. 28 U.S.C. §1915(e)(1).  
9 "A finding of exceptional circumstances requires an evaluation of both the likelihood of  
10 success on the merits and the ability of the petitioner to articulate his claims pro se in  
11 light of the complexity of the legal issues involved." *Terrell v. Brewer*, 935 F.2d 1015,  
12 1017 (9th Cir. 1991) (internal citations omitted). "Neither of these factors is dispositive  
13 and both must be viewed together before reaching a decision." *Id.* (internal citations  
14 omitted).

15 The facts underlying Rivera's claims are rather straightforward and simple. Rivera  
16 appears to be able to articulate them without assistance. Furthermore, he is able to find  
17 and cite authority. The real problem for Rivera is that he has no claim that this Court can  
18 exercise jurisdiction over, so it is unlikely he will succeed on the merits.

19 Rivera is no longer in custody, so any claims for injunctive relief are moot. For  
20 reasons explained in the Court's earlier order of dismissal, temporarily restricting  
21 Rivera's access to showers for security reasons does not give rise to a claim under the  
22 U.S. Constitution or any other federal law. Even though the alleged restriction lasted  
23 longer than is usually considered acceptable, Rivera had some soap and was able to wash  
24 in his cell, which mitigated the hardship. Courts have held that providing prisoners with  
25 alternative ways of keeping clean can avert a constitutional violation. *See, e.g., Unknown*  
26 *Parties v. Johnson*, 2016 WL 8188563, slip op. at \*11 (D. Ariz., Nov. 18, 2016) (citing  
27 *Shakka v. Smith*, 71 F.3d 162, 168 (4th Cir. 1995)).

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1 Furthermore, Rivera never alleged Defendant acted with a culpable state of mind;  
2 rather, the allegations suggest that the restrictions were imposed because of security  
3 concerns and not out of deliberate indifference to his health or safety. *See Lemire v. Cal.*  
4 *Dept. of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9<sup>th</sup> Cir. 2013).

5 And even assuming it turned out that the restrictions were found unconstitutional,  
6 it appears Defendant would be entitled to qualified immunity, because reasonable officers  
7 in those circumstances could have believed their actions were lawful. *See Hemphill v.*  
8 *Kincheloe*, 987 F.2d 589, 592 (9th Cir. 1993), as amended (June 15, 1993).

9 It is unclear whether the alleged violation of the California Penal Code's hygiene  
10 requirements might give Rivera might have some kind of claim under state law. But even  
11 if he has such a claim, the Court cannot exercise jurisdiction over it. It does not arise  
12 under federal law, the parties are not diverse, and there does not appear to be any other  
13 facts which would give the Court jurisdiction over these claims.

14 Rivera appears capable of articulating his claims without the assistance of counsel,  
15 but the likelihood of his succeeding on the merits is slim. The Court finds no exceptional  
16 circumstances are present, and Rivera's request for appointment of counsel is **DENIED**.

17 Because the October 2 deadline is approaching quickly and Rivera may not receive  
18 notice of this order before then, the deadline is extended by one week to October 9. If  
19 Rivera thinks he can successfully amend his complaint, he must file an amended  
20 complaint as ordered, by **October 9, 2017**. If Rivera needs an extension, he should file  
21 an ex parte motion (without obtaining a hearing date) requesting it, and any such motion  
22 should be filed well before the deadline. **If he does not file an amended complaint**  
23 **within the time permitted, this action will be dismissed without leave to amend.**

24 **IT IS SO ORDERED.**

25 Dated: September 29, 2017

26   
27 Hon. Larry Alan Burns  
28 United States District Judge