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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE AVIÑA,

Plaintiff,

No. CIV S-02-2661 FCD KJM P

vs.

J.C. MEDELLIN, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding pro se with an action under 42 U.S.C. § 1983. Plaintiff has moved for an extension of time to disclose the identity of his expert witness. He has also moved to supplement the record for the purpose of raising yet again his motion for the appointment of counsel, which the court has denied.

I. Procedural Background

On July 27, 2009, the Ninth Circuit vacated this court’s ruling that plaintiff had not exhausted his administrative remedies with respect to his due process claim that he received insufficient opportunity to be heard on his validation as a gang associate and subsequent confinement to a security housing unit (SHU).<sup>1</sup> See Memorandum Opinion at 2-3 (Docket No.

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<sup>1</sup> The Ninth Circuit affirmed the court’s ruling that plaintiff failed to exhaust administrative remedies with respect to his First and Eighth Amendment claims.

1 119). The Ninth Circuit remanded this action “so that the district court can determine who were  
2 the critical decisionmakers [in reclassifying plaintiff for reassignment to SHU], and whether  
3 Aviña received a meaningful opportunity to present his views on the issue of validation.” Id. at  
4 3.

5           After the Ninth Circuit issued its mandate, this court gave both parties time to file  
6 requests or motions for pre-trial relief they deemed warranted. Both parties moved for summary  
7 judgment, which the court has taken under consideration. Plaintiff also requested that the court  
8 reconsider its denial of the appointment of counsel and that the court re-open discovery. The  
9 court denied both requests. The court explained that, in certain exceptional circumstances, the  
10 court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1), and,  
11 further, that the Ninth Circuit had affirmed the court’s denial of plaintiff’s initial motion for  
12 appointment of counsel. Finding “nothing in the factual or legal nature of this case has changed  
13 that would warrant the appointment of counsel at this stage,” the court denied the request for  
14 appointment of counsel. Order at 2 (Docket No. 130). The court further found that plaintiff had  
15 shown no good cause to re-open discovery. Id.

## 16 II. Motion To Supplement Record

17           The court construes plaintiff’s motion to supplement the record as yet another  
18 request for appointment of counsel. Plaintiff argues that his access to the prison law library and  
19 the limited resources there constitute extraordinary circumstances that necessitate the  
20 appointment of counsel. Plaintiff thus invokes his right of access to the court, which includes  
21 reasonable access to a law library and legal materials. Bounds v. Smith, 430 U.S. 817, 820-21  
22 (1977). However, there is no freestanding constitutional right to law library access for prisoners;  
23 law library access serves as one means of ensuring the constitutional right of access to the courts.  
24 See Lewis v. Casey, 518 U.S. 343, 350-51 (1996). “[T]he Constitution does not guarantee a  
25 prisoner unlimited access to a law library. Prison officials of necessity must regulate the time,  
26 manner, and place in which library facilities are used.” Linquist v. Idaho State Bd. of

1 Corrections, 776 F.2d 851, 858 (9th Cir. 1985). An inmate is also entitled to adequate materials  
2 for drafting submissions to the courts: “It is indisputable that indigent inmates must be provided  
3 at state expense with paper and pen to draft legal documents, with notarial services to  
4 authenticate them, and with stamps to mail them.” Bounds, 430 U.S. at 824-25.

5 By alleging his right of access to the court has been so impeded that it rises to the  
6 level of an “exceptional circumstance” warranting appointment of counsel, plaintiff subjects his  
7 latest request for counsel to the same inquiry the court applies to inmates who claim their access  
8 to the law library has been unconstitutionally restricted. A prisoner claiming that his right of  
9 access to the courts has been violated due to blocked access to the prison library must show: 1)  
10 access was so limited as to be unreasonable, and 2) the inadequate access caused actual injury.

11 Vandelft v. Moses, 31 F.3d 794, 797 (9th Cir. 1994). A prisoner cannot make conclusory  
12 declarations of injury, but instead must demonstrate that a non-frivolous legal claim has been  
13 frustrated or impeded. It is not enough for an inmate to show some sort of denial. An “actual  
14 injury” is “actual prejudice with respect to contemplated or existing litigation, such as the  
15 inability to meet a filing deadline or to present a claim.” Lewis, 518 U.S. at 348.

16 [T]he inmate... must go one step further and demonstrate that the  
17 alleged shortcomings in the library or legal assistance program  
18 hindered his efforts to pursue a legal claim. He might show, for  
19 example, that a complaint he prepared was dismissed for failure to  
20 satisfy some technical requirement which, because of deficiencies  
in the prison’s legal assistance facilities, he could not have known.  
Or that he suffered arguably actionable harm that he wished to  
bring before the courts, but was so stymied by inadequacies of the  
law library that he was unable even to file a complaint.

21 Id. at 351.

22 Plaintiff has failed to demonstrate that he has been prejudiced by any restricted  
23 access to the prison library or that the resources of the library are so inadequate that he must be  
24 appointed a lawyer. To the contrary, the docket provides ample evidence of plaintiff’s unfettered  
25 access to the court: since the Ninth Circuit remanded his case for trial, plaintiff has submitted,  
26 among other things, a motion for summary judgment within the time allowed by the court

1 (Docket No. 125) and an opposition to defendants' motion for summary judgment (Docket No.  
2 127). Between May 5 and May 17, 2010, he filed the two motions addressed in this order, two  
3 motions in limine and three other motions for miscellaneous relief concerning the trial currently  
4 set for August 17, 2010 (Docket Nos. 134-137, 139-141). In short, plaintiff has vigorously  
5 prosecuted his case since the Ninth Circuit's remand. Whatever limitations he has experienced  
6 with respect to the prison law library have not been "exceptional" under 28 U.S.C. § 1915(e)(1).  
7 The motion to supplement the record, construed by the court as a renewed motion for  
8 appointment of counsel, will be denied.

9 III. Motion To Designate Expert

10 Plaintiff also has not shown why he should be allowed a very late designation of a  
11 yet-to-be-identified expert witness. The motion to extend the time to designate an expert  
12 essentially reprises his request to re-open discovery, which the court denied. See Order (Docket  
13 No. 130). Given that plaintiff has already moved for summary judgment and that the Ninth  
14 Circuit remanded this action "so that the district court can determine who were the critical  
15 decisionmakers [in reclassifying plaintiff for reassignment to SHU], and whether Aviña received  
16 a meaningful opportunity to present his views on the issue of validation," there still is no good  
17 cause to allow any discovery measure including the identification of an expert witness. The  
18 motion for additional time to do so will be denied.

19 Accordingly, IT IS HEREBY ORDERED that:

20 1. Plaintiff's motion to supplement the record (Docket No. 134), construed by  
21 the court as a renewed motion for appointment of counsel, is denied.

22 2. Plaintiff's motion for an extension of time in which to identify and disclose  
23 expert witnesses (Docket No. 135) is denied.

24 DATED: June 4, 2010.

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U.S. MAGISTRATE JUDGE