

1 Silva, and the United States; and dismissed with prejudice Plaintiff's First Amendment
2 free speech and Federal Tort Claims Act claims. (Id.)

3 Before the Court are Plaintiff's objections to the Court's screening order (ECF No.
4 72), which the Court construes as a motion for reconsideration.

6 **II. PLAINTIFF'S SEVENTH AMENDED COMPLAINT**

7 The allegations in Plaintiff's seventh amended complaint occurred at United
8 States Penitentiary in Atwater, California ("USP-Atwater"), where Plaintiff is currently
9 housed.

10 The complaint alleges violations of Plaintiff's rights under the First Amendment,
11 Fifth Amendment, and Federal Tort Claims Act. Plaintiff names the following individuals
12 as defendants: 1) Hector Rios, former USP-Atwater Warden, 2) the United States, 3)
13 Defendant A, USP-Atwater mail room employee, 4) Defendant B, USP-Atwater mail
14 room employee, 5) Gonzaga, USP-Atwater mail room supervisor, 6) Capel, correctional
15 counselor for Plaintiff at USP-Atwater, and 7) Silva, correctional counselor for Plaintiff at
16 USP-Atwater.
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18 Plaintiff's allegations may be summarized essentially as follows:

19 Legal mail related to Plaintiff's criminal appeal was rejected by Defendants A and
20 B. Defendant Gonzaga informed Plaintiff that there was no record of Plaintiff's mail
21 having been rejected by the prison, refused to accept Plaintiff's package authorization
22 form, and informed Plaintiff that no authorization form was required for packages sent by
23 an attorney, even though a package sent by Plaintiff's attorney had been rejected for
24 lack of an authorization form. Plaintiff's criminal appeal ultimately was denied.
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26 Defendants Capel and Silva refused Plaintiff's request for an unmonitored phone
27 line on which to speak to his attorney, and informed Plaintiff that the request should
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1 come directly from Plaintiff's attorney. Plaintiff was unable to speak with his attorney
2 while his appellate briefs were drafted. As a result, the appellate record for his appeal
3 was incomplete.

4 **III. LEGAL STANDARDS**

5 **1. Motion for Reconsideration**

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7 Federal Rules of Civil Procedure 60(b)(6) allows the Court to relieve a party from
8 an order for any reason that justifies relief. Rule 60(b)(6) "is to be used sparingly as an
9 equitable remedy to prevent manifest injustice and is to be utilized only where
10 extraordinary circumstances" exist. Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008)
11 (internal quotations marks and citation omitted).

12 "A motion for reconsideration should not be granted, absent highly unusual
13 circumstances, unless the district court is presented with newly discovered evidence,
14 committed clear error, or if there is an intervening change in the controlling law," Marlyn
15 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009).

17 "A motion for reconsideration may not be used to raise arguments or present evidence
18 for the first time when they could reasonably have been raised in earlier litigation." Id.
19 Moreover, "recapitulation of the cases and arguments considered by the court before
20 rendering its original decision fails to carry the moving party's burden." U.S. v. Westlands
21 Water Dist., 134 F. Supp. 2d 1111, 1131 (9th Cir. 2001) (quoting Birmingham v. Sony
22 Corp. of Am., Inc., 820 F. Supp. 834, 856-57 (D.N.J. 1992)). Similarly, Local Rule 230(j)
23 requires that a party seeking reconsideration show that "new or different facts or
24 circumstances are claimed to exist which did not exist or were not shown upon such
25 prior motion, or what other grounds exist for the motion"
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1 **2. First Amendment – Free Speech**

2 “[T]he constitutional rights that prisoners possess are more limited in scope than
3 the constitutional rights held by individuals in society at large. In the First Amendment
4 context . . . some rights are simply inconsistent with the status of a prison or ‘with the
5 legitimate penological objectives of the corrections system.’” Shaw v. Murphy, 532 U.S.
6 223, 229 (2001) (quoting Pell v. Procnier, 417 U.S. 817, 822 (1974)). Thus, jail
7 personnel may regulate speech if such restriction is reasonably related to legitimate
8 penological interests and an inmate is not deprived of all means of expression. Valdez v.
9 Rosenbaum, 302 F.3d 1039, 1048 (9th Cir. 2002) (citing Turner v. Safley, 482 U.S. 78,
10 92 (1986)).

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12 Based on the foregoing, the United States Constitution does not provide for an
13 unfettered right to use a telephone. Rather, to state a constitutional claim, a plaintiff must
14 allege that the use of a phone is connected to another constitutional right, such as the
15 right of free speech or access to the courts. Even then, a telephone is only one means
16 for an inmate to exercise the extremely limited First Amendment right to communicate
17 with persons outside the jail. Valdez, 302 F.3d at 1048. That same right may be met
18 through other means such as correspondence or personal visits.

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20 **3. Federal Tort Claims Act**

21 The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680, waives
22 the sovereign immunity of the United States for certain torts committed by federal
23 employees. FDIC v. Meyer, 510 U.S. 471, 475 (1994). The FTCA provides that district
24 courts have exclusive jurisdiction over civil actions against the United States for money
25 damages “for injury or loss of property, or personal injury or death caused by the
26 negligent or wrongful act or omission of any employee of the [federal] Government while
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1 acting within the scope of his office or employment.” 28 U.S.C. § 1346(b)(1). The FTCA
2 allows federal inmates to sue the United States for injuries sustained while incarcerated.
3 28 U.S.C. § 2674.

4 The United States is the only proper defendant in a suit brought pursuant to the
5 FTCA. FDIC v. Craft, 157 F.3d 697, 706 (9th Cir. 1998); Kennedy v. U.S. Postal Serv.,
6 145 F.3d 1077, 1078 (9th Cir. 1998). “A claim against [a federal agency] in its own name
7 is not a claim against the United States.” Kennedy, 145 F.3d at 1078. Nor is an agency a
8 proper defendant under the FTCA. Craft, 157 F.3d at 706 (citing Shelton v. U.S.
9 Customs Serv., 565 F.2d 1140, 1141 (9th Cir. 1977)).

10 Under the FTCA a claim must be filed with the appropriate federal agency within
11 two years of its accrual and suit must be commenced within six months of the agency’s
12 denial of the claim. 28 U.S.C. § 2401(b). This administrative exhaustion requirement is
13 mandatory and jurisdictional. Valadez-Lopez v. Chertoff, 656 F.3d 851, 855 (9th Cir.
14 2011) (quoting Brady v. United States, 211 F.3d 499, 502 (9th Cir. 2000)). Exhaustion
15 must be affirmatively alleged in the complaint. Gillespie v. Civiletti, 629 F.2d 637, 640
16 (9th Cir. 1980).

17 **IV. ANALYSIS**

18 **A. First Amendment Claim**

19 Plaintiff objects to the dismissal of his First Amendment free speech claim against
20 Defendants Capel and Silva, and attempts to cure the deficiencies in his seventh
21 amended complaint by alleging that his attorney did not want to speak on a monitored
22 telephone line, that Defendants Capel and Silva denied his requests for a legal
23 telephone call, and that Plaintiff did not have any other avenue for speaking with his
24 attorney.
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1 Plaintiff's assertion that he had no other avenue for speaking with his attorney is
2 new. Plaintiff was advised of the elements of a First Amendment free speech claim in the
3 order screening his sixth amended complaint. (ECF No. 68 at 5.) The proper time for him
4 to have made his allegations was in his seventh amended complaint, not in objections
5 filed after that complaint was screened. See Marlyn Nutraceuticals, Inc., 571 F.3d at 880
6 ("A motion for reconsideration may not be used to raise arguments or present evidence
7 for the first time when they could reasonably have been raised in earlier litigation.").

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9 In any event, Plaintiff's allegations do not state a First Amendment claim.
10 Plaintiff's conclusory statement that he had no other avenue for speaking with his
11 attorney is contradicted by his complaint, which alleges that Plaintiff was informed his
12 attorney could submit a request for a legal telephone call. Plaintiff has not alleged that
13 his attorney requested a legal telephone call and that such a request was denied, or that
14 other avenues of communication, such as personal visits, were not available.
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16 **B. Federal Tort Claims Act**

17 Plaintiff objects to the Court's dismissal of his FTCA claim on the ground that his
18 complaint alleged that he had exhausted his administrative remedies and that "certain
19 individuals' failure to allow Plaintiff to receive packages from his attorney" constituted a
20 tortious act on the part of the United States. (ECF No. 72 at 4.) Plaintiff argues that
21 Defendants' conduct was tortious because they acted with deliberate indifference. (Id.)
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23 Plaintiff's arguments restate allegations that have already been considered by the
24 Court. See Westlands Water Dist., 134 F. Supp. 2d at 1131. Plaintiff's seventh amended
25 complaint alleged that Plaintiff had "exhausted his administrative remedies by filing his
26 Administrative claims with [the] appropriate federal agency." (ECF No. 69 at 6.)
27 However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere
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1 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662 (2009) (citing Bell
2 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Similarly, although Plaintiff
3 continues to allege that Defendants’ failure to allow Plaintiff to receive packages
4 constituted a tortious act, this allegation, standing alone, is insufficient to state a tort
5 claim.
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7 **V. CONCLUSION AND ORDER**

8 Plaintiff has not met the standard for granting a motion for reconsideration, and
9 accordingly, his objections (ECF No. 72) are HEREBY DENIED.
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11 IT IS SO ORDERED.
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13 Dated: July 11, 2014

14 /s/ Michael J. Seng
15 UNITED STATES MAGISTRATE JUDGE
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