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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 SHANNON RILEY,

12 Plaintiff,

13 v.

14 VIZCARRA,

15 Defendant.  
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Case No.: 3:18-cv-2911-JAH-AHG

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

**[ECF No. 43]**

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21 Before the Court is Plaintiff Shannon Riley's ("Plaintiff") Motion for Appointment  
22 of Counsel. ECF No. 43. Plaintiff, proceeding pro se and in forma pauperis, filed a civil  
23 complaint pursuant to 42 U.S.C. § 1983 relating to incidents that occurred while  
24 incarcerated at Richard J. Donovan Correctional Facility ("RJD") in San Diego, California.  
25 ECF No. 24. For the reasons set forth below, the Court **DENIES** Plaintiff's motion.

26 **I. BACKGROUND**

27 Plaintiff initiated this action by filing a complaint on December 31, 2018, naming as  
28 Defendants RJD Correctional Officers Vizcarra, Alvarez, and Luna. ECF No. 1.

1 Defendants’ motion to dismiss the original Complaint was denied as moot after Plaintiff  
2 filed his First Amended Complaint on July 1, 2019. ECF Nos. 13, 17, 18. Defendants’  
3 motion to dismiss the First Amended Complaint was granted on December 3, 2019. ECF  
4 No. 23. The Court dismissed certain claims and notified Plaintiff of the defects of pleading  
5 as to the dismissed claims, granting leave to amend. *Id.* at 16.

6 Plaintiff filed his Second Amended Complaint, the operative pleading in this action,  
7 on January 13, 2020. ECF No. 24. Defendants moved to dismiss all claims from the Second  
8 Amended Complaint except the First and Eighth Amendment claims against Defendant  
9 Vizcarra arising from a March 18, 2018 incident.<sup>1</sup> ECF No. 28. Plaintiff opposed the  
10 motion. ECF No. 32. The Court dismissed all claims in Plaintiff’s Second Amended  
11 Complaint, except the First and Eighth Amendment claims against Defendant Vizcarra  
12 arising from the March 18, 2018 incident. ECF No. 37.

13 On July 2, 2020, Defendant filed an Answer to the surviving claims in Plaintiff’s  
14 Second Amended Complaint. ECF No. 38. On July 7, 2020, the Court issued its Scheduling  
15 Order regulating discovery and other pre-trial proceedings. ECF No. 39. Plaintiff filed the  
16 instant motion for appointment of counsel shortly thereafter, on July 13, 2020. ECF No.  
17 43. This Order follows.

18 **II. LEGAL STANDARD**

19 There is no constitutional right to appointment of counsel in a civil case, unless an  
20 indigent litigant’s physical liberty is at stake. *Lassiter v. Dep’t. of Soc. Servs.*, 452 U.S. 18,  
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23 <sup>1</sup> Plaintiff alleges Defendant Vizcarra violated his Eighth Amendment rights during a  
24 March 18, 2018 incident in which he used excessive force, was deliberately indifferent to  
25 Plaintiff’s medical condition by handcuffing him with his hands behind his back, and  
26 placed him in danger of assault by other inmates. ECF No. 1 at 10–14 (reiterated by ECF  
27 No. 24 at 16). Plaintiff alleged his First Amendment right to petition for the redress of  
28 grievances was violated by Defendant Vizcarra because he took the March 18, 2018 actions  
in retaliation for a complaint Plaintiff filed about an earlier incident, and because Defendant  
Vizcarra falsely charged him with possession of alcohol in retaliation for that complaint.  
*Id.*

1 25 (1981); see, e.g., *United States v. Sardone*, 94 F.3d 1233, 1236 (9th Cir. 1996)  
2 (collecting cases to show that it is “well-established that there is generally no constitutional  
3 right to counsel in civil cases”). Additionally, there is no constitutional right to a court-  
4 appointed attorney in cases filed by inmates arising under 42 U.S.C. § 1983. *Storseth v.*  
5 *Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981); see, e.g., *Thornton v. Schwarzenegger*, No.  
6 10cv1583-BTM-RBB, 2011 WL 90320, at \*1 (S.D. Cal. Jan. 11, 2011).

7         Nevertheless, courts have discretion to request legal representation for “any person  
8 unable to afford counsel.” See 28 U.S.C. § 1915(e)(1); see also *Terrell v. Brewer*, 935 F.2d  
9 1015, 1017 (9th Cir. 1991). Courts have required that plaintiffs demonstrate they are  
10 indigent and that they have made a reasonably diligent effort to secure counsel before they  
11 are eligible for an appointed attorney. *Bailey v. Lawford*, 835 F. Supp. 550, 552 (S.D. Cal.  
12 1993) (extending the “reasonably diligent effort” standard used in *Bradshaw v. Zoological*  
13 *Soc’y of San Diego*, 662 F.2d 1301, 1319 (9th Cir. 1981) to requests made pursuant to 28  
14 U.S.C. § 1915); see, e.g., *Verble v. United States*, No. 07cv0472 BEN-BLM, 2008 WL  
15 2156327, at \*2 (S.D. Cal. May 22, 2008).

16         But even after a plaintiff satisfies the two initial requirements of indigence and a  
17 diligent attempt to obtain counsel, “he is entitled to appointment of counsel only if he can  
18 [also] show exceptional circumstances.” *Bailey*, 835 F. Supp. at 552 (citing *Wilborn v.*  
19 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)). Finding exceptional circumstances  
20 entails “an evaluation of both the ‘likelihood of success on the merits and the ability of the  
21 plaintiff to articulate his claims pro se in light of the complexity of the legal issues  
22 involved.’ Neither of these issues is dispositive and both must be viewed together before  
23 reaching a decision.” *Terrell*, 935 F.2d at 1017 (quoting *Wilborn*, 789 F.2d at 1331); see  
24 also *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009).

### 25 **III. DISCUSSION**

26         First, the Court examines the threshold requirements that Plaintiff is indigent and  
27 has made a reasonably diligent effort to secure counsel. Here, the Court acknowledged  
28 Plaintiff’s indigence when it granted Plaintiff’s motion to proceed in forma pauperis. ECF

1 No. 9 at 3–4. However, Plaintiff does not include any information in his motion about  
2 whether he has attempted to secure counsel on his own.<sup>2</sup> Requiring that litigants “make a  
3 reasonably diligent effort to secure counsel before asking the court to appoint counsel for  
4 them . . . is ‘not [to] suggest that a plaintiff should be required to exhaust the legal directory  
5 before a court could appoint him an attorney. [H]owever, a person’s diligence in attempting  
6 to obtain a lawyer to assist him may properly be considered by the district court in assessing  
7 the justness of the application for counsel.’” Moore v. Raught, No. 07-03836-VBF-JPR,  
8 2014 WL 1795138, at \*7 (C.D. Cal. Mar. 17, 2014) (brackets in original) (quoting Caston  
9 v. Sears, Roebuck & Co., 556 F.2d 1305, 1309 (5th Cir. 1977)). Here, “Plaintiff’s lack of  
10 funds alone does not demonstrate that efforts to secure counsel necessarily would be  
11 futile.” Vera v. Gipson, No. 13cv870-AWI-MJS-PC, 2014 WL 807051, at \*5 (E.D. Cal.  
12 Feb. 28, 2014).

13       Though Plaintiff did not satisfy a threshold requirement, for completeness, the Court  
14 will proceed to the next step of the analysis to determine whether Plaintiff can show  
15 exceptional circumstances justifying court-appointed counsel by examining the likelihood  
16 of Plaintiff succeeding on the merits and his ability to proceed without counsel. See, e.g.,  
17 Moore, 2014 WL 1795138, at \*4–\*8 (examining plaintiff’s likelihood of success on the  
18 merits and ability to articulate his claims pro se, even though he did “not provide[] evidence  
19 documenting any efforts he made to secure counsel before filing the instant motion”);  
20 Verble, 2008 WL 2156327, at \*2 (examining whether plaintiff demonstrated exceptional  
21 circumstances, while acknowledging that “[Plaintiff]’s request for appointment of counsel  
22 should be denied because he has failed to show that he made a reasonably diligent effort to  
23 secure counsel.”)

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27 <sup>2</sup> Plaintiff notes that he has “had to seek assistance from fellow prisoners, who appeared to  
28 have some knowledge of law[.]” ECF No. 43 at 5. However, this statement alone does not  
show that Plaintiff diligently attempted to secure counsel.

1           **A. Likelihood of Success on the Merits**

2           “A plaintiff that provides no evidence of his likelihood for success at trial fails to  
3 satisfy the first factor of the [exceptional circumstances] test.” *Torbert v. Gore*, No.  
4 14cv2911-BEN-NLS, 2016 WL 1399230, at \*1 (S.D. Cal. Apr. 8, 2016). Here, Plaintiff  
5 has not offered evidence in his motion suggesting that he is likely to succeed on the merits.<sup>3</sup>  
6 Additionally, there is little before the Court regarding the merits of Plaintiff’s case, other  
7 than assertions in the operative complaint.<sup>4</sup> Thus, at this early stage of the case,<sup>5</sup> when the  
8 parties have not yet engaged in discovery and proffered evidence to the Court in support  
9 of their claims and defenses, the Court cannot find that Plaintiff is likely to succeed on the  
10 merits. See *Garcia v. Smith*, No. 10cv1187-AJB-RBB, 2012 WL 2499003, at \*3 (S.D. Cal.  
11 June 27, 2012) (denying motion for appointment of counsel even though plaintiff had  
12 survived a motion to dismiss, because it was too early to determine whether any of  
13 plaintiff’s claims would survive a motion for summary judgment); see, e.g., *Arellano v.*  
14 *Blahnik*, No. 16cv2412-CAB-RNB, 2018 WL 4599697, at \*2 n.1 (S.D. Cal. Sept. 25, 2018)  
15 (denying motion for appointment of counsel because “[a]lthough plaintiff’s [] claim  
16 survived defendant’s motion to dismiss, it is still too early to determine the likelihood of  
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19 <sup>3</sup> The Court notes that Plaintiff refers to his “meritorious proceeding” (see ECF No. 43  
20 at 5), however, this statement on its own is not enough to prove that he is likely to succeed  
21 on the merits.

22 <sup>4</sup> That certain claims in Plaintiff’s amended complaint survived the Court’s screening  
23 process (ECF No. 9) and Defendants’ motion to dismiss (ECF No. 37) does not  
24 demonstrate that Plaintiff is likely to succeed at trial. *McGinnis v. Ramos*, No. 15cv2812-  
25 JLS-JLB, 2017 U.S. Dist. LEXIS 58507, at \*6–\*7 (S.D. Cal. Apr. 17, 2017) (“The Rule  
26 12(b)(6) standard tests not whether a plaintiff will ultimately prevail on his alleged claim  
27 but whether he is entitled to offer evidence to support his claim. [] Thus, the Court’s  
28 screening process and Defendant’s motion to dismiss did not test the merits of Plaintiff’s  
claim but rather only whether Plaintiff adequately stated a claim that could potentially have  
merit.”) (internal citation omitted).

<sup>5</sup> The Court issued its Scheduling Order regulating discovery and other pre-trial  
proceedings on July 7, 2020. ECF No. 39.

1 success on the merits.”); *Arellano v. Hodge*, No. 14cv590-JLS-JLB, 2017 WL 1711086, at  
2 \*4 (S.D. Cal. May 3, 2017) (denying motion for appointment of counsel when discovery  
3 had recently begun after fourth amended complaint, because it was too early to determine  
4 whether any of plaintiff’s claims would succeed on the merits). Therefore, Plaintiff fails to  
5 satisfy the first “exceptional circumstances” factor that would support his motion for  
6 appointment of counsel.

### 7 **B. Ability to Articulate Claims Pro Se**

8 As to the second factor, Plaintiff cites barriers to successfully articulating his claims,  
9 including: limited access to the law library, complex issues requiring significant discovery,  
10 and limited knowledge of the law. ECF No. 43 at 1–3. However, Plaintiff fails to  
11 demonstrate an inability to represent himself beyond the ordinary burdens encountered by  
12 incarcerated plaintiffs representing themselves pro se.

13 First, limited access to the law library and unfamiliarity with the law are  
14 circumstances common to most incarcerated plaintiffs and do not establish exceptional  
15 circumstances. See, e.g., *Wood v. Housewright*, 900 F.2d 1332, 1335–36 (9th Cir. 1990)  
16 (denying appointment of counsel where plaintiff complained that he had limited access to  
17 law library and lacked a legal education); *Fletcher v. Quin*, No. 15cv2156-GPC-NLS, 2018  
18 WL 840174, at \* 3 (S.D. Cal. Feb. 13, 2018) (same); *Galvan v. Fox*, No. 2:15-CV-01798-  
19 KJM (DB), 2017 WL 1353754, at \*8 (E.D. Cal. Apr. 12, 2017) (“Circumstances common  
20 to most prisoners, such as lack of legal education and limited law library access, do not  
21 establish exceptional circumstances that warrant a request for voluntary assistance of  
22 counsel”). Plaintiff has not shown he faces barriers conducting legal research beyond those  
23 ordinarily experienced by pro se plaintiffs.

24 Specifically, Plaintiff raises the issue that the law library is rarely open as a result of  
25 COVID-19, due to staff shortages and state mandated social-distancing. ECF No. 43 at 2,  
26 5. However, courts in this circuit have declined to find that the COVID-19 pandemic  
27 establishes exceptional circumstances. See, e.g., *Pitts v. Washington*, No. C18-526-RSL-  
28 MLP, 2020 WL 2850564, at \*1 (W.D. Wash. June 2, 2020) (denying motion for

1 appointment of counsel because, “[a]lthough Plaintiff contends he is unable to access the  
2 law library because of social distancing, this bare assertion does not justify the appointment  
3 of counsel at this time, nor does the COVID-19 pandemic.”); *Faultry v. Saechao*, No.  
4 18cv1850-KJM-AC-P, 2020 WL 2561596, at \*2 (E.D. Cal. May 19, 2020) (denying  
5 motion for appointment of counsel and explaining that “[c]ircumstances common to most  
6 prisoners, such as lack of legal education and limited law library access, do not establish  
7 exceptional circumstances supporting appointment of counsel. . . . The impacts of the  
8 COVID-19 health crisis on prison operations are also common to all prisoners.”).

9 Second, the need for research, investigation, and discovery is common to most  
10 litigation and does not automatically qualify the issues in a case as complex. See *Wilborn*,  
11 789 F.2d at 1331; *McGinnis*, 2017 U.S. Dist. LEXIS 58507, at \*7–\*8 (same); *Miller v.*  
12 *LaMontagne*, No. 10cv702-WQH-BGS, 2012 WL 1666735, at \*1–\*2 (S.D. Cal. May 11,  
13 2012) (concluding that plaintiff’s arguments “that this case will involve research and  
14 investigation are not based on the complexity of the legal issues involved, but rather on the  
15 general difficulty of litigating pro se”); see also *Rand v. Rowland*, 113 F.3d 1520, 1525  
16 (9th Cir. 1997) (holding that while a pro se inmate might fare better with counsel during  
17 discovery, this is not the test for determining whether to appoint counsel); *Peterson v.*  
18 *Anderson*, No. CV09-21-GF-SHE, 2009 WL 4506542, at \*3 (D. Mont. Dec. 2, 2009)  
19 (“Although Plaintiff contends he is not in a position to litigate this matter, pro se litigants  
20 are rarely in a position to research and investigate facts easily. This alone does not deem a  
21 case complex.”); cf. *Eusse v. Vitela*, No. 13cv916-BEN-NLS, 2015 WL 4404865, at \*2  
22 (S.D. Cal. July 16, 2015) (“Plaintiff asks the Court to appoint counsel because his case  
23 requires discovery, he is currently incarcerated and is unable to investigate the facts, and  
24 he has limited access to the library. [] However, the need for discovery or difficulties  
25 developing the factual record do not constitute the type of ‘exceptional circumstances’  
26 required for appointment of counsel.”). It is true that courts have recognized that  
27 incarcerated, pro se litigants would potentially be “better served with the assistance of  
28 counsel.” *Eusse*, 2015 WL 4404865, at \*2 (internal quotations omitted). However, whether

1 a litigant would have fared better with counsel is not the test for appointment of counsel.  
2 Thornton, 2010 WL 3910446, at \*5. The discovery concerns Plaintiff raises in his motion  
3 “do not present ‘exceptional circumstances,’ but rather illustrate the difficulties any  
4 prisoner would have litigating pro se.” Eusse, 2015 WL 4404865, at \*2.

5 Third, Plaintiff’s lack of legal training, limited education, and difficulty  
6 understanding legal standards and reasoning also do not establish exceptional  
7 circumstances. See McGinnis, 2017 U.S. Dist. LEXIS 58507, at \*7–\*8 (finding that, though  
8 plaintiff argued “he is a layman with no legal experience and training and who is confused  
9 by complex legal reasoning and about his responsibilities in the case, . . . these burdens are  
10 common to most prisoners representing themselves pro se and do not establish the  
11 exceptional circumstances that would support the appointment of counsel”); cf. Torbert,  
12 2016 WL 1399230, at \*1–\*2 (denying motion for appointment of counsel when the  
13 plaintiff argued that the legal issues were outside of his scope of understanding because of  
14 his eighth grade education).

15 In the instant case, Plaintiff has demonstrated the ability to articulate his position,  
16 conduct legal research, and comprehend this Court’s instructions. See, e.g., Griffin v.  
17 Zurbano, No. 16cv2715-JLS-WVG, 2017 U.S. Dist. LEXIS 132636, at \*3 (S.D. Cal. Aug.  
18 18, 2017) (denying motion for appointment of counsel and noting that “Plaintiff’s lack of  
19 education in the law and 10th-grade education level have not prevented him from filing  
20 very cogent and well-organized documents”). Here, Plaintiff has ably represented himself  
21 thus far by filing his amended complaint and opposition to Defendant’s motion to dismiss.  
22 See ECF Nos. 24, 30. Moreover, Plaintiff’s present motion shows that he is able to write  
23 very well and perform legal research. See ECF No. 43. Plaintiff has also shown a good  
24 grasp of litigation procedure thus far, seeking a stay in light of his pending transfer to  
25 another facility, and timely seeking an extension to file his opposition to Defendants’  
26 motion to dismiss when the deadline was approaching and Plaintiff had not yet received a  
27 copy of Defendant’s motion. See ECF Nos. 30, 34. Such circumstances do not indicate to  
28 the Court that appointment of counsel is necessary at this time.



1 As to Plaintiff's specific contention that he lacks the ability to articulate his claims  
2 pro se because he had to seek assistance from fellow inmates due to his limited education  
3 and lack of legal knowledge, the Court notes that, "[w]ith the assistance of other inmates,  
4 plaintiff has continued to capably pursue this case. Although the undersigned recognizes  
5 that these efforts do not reflect plaintiff's personal capacity to articulate his claims pro se,  
6 they do reflect plaintiff's resourcefulness in locating capable assistance." *Snowden v. Yule*,  
7 No. 17cv2167-TLN-AC-P, 2020 WL 2539229, at \*2 (E.D. Cal. May 19, 2020); *Reyes v.*  
8 *Brown*, No. 16cv84-JLS-BLM, 2016 U.S. Dist. LEXIS 104301, at \*1-\*3, \*3 n.2 (S.D. Cal.  
9 Aug. 8, 2016) (denying motion for appointment of counsel and finding that plaintiff was  
10 able to articulate his claims even though he relied on another inmate for assistance in  
11 drafting his pleadings); see, e.g., *Williams v. Kernan*, No. 18cv1833-WQH-MSB, 2019 WL  
12 1099842, at \*2 (S.D. Cal. Mar. 8, 2019) (collecting cases and finding that inmate's  
13 "reliance on another inmate for assistance in drafting his Petition does not warrant a  
14 different outcome [i.e., appointment of counsel]").

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

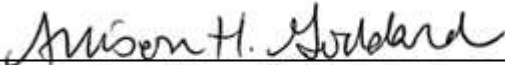
#### 26 **IV. CONCLUSION**

27 Although Plaintiff is indigent, he failed to show that he made reasonable efforts to  
28 obtain counsel or that exceptional circumstances require appointment of counsel. Thus, the

1 Court **DENIES** Plaintiff's Motion for Appointment of Counsel (ECF No. 43) **without**  
2 **prejudice.**<sup>6</sup>

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4 **IT IS SO ORDERED.**

5 Dated: July 28, 2020

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8 Honorable Allison H. Goddard  
9 United States Magistrate Judge  
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26 <sup>6</sup> Plaintiff notes in his motion that counsel would be essential to assist him prepare for trial.  
27 See ECF No. 43 at 3. That issue is raised prematurely. This case is still in its very early  
28 stages and trial is not on the horizon. Because Plaintiff's motion is denied without prejudice  
to refiling, Plaintiff is free to seek appointment of counsel again in the future and may raise  
such arguments at that time, if applicable.