



1 On August 29, 2013, Plaintiff filed objections to the Court's screening order (ECF  
2 No. 72), which the Court construed as a motion for reconsideration and denied on July  
3 14, 2014 (ECF No. 74). The Court's order mistakenly referred to Plaintiff as a state  
4 prisoner.

## 5 **II. PLAINTIFF'S SEVENTH AMENDED COMPLAINT**

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

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

16 Plaintiff's allegations may be summarized essentially as follows:

17 Legal mail related to Plaintiff's criminal appeal was rejected by Defendants A and  
18 B. Defendant Gonzaga informed Plaintiff that there was no record of Plaintiff's mail  
19 having been rejected by the prison, refused to accept Plaintiff's package authorization  
20 form, and informed Plaintiff that no authorization form was required for packages sent by  
21 an attorney, even though a package sent by Plaintiff's attorney had been rejected for  
22 lack of an authorization form. Plaintiff's criminal appeal ultimately was denied.

23 Defendants Capel and Silva refused Plaintiff's request for an unmonitored phone  
24 line on which to speak to his attorney, and informed Plaintiff that the request should  
25 come directly from Plaintiff's attorney. Plaintiff was unable to speak with his attorney  
26 while his appellate briefs were drafted. As a result, the appellate record for his appeal  
27 was incomplete.

28

1 **III. LEGAL STANDARDS**

2 **1. Motion for Reconsideration**

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

8 “A motion for reconsideration should not be granted, absent highly unusual  
9 circumstances, unless the district court is presented with newly discovered evidence,  
10 committed clear error, or if there is an intervening change in the controlling law,” Marlyn  
11 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009).  
12 “A motion for reconsideration may not be used to raise arguments or present evidence  
13 for the first time when they could reasonably have been raised in earlier litigation.” Id.  
14 Moreover, “recapitulation of the cases and arguments considered by the court before  
15 rendering its original decision fails to carry the moving party's burden.” U.S. v. Westlands  
16 Water Dist., 134 F. Supp. 2d 1111, 1131 (9th Cir. 2001) (quoting Birmingham v. Sony  
17 Corp. of Am., Inc., 820 F. Supp. 834, 856-57 (D.N.J. 1992)). Similarly, Local Rule 230(j)  
18 requires that a party seeking reconsideration show that “new or different facts or  
19 circumstances are claimed to exist which did not exist or were not shown upon such  
20 prior motion, or what other grounds exist for the motion . . . .”

21 **2. First Amendment – Free Speech**

22 “[T]he constitutional rights that prisoners possess are more limited in scope than  
23 the constitutional rights held by individuals in society at large. In the First Amendment  
24 context . . . some rights are simply inconsistent with the status of a prison or ‘with the  
25 legitimate penological objectives of the corrections system.’” Shaw v. Murphy, 532 U.S.  
26 223, 229 (2001) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)). Thus, jail  
27 personnel may regulate speech if such restriction is reasonably related to legitimate  
28 penological interests and an inmate is not deprived of all means of expression. Valdez v.

1 Rosenbaum, 302 F.3d 1039, 1048 (9th Cir. 2002) (citing Turner v. Safley, 482 U.S. 78,  
2 92 (1986)).

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

### 10 **3. Federal Tort Claims Act**

11 The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680, waives  
12 the sovereign immunity of the United States for certain torts committed by federal  
13 employees. FDIC v. Meyer, 510 U.S. 471, 475 (1994). The FTCA provides that district  
14 courts have exclusive jurisdiction over civil actions against the United States for money  
15 damages “for injury or loss of property, or personal injury or death caused by the  
16 negligent or wrongful act or omission of any employee of the [federal] Government while  
17 acting within the scope of his office or employment.” 28 U.S.C. § 1346(b)(1). The FTCA  
18 allows federal inmates to sue the United States for injuries sustained while incarcerated.  
19 28 U.S.C. § 2674.

20 The United States is the only proper defendant in a suit brought pursuant to the  
21 FTCA. FDIC v. Craft, 157 F.3d 697, 706 (9th Cir. 1998); Kennedy v. U.S. Postal Serv.,  
22 145 F.3d 1077, 1078 (9th Cir. 1998). “A claim against [a federal agency] in its own name  
23 is not a claim against the United States.” Kennedy, 145 F.3d at 1078. Nor is an agency a  
24 proper defendant under the FTCA. Craft, 157 F.3d at 706 (citing Shelton v. U.S.  
25 Customs Serv., 565 F.2d 1140, 1141 (9th Cir. 1977)).

26 Under the FTCA a claim must be filed with the appropriate federal agency within  
27 two years of its accrual and suit must be commenced within six months of the agency’s  
28 denial of the claim. 28 U.S.C. § 2401(b). This administrative exhaustion requirement is

1 mandatory and jurisdictional. Valadez-Lopez v. Chertoff, 656 F.3d 851, 855 (9th Cir.  
2 2011) (quoting Brady v. United States, 211 F.3d 499, 502 (9th Cir. 2000)). Exhaustion  
3 must be affirmatively alleged in the complaint. Gillespie v. Civiletti, 629 F.2d 637, 640  
4 (9th Cir. 1980).

#### 5 **IV. ANALYSIS**

##### 6 **A. First Amendment Claim**

7 Plaintiff objects to the dismissal of his First Amendment free speech claim against  
8 Defendants Capel and Silva, and attempts to cure the deficiencies in his seventh  
9 amended complaint by alleging that his attorney did not want to speak on a monitored  
10 telephone line, that Defendants Capel and Silva denied his requests for a legal  
11 telephone call, and that Plaintiff did not have any other avenue for speaking with his  
12 attorney.

13 Plaintiff's assertion that he had no other avenue for speaking with his attorney is  
14 new. Plaintiff was advised of the elements of a First Amendment free speech claim in the  
15 order screening his sixth amended complaint. (ECF No. 68 at 5.) The proper time for him  
16 to have brought his allegations was in his seventh amended complaint, not in objections  
17 filed after that complaint was screened. See Marlyn Nutraceuticals, Inc., 571 F.3d at 880  
18 ("A motion for reconsideration may not be used to raise arguments or present evidence  
19 for the first time when they could reasonably have been raised in earlier litigation.").

20 In any event, Plaintiff's allegations do not state a First Amendment claim.  
21 Plaintiff's conclusory statement that he had no other avenue for speaking with his  
22 attorney is contradicted by his complaint, which alleges that Plaintiff was informed his  
23 attorney could submit a request for a legal telephone call. Plaintiff has not alleged that  
24 his attorney requested a legal telephone call or that such a request was denied, or that  
25 other avenues of communication, such as personal visits, were not available.

##### 26 **B. Federal Tort Claims Act**

27 Plaintiff objects to the Court's dismissal of his FTCA claim on the ground that his  
28 complaint alleged that he had exhausted his administrative remedies and that "certain

1 individuals' failure to allow Plaintiff to receive packages from his attorney" constituted a  
2 tortious act on the part of the United States. (ECF No. 72 at 4.) Plaintiff argues that  
3 Defendants' conduct was tortious because they acted with deliberate indifference. (Id.)

4 Plaintiff's arguments restate allegations that have already been considered by the  
5 Court. See Westlands Water Dist., 134 F. Supp. 2d at 1131. Plaintiff's seventh amended  
6 complaint alleged that Plaintiff had "exhausted his administrative remedies by filing his  
7 Administrative claims with [the] appropriate federal agency." (ECF No. 69 at 6.)  
8 However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere  
9 conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662 (2009) (citing Bell  
10 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Similarly, although Plaintiff  
11 continues to allege that Defendants' failure to allow Plaintiff to receive packages  
12 constituted a tortious act, this allegation, standing alone, is insufficient to state a tort  
13 claim.

14 **V. CONCLUSION AND ORDER**

15 The Court's prior order denying Plaintiff's objections (ECF No. 74) is VACATED  
16 due to the erroneous reference to Plaintiff being a state prisoner.

17 Plaintiff has not, however, met the standard for granting a motion for  
18 reconsideration, and accordingly, his objections (ECF No. 72) are HEREBY DENIED.

19  
20 IT IS SO ORDERED.

21 Dated: August 25, 2014

22 /s/ Michael J. Seng  
23 UNITED STATES MAGISTRATE JUDGE  
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