

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 MICHAEL WILLIAMS,

Case No. 3:17-cv-00355-MMD-WGC

5 Plaintiff,

ORDER

6 v.

7 MARKS, et al.,

8 Defendants.

9 **I. SUMMARY**

10 This is a civil rights case brought by an individual—Plaintiff Michael Williams—who
11 is incarcerated within the Nevada Department of Corrections (“NDOC”). Before the Court
12 is Plaintiff’s objection (ECF No. 32) to Magistrate Judge Cobb’s order (ECF No. 29)
13 denying Plaintiff’s ex parte motion for appointment of counsel (ECF No. 27). The Court
14 has reviewed Defendants Isidro Baca, Melissa Mitchell, and Brian Ward’s (collectively,
15 “Defendants”) response (ECF No. 34).¹ For the following reasons, the Court overrules
16 Plaintiff’s objection.

17 **II. BACKGROUND**

18 Plaintiff filed a motion for appointment of counsel on the basis of his physical
19 impairments. (See ECF No. 27 at 2-3.) Specifically, Plaintiff alleges that he “suffers from
20 sever[e] back pain that restricts [him] from sitting, bending forward and wri[t]ing for any
21 length of time.” (Id. at 2.) Plaintiff further alleges that he has been “prescribed medication
22 for the pain that causes mental fogginess and drow[s]iness without any form of
23 concentration.” (Id.)

24 Judge Cobb denied Plaintiff’s motion, finding that Plaintiff has shown an ability to
25 articulate his claims, that the substantive claims in the action are not unduly complex, and

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28 ¹The Court also has reviewed Defendants’ motion for enlargement of time to
respond to Plaintiff’s objection. (ECF No. 33.) Good cause appearing, the Court will grant
the motion for enlargement of time nunc pro tunc.

1 that Plaintiff failed to convince the court of the likelihood of success on the merits of his
2 claims. (ECF No. 29 at 1-2.)

3 **III. LEGAL STANDARD**

4 Magistrate judges are authorized to resolve pretrial matters subject to district court
5 review under a “clearly erroneous or contrary to law” standard. 28 U.S.C. § 636(b)(1)(A);
6 see also Fed. R. Civ. P. 72(a); LR IB 3-1(a) (“A district judge may reconsider any pretrial
7 matter referred to a magistrate judge in a civil or criminal case pursuant to LR IB 1-3,
8 where it has been shown that the magistrate judge’s ruling is clearly erroneous or contrary
9 to law.”). “This subsection . . . also enable[s] the court to delegate some of the more
10 administrative functions to a magistrate, such as . . . assistance in the preparation of plans
11 to achieve prompt disposition of cases in the court.” *Gomez v. United States*, 490 U.S.
12 858, 869 (1989). “A finding is clearly erroneous when although there is evidence to support
13 it, the reviewing body on the entire evidence is left with the definite and firm conviction that
14 a mistake has been committed.” *United States v. Ressam*, 593 F.3d 1095, 1118 (9th Cir.
15 2010) (quotation omitted). A magistrate’s pretrial order issued under 28 U.S.C.
16 § 636(b)(1)(A) is not subject to de novo review, and the reviewing court “may not simply
17 substitute its judgment for that of the deciding court.” *Grimes v. City & County of San*
18 *Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

19 **IV. DISCUSSION**

20 There is no constitutional right to appointed counsel in a § 1983 action. E.g., *Rand*
21 *v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), opinion reinstated in pertinent part, 154
22 F.3d 952, 954 n.1 (9th Cir. 1998) (en banc). The provision in 28 U.S.C. § 1915(e)(1),
23 however, gives a district court the discretion to request that an attorney represent an
24 indigent civil litigant. 28 U.S.C. § 1915(e)(1) (“The court may request an attorney to
25 represent any person unable to afford counsel.”); see, e.g., *Wilborn v. Escalderon*, 789
26 F.2d 1328, 1331 (9th Cir. 1986). Yet, the statute does not give the court the authority to
27 compel an attorney to accept appointment, such that counsel remains free to decline the
28 request. See *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 310 (1989).

1 Furthermore, while the decision to request counsel lies within the discretion of the district
2 court, the court may exercise this discretion to request counsel only under “exceptional
3 circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of
4 exceptional circumstances requires an evaluation of both the likelihood of success on the
5 merits and [the plaintiff’s ability to] articulate his claims pro se in light of the complexity of
6 the legal issues involved.” *Id.* (quoting *Wilborn*, 789 F.2d at 1331) (internal quotation marks
7 omitted).

8 Plaintiff’s first objection relates to Judge Cobb’s finding that Plaintiff did not show a
9 likelihood of success on the merits. (ECF No. 32 at 2.) Plaintiff argues (1) that he need
10 only show that his case “has merit”—not that he is likely to succeed on the merits—to
11 demonstrate a “likelihood of success on the merits;” (2) that his case “has merit” because
12 the Court allowed some of his claims to proceed past screening; and (3) that Eighth
13 Amendment deliberate indifference claims are automatically considered meritorious. (*Id.*)

14 Plaintiff’s arguments are unpersuasive. To show a likelihood of success on the
15 merits, Plaintiff must show a probability of success—not just that his case has merit. See
16 *Illumina, Inc. v. Qiagen, N.V.*, 207 F. Supp. 3d 1081, 1087 (N.D. Cal. 2016) (“Likelihood of
17 success on the merits is a probability of fifty-one percent or more.”). Next, the standard for
18 screening is more lenient than the “likelihood of success” standard. On screening, the
19 court must identify any cognizable claims and dismiss any claims that are frivolous,
20 malicious, fail to state a claim upon which relief may be granted, or seek monetary relief
21 from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2).
22 Plaintiff’s success at the screening stage does not demonstrate a likelihood of success on
23 the merits. Finally, Eighth Amendment deliberate indifference claims are not uniformly
24 likely to succeed on the merits as Plaintiff contends. See, e.g., *Toavs v. Bannister*, No.
25 3:12-cv-00449-MMD-WGC, 2013 WL 2445035, at *1, *9-10 (D. Nev. May 16, 2013)
26 (finding no likelihood of success on the merits of a claim for Eighth Amendment deliberate
27 indifference to serious medical needs).

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1 Plaintiff's second objection relates to his ability to articulate his claims. Plaintiff
2 argues that he has only been able to articulate his claims with the assistance of another
3 inmate. (ECF No. 32 at 3.) Plaintiff also argues that he is wholly unversed in civil litigation
4 and that his physical disability and lack of mental acuity due to pain management
5 medication must be taken into account. (Id.) But Plaintiff has not shown that the Magistrate
6 Judge clearly erred or ruled contrary to law. Regardless of assistance, the fact remains
7 that Plaintiff has articulated his claims to the Court.

8 Plaintiff's third objection relates to the complexity of the legal issues involved in this
9 case. Plaintiff contends that his claim is complex because it involves medical records,
10 expert witnesses, and adequacy of treatment. (ECF No. 32 at 4.) But this is true of nearly
11 every claim for Eighth Amendment deliberate indifference to serious medical needs.
12 Plaintiff has not shown how his claim is more complex than any other claim for Eighth
13 Amendment deliberate indifference to serious medical needs.

14 In sum, Plaintiff has not shown the Magistrate Judge clearly erred or ruled contrary
15 to law in denying Plaintiff's motion for appointment of counsel. Accordingly, the Court will
16 overrule Plaintiff's objection. Nevertheless, Plaintiff may consider filing a renewed motion
17 for appointment of counsel if, for example, he loses the assistance of his fellow inmate,
18 his conditions worsen, or the case's complexity increases.

19 **V. CONCLUSION**

20 The Court notes that the parties made several arguments and cited to several cases
21 not discussed above. The Court has reviewed these arguments and cases and determines
22 that they do not warrant discussion as they do not affect the outcome of the objection.

23 It is therefore ordered that Plaintiff's objection (ECF No. 32) is overruled.

24 It is further ordered that Defendants' motion to extend time (ECF No. 33) is granted
25 nunc pro tunc.

26 DATED THIS 24th day of April 2019.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE