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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HERMAN HAYNES,

Plaintiff,

v.

H. ASBURY, et al.,

Defendants.

Case No.: 19cv02380-BAS (MSB)

**ORDER DENYING PLAINTIFF'S MOTION
FOR APPOINTMENT OF COUNSEL
[ECF No. 25]**

On January 7, 2021, Plaintiff Herman Haynes (“Plaintiff”) submitted “Plaintiff Request for Appointed Counsel” (“Motion for Appointment of Counsel”), which the Court accepted on discrepancy on January 11, 2021. (See ECF Nos. 24 and 25.) Plaintiff requests counsel “to assist with the remainder of the case.” (ECF No. 25.) Plaintiff’s sole argument in support of his request is that, as a result of COVID-19, he currently has “minimum to no access to the Law Library at the Facility due to constant lockdowns and unit quarantines for exposure precautions.” (Id.)

I. RELEVANT BACKGROUND

Plaintiff, a California prisoner proceeding pro se and in forma pauperis, filed this civil rights case alleging violations of the Eighth and Fourteenth Amendments against prison officials at Richard J. Donovan Correctional Facility in San Diego, California. (See ECF No. 1 at 1.) The District Court screened Plaintiff’s allegations and allowed only

1 Plaintiff’s Eighth Amendment claim against defendants Asbury, Shepard, and Torres
2 (“Defendants”) to proceed. (See ECF No. 3 at 6, 8.) Plaintiff’s surviving claim arises from
3 Defendants’ alleged failure to protect Plaintiff from imminent harm after Plaintiff had
4 informed them of threats to his physical safety before he was attacked by other
5 inmates. (See ECF No. 1 at 4-5, 8.) Defendants filed an Answer[ECF No. 22] in this case
6 on January 4, 2021 and the Court will hold a Telephonic Case Management Conference
7 on February 8, 2021. (See ECF No. 23.)

8 II. LEGAL STANDARD

9 The Constitution provides no right to appointment of counsel in a civil case unless
10 an indigent litigant may lose his physical liberty if he loses the litigation. Lassiter v.
11 Dep’t Soc. Servs., 452 U.S. 18, 25 (1981). Additionally, there is no constitutional right to
12 a court-appointed attorney in cases filed by inmates arising under 42 U.S.C. § 1983.
13 Storseth v. Spellman, 654 F.2d 1349, 1353 (9th Cir. 1981). However, under 28 U.S.C. §
14 1915(e)(1), courts have the authority to “request” that an attorney represent indigent
15 civil litigants upon a showing of “exceptional circumstances.” Agyeman v. Corr. Corp.
16 Am., 390 F.3d 1101, 1103 (9th Cir. 2004). When assessing whether exceptional
17 circumstances exist, the Court must undergo “an evaluation of both ‘the likelihood of
18 success on the merits [and] the ability of the petitioner to articulate his claims *pro se* in
19 light of the complexity of the legal issues involved.’” Wilborn v. Escalderon, 789 F.2d
20 1328, 1331 (9th Cir. 1986) (quoting Weygandt v. Look, 718 F.2d 952, 954 (9th Cir.
21 1983)). Courts must review both of these factors before deciding whether to appoint
22 counsel, and neither factor is individually dispositive. Id.

23 II. ANALYSIS

24 A. Likelihood of Success on the Merits

25 A plaintiff that provides no evidence of his likelihood of success at trial fails to
26 satisfy the first factor of the Wilborn test. See, e.g., Bailey v. Lawford, 835 F. Supp. 550,
27 552 (S.D. Cal. 1993) (finding that where the plaintiff offered “no evidence other than his
28 own assertions to support his claims,” he failed to satisfy the first Wilborn factor). The

1 Court notes that Plaintiff has not presented evidence regarding the likelihood of his
2 success on the merits of his remaining claims for Failure to Protect in violation of the
3 Eight Amendment. (See ECF No. 3.) Though the allegations Plaintiff raised in his
4 complaint regarding his remaining claims are sufficient to state a claim for relief (see
5 ECF Nos. 1 and 3), it is premature for the Court to determine the strength of his claim.
6 See, e.g., Garcia v. Smith, No. 10cv1187-AJB-RBB, 2012 WL 2499003, at *3 (S.D. Cal. June
7 27, 2012) (denying motion for appointment of counsel even though plaintiff had
8 survived a motion to dismiss, because it was too early to determine whether any of
9 plaintiff's claims would survive a motion for summary judgment); Arellano v. Blahnik,
10 No. 16cv2412-CAB-RNB, 2018 WL 4599697, at *2 n.1 (S.D. Cal. Sept. 25, 2018) (denying
11 motion for appointment of counsel because “[a]lthough plaintiff's [] claim survived
12 defendant's motion to dismiss, it is still too early to determine the likelihood of success
13 on the merits.”). Therefore, Plaintiff fails to satisfy the first “exceptional circumstances”
14 factor that would support his motion for appointment of counsel.

15 **B. Plaintiff’s Ability to Articulate his Claims Pro Se**

16 Where a pro se civil rights plaintiff shows he has a good grasp of basic litigation
17 procedure and has articulated his claims adequately, he does not demonstrate the
18 exceptional circumstances required for the appointment of counsel. See Palmer v.
19 Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (finding that the second Wilborn factor was not
20 satisfied where the District Court observed Plaintiff “was well-organized, made clear
21 points, and presented evidence effectively”). The Court has reviewed all of the
22 documents filed by Plaintiff in this case including the Complaint [ECF No. 1], Motion to
23 Proceed in Forma Pauperis [ECF No. 2], response with intention to proceed with Eighth
24 Amendment claim [ECF No. 4], Notice of Change of Address [ECF No. 8], Motion for
25 Extension of Time to Show Cause [ECF No. 10], and the instant Motion for Appointment
26 of Counsel [ECF No. 25]. While the Court notes that the litigation to date has not been
27 extensive, these documents demonstrate that Plaintiff is able to articulate his claims
28

1 and navigate civil procedure without legal assistance, and has done so while facing the
2 pandemic-related challenges he complains of.

3 Furthermore, while the Court is sympathetic to the very real difficulties Plaintiff is
4 likely experiencing due to the COVID-19 pandemic, minimal to no access to the law
5 library does not establish exceptional circumstances. Lacking legal expertise is the norm
6 rather than an exceptional circumstance in pro se civil rights cases. See, e.g., Wood v.
7 Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990) (denying appointment of counsel
8 where plaintiff complained that he had limited access to law library and lacked a legal
9 education). Courts in this circuit have declined to find that challenges presented by
10 the COVID-19 pandemic establish exceptional circumstances. See, e.g., Pitts v.
11 Washington, No. C18-526-RSL-MLP, 2020 WL 2850564, at *1 (W.D. Wash. June 2,
12 2020) (denying motion for appointment of counsel because, “[a]lthough Plaintiff
13 contends he is unable to access the law library because of social distancing, this bare
14 assertion does not justify the appointment of counsel at this time, nor does the COVID-
15 19 pandemic.”); Faultry v. Saechao, No. 18cv1850-KJM-AC-P, 2020 WL 2561596, at *2
16 (E.D. Cal. May 19, 2020) (denying motion for appointment of counsel and explaining that
17 “[c]ircumstances common to most prisoners, such as lack of legal education and limited
18 law library access, do not establish exceptional circumstances supporting
19 appointment of counsel. . . . The impacts of the COVID-19 health crisis on prison
20 operations are also common to all prisoners.”).

21 Thus, because Plaintiff appears able to articulate his claim and his limited access
22 to the law library amid the COVID-19 pandemic does not establish exceptional
23 circumstances, the second factor that might support the appointment of counsel is not
24 met.

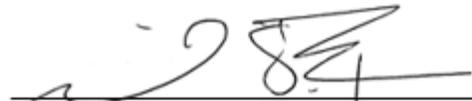
25 III. CONCLUSION AND ORDER

26 Viewing the Wilborn factors together, Plaintiff has not shown that he enjoys a
27 likelihood of success on the merits or that he is unable to articulate his claims and
28 litigate his case without the assistance of an attorney. The Court finds Plaintiff has not

1 established exceptional circumstances required for the appointment of counsel
2 pursuant to 28 U.S.C. § 1915(e)(1) and **DENIES** Plaintiff's Motion for Appointment of
3 Counsel **without prejudice**. The court will consider the impact of current conditions in
4 the prison when scheduling this case.

5 **IT IS SO ORDERED.**

6 Dated: January 19, 2021

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9 Honorable Michael S. Berg
10 United States Magistrate Judge
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