

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

GERRARD D. JONES,

Plaintiff,

v.

Case No. 3:18-cv-155-MCR/MJF

SCHWARZ, *et al.*,

Defendants.

ORDER

This matter is before this court upon Plaintiff’s “Motion for Appointment of Counsel and Motion for 45 Day Continuance” (Doc. 108). This court will order the clerk of the court to issue a notice to all attorneys registered with the court’s electronic filing system inviting counsel to represent Plaintiff.

I. BACKGROUND

Plaintiff commenced this action pursuant to 42 U.S.C. § 1983 against five correctional officers. Plaintiff alleged that the correctional officers used excessive force in violation of the Eighth Amendment and/or failed to protect him from excessive force and retaliated against him in violation of the First Amendment. Defendants moved for partial summary judgment. Summary judgment was granted on the Plaintiff’s First Amendment retaliation claim and on his Eighth Amendment claim that the initial use of force was unjustified. (Doc. 105). The motion was denied

as to whether the Defendants violated the Eighth Amendment when they purportedly continued to use force on Plaintiff once he was fully restrained. By order entered April 6, 2021, the parties were directed to submit their pre-trial documents. (Doc. 107). In response, Plaintiff has filed a “Motion for Appointment of Counsel and Motion for 45 Day Continuance.” (Doc. 108).

II. DISCUSSION

“A plaintiff in a civil case has no constitutional right to counsel.” *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999); *see also Kilgo v. Ricks*, 983 F.2d 189, 193-94 (11th Cir. 1993); *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987). According to the *in forma pauperis* statute, 28 U.S.C. § 1915, “[t]he court may request an attorney to represent any person unable to afford counsel.” 28 U.S.C. § 1915(e)(1). The statute, however, does not allow the court to require or “appoint” an unwilling attorney to represent an indigent litigant. *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296 (1989) (holding that 28 U.S.C. § 1915 does not authorize a federal court to require an unwilling attorney to represent an indigent litigant in a civil case; emphasizing that Congress used the word “request” in § 1915, not the word “assign” or “appoint”).

A litigant requesting counsel must make two threshold showings: (1) that he made a genuine effort to secure counsel himself and (2) that his case presents exceptional circumstances. *See Ulmer v. Chancellor*, 691 F.2d 209 (5th Cir. 1982);

Bass, 170 F.3d at 1320. The Eleventh Circuit has looked to factors outlined in *Ulmer* for guidance in determining if exceptional circumstances warrant appointment of counsel. See *Smith v. Fla. Dep't of Corr.*, 713 F.3d 1059, 1065 n.11 (11th Cir. 2013); see also, e.g., *Neal v. Cassidy*, 511 App'x 865, 865-66 (11th Cir. 2013). Those factors include: (1) the type and complexity of the case, (2) whether the indigent is capable of adequately presenting his case, (3) whether the indigent is in a position to adequately investigate the case, and (4) whether the evidence will consist in large part of conflicting testimony so as to require the skill in the presentation of evidence and in cross-examination. *Ulmer*, 691 F.2d at 213; see *Neal*, 511 App'x at 865-66; *Smith*, 713 F.3d at 1065 n.11; *Fowler v. Jones*, 889 F.2d 1088, 1096 (11th Cir. 1990).

In support of his motion, Plaintiff notes that this case is proceeding to trial and that there likely will be conflicting testimony. He alleges that an attorney will be better suited to cross-examine the Defendants. Plaintiff also asserts that he intends to submit a complex motion for spoliation of evidence against the Defendants.¹ Additionally, Plaintiff notes that there are inmate witnesses who need to be located for trial.

¹ In his motion seeking appointment of counsel Plaintiff states that he will file a motion for spoliation and then requests that the court review the video footage. He does not ask, however, for any relief for the alleged spoliation. If Plaintiff seeks relief for the alleged spoliation, he must file a motion asking this court to act and must state with particularity the grounds for relief. It is not sufficient to merely indicate that *Plaintiff will file* a motion sometime in the future.

The undersigned will direct the clerk of the court to electronically notify attorneys that they may seek to represent Plaintiff. It is possible that no attorney will volunteer to assist Plaintiff. Plaintiff, therefore, should continue to prosecute his case and continue to comply with all court orders.

Finally, the court notes that Plaintiff alternatively requested a forty-five (45) day extension to seek counsel on his own if the court did not post a notice on the district's website. In light of the fact that Plaintiff's deadline to comply with the court's order to submit his pre-trial documents expired on May 7, 2021, and it may take some time—if an attorney chooses to represent Plaintiff—for an attorney to file a notice of appearance, the court also will grant Plaintiff an additional 45 days to comply with the court's order.

Accordingly, it is **ORDERED**:

1. Plaintiff's "Motion for Appointment of Counsel and Motion for 45 Day Continuance," (Doc. 108), is **GRANTED** in part and **DENIED** without prejudice in part.
2. The motion is granted to the extent that **on or before July 1, 2021**, Plaintiff shall file and serve his statement of facts, exhibit list, and witness list as described in this court's order dated April 6, 2021. **On or before August 2, 2021**. Defendant shall file and serve their documents.
3. The clerk of the court shall issue a notice to all attorneys registered with

the court's electronic filing system, and publish on the court's website, the notice soliciting a volunteer attorney set forth below. The notice must state:

This is a notice of an opportunity to provide *pro bono* representation in the case of *Jones v. Schwarz, et al.*, 3:18-cv-155-MCR-MJF.

Plaintiff is a prisoner in the custody of the Florida Department of Corrections alleging that five Defendants violated his rights under the Eighth Amendment to the United States Constitution.

Plaintiff alleges that after he was placed in restraints, Defendants continued to use force on him until he lost consciousness. After he regained consciousness, one defendant purportedly stuck a metal object into Plaintiff rectum and other officers twisted Plaintiff's wrists, feet, and ankles. (Doc. 20).

Public funds are not available for payment of attorney's fees. Fees may be recoverable under applicable law if Plaintiff ultimately prevails. *See* 42 U.S.C. § 1988(b); *World Outreach Conference Ctr. v. City of Chicago*, 234 F. Supp. 3d 904 (N.D. Ill. 2017). Limited funds sometimes are available from the District's Bench and Bar Fund for the payment of out-of-pocket expenses incurred by an attorney providing representation of this type.

Members of the District's bar will be afforded access to the electronic docket without charge for the purpose of considering whether to undertake the representation. An attorney who wishes to provide representation may contact Plaintiff directly and may enter the case by filing a notice of appearance. Plaintiff is currently confined at Tomoka Correctional Institution in Daytona Beach, Florida.

SO ORDERED this 17th day of May, 2021.

/s/ Michael J. Frank

Michael J. Frank

United States Magistrate Judge