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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUAN FERNANDO MEJIA BANEGAS,
Plaintiff,
v.
JOHN DOE #1, CBP; JOHN DOE # 2,
CBP,
Defendants.

Case No.: 3:18-cv-2670-GPC-RBM

**REPORT & RECOMMENDATION
OF U.S. MAGISTRATE JUDGE RE:
(1) DISSOLVING ORDER TO SHOW
CAUSE ; (2) GRANTING PLAINTIFF
ADDITIONAL TIME TO FILE AND
SERVE AMENDED COMPLAINT;
AND (3) DIRECTING CLERK OF
COURT TO ISSUE CIVIL
RIGHTS/BIVENS COMPLAINT TO
PLAINTIFF**

AND

**ORDER DENYING PLAINTIFF’S
MOTION FOR APPOINTMENT OF
COUNSEL**

[Docs. 32, 33, 36]

I. INTRODUCTION

On November 23, 2018, Plaintiff Juan Fernando Mejia Banegas (“Plaintiff”) filed a civil rights complaint against two John Doe defendants (collectively “Doe Defendants”)

1 allegedly employed by U.S. Customs and Border Protection (“CBP”). (Doc. 1.) He is
2 proceeding pro se and in forma pauperis (“IFP”). (Docs. 1, 4.) On January 31, 2020, after
3 Plaintiff identified the names of the two CBP officer defendants, the undersigned directed
4 Plaintiff to file a first amended complaint (“FAC”) substituting the Doe Defendants for the
5 now-identified officers so that proper service could be effectuated. (Doc. 31.) The
6 undersigned granted Plaintiff sixty (60) days to file an FAC, which elapsed on March 30,
7 2020. (*Id.*) Plaintiff did not timely file an FAC. On June 29, 2020, District Judge Gonzalo
8 P. Curiel ordered Plaintiff to show cause (“OSC”) why the case should not be dismissed
9 for failure to prosecute. (Doc. 32.) Plaintiff filed a response to the OSC and subsequently
10 filed a motion for appointment of counsel. (Docs. 33, 36.) Both filings raise the same
11 issue: Plaintiff requests the Court to appoint counsel to represent him. (Docs. 33, 36.)

12 Plaintiff’s motion for appointment of counsel was referred to the undersigned. After
13 a thorough review of the motion for appointment of counsel, the undersigned does not find
14 exceptional circumstances exist to justify appointment of counsel at this time.
15 Accordingly, Plaintiff’s motion is **DENIED, WITHOUT PREJUDICE**. The issues
16 presented in Plaintiff’s response to the OSC was also referred to the undersigned for Report
17 and Recommendation. *See* 28 U.S.C. § 636(b)(1)(B); CivLR 72.1(c). After a thorough
18 review of the pleadings and Plaintiff’s response to the OSC, the undersigned respectfully
19 **RECOMMENDS** the order to show cause (Doc. 32) be **DISSOLVED**, and the Court
20 **GRANT** Plaintiff an additional sixty (60) days to file an amended complaint. To the extent
21 Plaintiff files an amended complaint, the undersigned further **RECOMMENDS** that the
22 Court **GRANT** Plaintiff sixty (60) days to serve the named defendants pursuant to Fed. R.
23 Civ. P. Rule 4(m), which shall run from the date the amended complaint is filed.

24 **II. BACKGROUND & PROCEDURAL HISTORY**

25 This Order incorporates the background and procedural history as set forth in the
26 Court’s September 4, 2019 and January 31, 2020 orders. (Docs. 22, 31.)

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1 **A. Complaint’s Allegations Against Doe Defendants**

2 Plaintiff’s complaint alleges he is a “citizen and national of Honduras” who is
3 seeking asylum in the United States. (Doc. 1 at 3.) On May 28, 2018, Plaintiff allegedly
4 left a shopping center in Calexico, California, when he was suddenly “punched in the face
5 with a closed fist” by Doe Defendant No. 1. (*Id.* at 4.) Plaintiff then fell to the ground,
6 and Doe Defendant No. 1 identified himself as a CBP officer. (*Id.*) Doe Defendant No. 1
7 told Plaintiff to lie still on the ground, and Plaintiff complied. (*Id.*) Doe Defendant No. 1
8 then handcuffed Plaintiff. (*Id.* at 5.) Plaintiff allegedly complied with all orders and
9 offered no resistance. (*Id.*) After a few minutes, Doe Defendant No. 2 allegedly
10 “appear[ed] at the scene,” and without provocation by Plaintiff, grabbed the back of
11 Plaintiff’s head and slammed it into the concrete, causing Plaintiff to lose consciousness.
12 (*Id.*)

13 After an unknown amount of time, Plaintiff regained consciousness and found
14 himself inside of a CBP vehicle. (*Id.*) The Doe Defendants began questioning Plaintiff
15 inside the vehicle, and Plaintiff admitted he was in the United States “without lawful
16 status.” (*Id.*) The Doe Defendants then transferred Plaintiff to a CBP detention facility.
17 (*Id.*)

18 While at the CBP detention facility, CBP staff noticed Plaintiff required medical
19 treatment and subsequently transported Plaintiff to an emergency room at a local hospital.
20 (*Id.* at 6.) Plaintiff was diagnosed with a nasal fracture and prescribed narcotics for pain
21 control. (*Id.*) After being released back to CBP, Plaintiff “returned to the same hospital a
22 few days later for . . . surgical drainage of [a] hematoma that resulted from the assault.”
23 (*Id.*)

24 Plaintiff alleges the Doe Defendants violated his Fourth Amendment rights by using
25 excessive force during his arrest. (*Id.* at 7-8.) Additionally, Plaintiff alleges the Doe
26 Defendants acted with deliberate indifference to his serious medical needs while
27 Defendants questioned Plaintiff. (*Id.* at 9-10.)

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1 At the time the Court issued its order granting Plaintiff’s IFP Motion, the Court
2 cautioned Plaintiff that he “must identify [the Doe Defendants] by name, and amend his
3 Complaint to substitute these individuals as proper parties in place of the Does before the
4 United States Marshal will be able to execute service upon them.” (Doc. 4 at 5, n. 2
5 (citations omitted).)

6 **B. Attempt to Effectuate Service of Process Upon Identified Officers**

7 On May 14, 2019, Plaintiff filed a Notice of Filing of Service Packet alleging the
8 identities of the Doe Defendants as Michael Mansfield (“Mansfield”) and Jose Meza
9 (“Meza”). (Doc. 15.) However, Plaintiff alleges he “is not exactly certain as to which
10 Defendant is [Doe Defendant No. 1] and [Doe Defendant No. 2] . . . [and] will therefore
11 leave the Caption as Doe Defendants at this time, expecting to clarify which Defendant is
12 which, early in discovery.” (*Id.* at 1.)

13 Plaintiff attempted to serve Mansfield and Meza *before* amending his complaint and
14 naming these individuals as defendants. In August and September 2019, Plaintiff filed
15 summonses addressed to Meza and Mansfield at 1150 Birch Street, Calexico, CA 92231,
16 all of which were returned unexecuted stating “[b]usiness is closed down permanently.”¹
17 (Docs. 16-17, 20-21.) On September 4, 2019, Judge Curiel granted Plaintiff up through
18 December 4, 2019 to serve Defendants and directed the Clerk of Court to re-issue
19 summonses to Plaintiff’s complaint and address U.S. Marshal Form 285 to Mansfield and
20 Meza. (Docs. 11, 22.) On October 10, 2019, Plaintiff filed the summonses addressed to
21 Mansfield and Meza, which were returned executed. (Docs. 26-27.) However, the U.S.
22 Attorney contends service is ineffective, because neither individual is a named defendant.
23 (Doc. 29.) Nonetheless, the U.S. Attorney states, “[i]f and when [Mansfield] and/or [Mesa]

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26 ¹ According to the CBP website, the Calexico station is listed with an address of 1150
27 Birch Street, Calexico, CA 92231. *See* [https://www.cbp.gov/border-security/along-us-](https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/el-centro-sector-california/calexico-station)
28 [borders/border-patrol-sectors/el-centro-sector-california/calexico-station](https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/el-centro-sector-california/calexico-station) (last visited Sept.
21, 2020). However, that location is permanently closed and has been relocated to 536
Barbara Worth Road, Calexico, CA 92231.

1 [are] name[d] as defendants in this case, Plaintiff’s designated process server is invited to
2 contact [the U.S. Attorney] to facilitate service of the summons and complaint.”² (*Id.* at
3 2.)

4 As stated above, the undersigned directed Plaintiff to file an FAC on or before March
5 30, 2020, substituting the identified officers for the Doe Defendants. (Doc. 31.) Plaintiff
6 did not file an FAC as directed. Judge Curiel ordered Plaintiff to show cause why the case
7 should not be dismissed for failure to prosecute. (Doc. 32.)

8 **III. RESPONSE TO OSC & MOTION FOR APPOINTMENT OF COUNSEL**

9 Plaintiff’s response to the OSC contends this case should not be dismissed because
10 he is mentally incompetent and requires the assistance of counsel to effectively litigate his
11 case. (Doc. 33 at 1-4.)

12 Plaintiff has been in immigration custody since May 28, 2018. (*Id.* at 1.) He has
13 been detained at the Eloy Detention Center in Eloy, Arizona since November 2019. (*Id.*)
14 Plaintiff alleges a detainee at another facility assisted him with drafting the initial
15 complaint, but he “has no one at Eloy to help him write an amended Complaint, conduct
16 discovery, file pleadings, or try the case.” (*Id.* at 2.) However, Plaintiff received assistance
17 in drafting his response to the OSC and motion for appointment of counsel. (*Id.*)

18 Plaintiff attached an order from Immigration Court where the court found Plaintiff
19 “mentally incompetent to represent himself,” and ordered a qualified representative to be
20 provided to Plaintiff through the Executive Office for Immigration Review’s National
21 Qualified Representative Program. (*Id.* at Ex. B, p. 10.) Plaintiff also attached medical
22 records indicating Plaintiff suffers from schizophrenia and psychosis. (*Id.* at Ex. A, pp. 7-
23 9.) Plaintiff also alleges he has a petition for review pending before the Ninth Circuit,
24 where the Court appointed counsel for him under the Court’s pro bono program. (*Id.* at 3.)

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28 ² The U.S. Attorney spells Mesa’s name differently than Plaintiff. (*Compare* Doc. 15 with
Doc. 29.)

1 Plaintiff also alleges Eloy Detention Center has a coronavirus outbreak, which makes it
2 difficult to research, file pleadings, and litigate this case. (*Id.*)

3 Plaintiff's motion for appointment of counsel incorporates by reference the
4 foregoing allegations contained in his response to the OSC. (Doc. 36.) He alleges he "does
5 not have a basic understanding of court proceedings or the roles of a judge and a lawyer."
6 (*Id.* at 2.) He has not been able to secure volunteer or retained counsel. (*Id.* at 3.) He
7 alleges, "[u]nless counsel is provided, [he] will simply be unable to investigate or litigate
8 this case." (*Id.*) Plaintiff contends that his case has merit, as evidenced by the medical
9 records documenting his injuries. (*Id.*)

10 **IV. DISCUSSION**

11 **A. Motion for Appointment of Counsel**

12 *i. Applicable Law*

13 Generally, a person has no right to court-appointed counsel in civil actions. *Palmer*
14 *v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (finding no abuse of discretion in denying
15 appointment of counsel in civil rights action, citing *Storseth v. Spellman*, 654 F.2d 1349,
16 1353 (9th Cir. 1981)). However, pursuant to 28 U.S.C. § 1915(e)(1), a court may appoint
17 counsel for indigent civil litigants under "exceptional circumstances." *Palmer*, 560 F.3d
18 at 970 (citing *Agyeman v. Corrs. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004), *cert.*
19 *denied sub nom. Gerber v. Agyeman*, 545 U.S. 1128 (2005)). In determining whether
20 "exceptional circumstances" exist, the court must consider "the likelihood of success on
21 the merits as well as the ability of the petitioner to articulate his claims pro se in light of
22 the complexity of the legal issues involved." *Palmer*, 560 F.3d at 970 (citing *Weygandt v.*
23 *Look*, 718 F.2d 952, 954 (9th Cir. 1983)); *see also Terrell v. Brewer*, 935 F.2d 1015, 1017
24 (9th Cir. 1991). Neither of these considerations is dispositive but instead must be viewed
25 together. *Terrell*, 935 F.2d at 1017 (citing *Wilborn v. Escalderon*, 789 F.2d 1328, 1331
26 (9th Cir. 1986)).

27 Only "rarely" will a federal court find a case to be so complex that it is appropriate
28 to appoint counsel for a civil litigant who faces no loss of liberty in the controversy at hand.

1 See *Dotson v. Doctor*, No. 1:14-CV-00093-LJO-SKO, 2014 U.S. Dist. LEXIS 72791, at
2 *1 n.1 (E.D. Cal. May 27, 2014) (“[c]ounsel is appointed in civil cases only rarely, if
3 exceptional circumstances exist”); *United States v. Melluzzo*, No. CV-09-8197-PCT-
4 MHM, 2010 U.S. Dist. LEXIS 53053, at *3 (D. Ariz. May 3, 2010); see also
5 *Schwartzmiller v. Roberts*, No. 93-1276-FR, 1994 U.S. Dist. LEXIS 1620, at *3 n.1 (D.
6 Or. Feb. 11, 1994). This includes civil rights litigation involving Fourth Amendment
7 excessive force allegations brought pursuant to 28 U.S.C. § 1331 and *Bivens v. Six*
8 *Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See
9 *Marquez v. Scott*, No. 13-CV-2507-BEN-BLM, 2014 U.S. Dist. LEXIS 37684, at *6 (S.D.
10 Cal. Mar. 19, 2014) (denying motion for appointment of counsel in excessive force action,
11 in part, due to relatively straightforward nature of the Fourth Amendment excessive force
12 allegations).

13 ii. *No Exceptional Circumstances Exist to Justify Appointment of Counsel*

14 Here, there are no “exceptional circumstances” to justify appointment of counsel at
15 this time. Litigation is in its early stages. The two identified CBP officers have yet to be
16 substituted as defendants, much less file a responsive pleading. (Docs. 1, 31, 32.) At the
17 initial pleading stage, it is difficult to determine Plaintiff’s likelihood of success on the
18 merits of his claims. To the extent this case proceeds beyond summary judgment, the Court
19 will be in a better position to make such determination.

20 As in *Marquez*, Plaintiff’s Fourth Amendment allegations are not sufficiently
21 complex to warrant appointment of counsel. See *Marquez*, 2014 U.S. Dist. LEXIS 37684,
22 at *6. Although Plaintiff claims he lacks an understanding of legal proceedings and suffers
23 from a mental illness, Plaintiff demonstrated literacy and an ability to communicate
24 through pleadings and motions to sufficiently articulate his claims pro se. (Docs. 1, 33,
25 36); see *Palmer*, 560 F.3d at 970 (affirming denial of appointment of counsel where a
26 plaintiff demonstrates ability to effectively present case). In all of Plaintiff’s filings to date,
27 he demonstrates an ability to articulate essential facts to support his claims and/or
28 arguments. (Docs. 1, 33, 36.) For example, Plaintiff’s response to the OSC attaches as

1 exhibits medical records and an immigration court order to support his allegations that he
2 lacks mental capacity. (Doc. 33 at 6-10.) Additionally, Plaintiff's complaint survived the
3 initial screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A, which further evidences
4 his ability to articulate his claims pro se.

5 In considering the nature of Plaintiff's claims together with Plaintiff's ability to
6 articulate the same, the undersigned does not find exceptional circumstances exist to justify
7 appointment of counsel at this time. If this case proceeds beyond summary judgment, the
8 Court may consider appointment of trial counsel.

9 **B. Plaintiff's Response to OSC**

10 Notably, Plaintiff's response to the OSC was timely filed and explained why he had
11 not timely filed an FAC in compliance with the undersigned's January 31, 2020 order.
12 (Doc. 33.) Plaintiff is detained and proceeding pro se, and he alleges he lacks legal
13 knowledge to competently represent himself. (*Id.* at 1-2.) Plaintiff further alleges the
14 ongoing COVID-19 pandemic makes it difficult for him to litigate. (*Id.* at 3.) Plaintiff
15 requests that the Court not dismiss his case. (*Id.* at 4.) He further requests the Court appoint
16 counsel and grant him an additional sixty days to file an FAC. (*Id.*) To the extent Plaintiff's
17 response to the OSC is construed as a motion for appointment of counsel, such request is
18 denied. *See supra* pp. 6-7.

19 Properly naming all parties in a complaint ensures timely service of the summons
20 and complaint pursuant to Fed. R. Civ. P. 4(m), which requires service to be accomplished
21 within ninety days after the complaint is filed. If service is not accomplished within ninety
22 days, the Court must dismiss the action without prejudice or order that service be made
23 within a specified time. *See* Fed. R. Civ. P. 4(m). If plaintiff establishes good cause for
24 the failure to effectuate timely service, the Court is required to extend the time for service.
25 *Id.* The Court has broad discretion to extend the time for service and may consider factors
26 such as actual notice of a lawsuit, prejudice to the defendant or eventual service. *See Efaw*
27 *v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007) (citation and internal quotation marks
28 omitted).

1 Although Plaintiff has yet to name Mansfield and Meza as defendants in an amended
2 complaint, it appears these officers are on notice of the allegations in the complaint such
3 that they will not suffer any prejudice from a delay in service. *See supra* pp.4-5; (Docs.
4 26-27, 29); *see Efav*, 473 F.3d at 1041. Given the ongoing COVID-19 pandemic,
5 Plaintiff's pro se circumstances, and the CBP officer defendants' actual notice of the
6 lawsuit, good cause exists to extend the time for Plaintiff to file and serve an amended
7 complaint pursuant to Fed. R. Civ. P. 4(m). *See Eldridge v. Block*, 832 F.2d 1132, 1136
8 (9th Cir. 1987) (stating "strict time limits . . . ought not to be insisted upon where restraints
9 resulting from a pro se prisoner plaintiff's incarceration prevent timely compliance with
10 court deadlines.") (internal quotations and citations omitted). As such, the undersigned
11 recommends that the OSC be dissolved and Plaintiff be granted additional time to file and
12 serve an amended complaint.

13 V. CONCLUSION

14 For the foregoing reasons, Plaintiff's motion for appointment of counsel is
15 **DENIED, WITHOUT PREJUDICE.**

16 Additionally, the undersigned submits a Report and Recommendation as to the June
17 29, 2020 Order to Show Cause to United States District Judge Gonzalo P. Curiel under 28
18 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.1(c) of the United States District Court for
19 the Southern District of California. The undersigned respectfully **RECOMMENDS** that:

- 20 1. The order to show cause (Doc. 32) be **DISSOLVED**;
- 21 2. The Court **GRANT** Plaintiff an additional **sixty (60) days to file an amended**
22 **complaint** substituting the Doe Defendants for the individual defendants identified by
23 Plaintiff;
- 24 3. To the extent Plaintiff files an amended complaint, the Court **GRANT** Plaintiff
25 sixty (60) days to serve the named defendants pursuant to Rule 4(m), Fed. R. Civ. P., which
26 shall begin running from the date the amended complaint is filed;

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