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

HAROLD SHAMBURGER,)	No. C 09-3745 JSW (PR)
)	
Plaintiff,)	ORDER GRANTING SUMMARY
)	JUDGMENT IN FAVOR OF
)	DEFENDANTS; ON PENDING
)	MOTIONS
v.)	
)	
M. DODSON, Correctional Sergeant and)	
A. MURPHY, Correctional Sergeant,)	
Defendants.)	(Docket Nos. 19, 23, 27, 31-34, 36, 37)

INTRODUCTION

This is a civil rights case filed by a *pro se* prisoner pursuant to 42 U.S.C. § 1983. Plaintiff Harold Shamburger claims that Defendants M. Dodson and A. Murphy, Correctional Sergeants at Pelican Bay State Prison, violated his right of access to the courts. Defendant Murphy moves for summary judgment on the ground that there are no material facts in dispute and that he is entitled to judgment as a matter of law. Plaintiff has opposed the motion, and Murphy has replied.¹ The Court has also considered the objections by both parties to the evidence submitted by the other side.

For the reasons set out below, Defendant Murphy’s motion for summary judgment is GRANTED. For the reasons discussed below, Defendant Dodson is

¹Murphy originally filed a reply brief on October 29, 2010 (docket number 29), but later filed an “errata” reply brief on January 14, 2011 (docket number 39). In ruling on his motion for summary judgment, the Court has only considered the latter, superceding brief.

1 similarly situated to the Murphy with respect to Plaintiff's claims, and summary
2 judgment is GRANTED in his favor. Plaintiff's pending motions are also addressed
3 below.

4 **BACKGROUND**

5 In his complaint, Plaintiff claims that Defendants violated his right of access to
6 the courts by stealing three "affidavits with exhibits" during a search of his cell on
7 February 2, 2007. (Compl. at 3.) He alleges that he needed these documents for two
8 habeas corpus petitions filed in 2007 the Santa Clara County Superior Court challenging
9 his 1984 murder conviction. (*Id.* at 3, Ex. A.) The petitions were denied in October and
10 December of 2007. (*Id.*)

11 The following facts are based on the parties' declarations and accompanying
12 exhibits. The facts are undisputed except where otherwise noted.

13 In February 2007, Defendants Murphy and Dodson, both investigator's for
14 PBSP's Gang Intelligence Unit, were part of a team that searched cells in an area of
15 PBSP's Security Housing Unit known as the "Short Corridor," where inmates identified
16 by prison officials as high-ranking gang members are housed. (Murphy Decl. ¶¶ 2-4).
17 Plaintiff's cell is on the Short Corridor because prison officials have identified him as a
18 "ranking member" of the prison gang known as the "Black Guerilla Family." (*Id.*)
19 Murphy and Dodson searched Plaintiff's cell on February 2, 2007, and, pursuant to the
20 ordinary procedure for such searches, removed all of the property in the cell, including
21 "legal paperwork," so that it could be reviewed for gang-related information. (*Id.* at ¶ 5,
22 Exs. 1 & 2.) According to Murphy and the records of the search, after Plaintiff's
23 property was reviewed, all of it was returned to Plaintiff except for one book and one
24 booklet, both about the Black Guerilla Family. (*Id.* at ¶ 6, Ex. 2.) These two items
25 were sent to gang investigation officials in Sacramento for further review. (*Id.* at ¶ 6.)

26 The records attached to Plaintiff's declaration, which are the records of his
27 administrative grievance on this issue, indicate that four items of property were not
28

1 returned to him:² two books identified by Mr. Murphy, a “confidential memorandum”
2 prepared by prison officials of an interview they conducted with a different inmate, and
3 a memorandum concerning gang activity at another prison. (Pl. Decl. Ex. A at 2-3.)
4 Plaintiff states in his declaration that Defendants also “stole” four affidavits, by William
5 Bell, Vanessa Tole-Carr, Paul Jones and Doug Fryman.³ (Pl. Decl. at ¶¶ 11-15.) These
6 affidavits are not included among the items not returned to Plaintiff in the records
7 regarding the search submitted by Plaintiff or Defendants.

8 Plaintiff states that the affidavits by Mr. Bell and Ms. Tole-Carr substantiated a
9 claim that the prosecutor knowingly presented the false testimony of a witness named
10 Johnnie Johnson. (*Id.* at ¶ 12.) According to Plaintiff, Mr. Bell and Ms. Tole-Carr were
11 present when Darryl Carr (Ms. Tole-Carr’s husband) told the prosecutor that Mr.
12 Johnson was a liar. (*Id.* at ¶ 12.) Plaintiff also states that Mr. Jones in his affidavit
13 “corroborated” the fact that Mr. Johnson was a liar, although he does not describe how
14 or what Mr. Jones’s affidavit said. (*Id.*) Finally, Plaintiff states that Mr. Fryman would
15 have “substantiated” Plaintiff’s claim that a juror, Sharon Martin, knew the victim and
16 victim’s girlfriend, although again Plaintiff does not state what Mr. Fryman said or how
17 he would have substantiated such a claim. (*Id.* at ¶ 15). According to Plaintiff, these
18 affidavits cannot be replaced because he does not know where Ms. Tole-Carr or Mr.
19 Lyman are, Mr. Bell is deceased, and Mr. Jones is an inmate whose correspondence to
20 Plaintiff has been blocked by prison officials because it contained gang-related

21 ²According to these records, initially nine items of property were confiscated and
22 five of those were later returned to Plaintiff, leaving four items that were never returned
23 to Plaintiff. (Pl. Decl. Ex. A at 2-3). These four items consisted of the book and booklet
24 identified by Murphy, and the two memoranda described above. (*Id.* at 2.)

25 ³At one point in his declaration, like in his complaint, Plaintiff states that they stole
26 “three” affidavits, but he then lists four individuals whose affidavits went missing. (Pl. Decl. at
27 ¶ 11.) Further confusing matters is that he initially includes Darryl Carr in this list instead of
28 four affiants (*id.*), but when he describes the missing affidavits and their relevance to his murder
case, he includes one by Mr. Fryman but not none by Mr. Carr (*id.* at ¶¶ 12-15). For these
reasons, the Court assumes for purposes of this order that Plaintiff is asserting that four
affidavits were stolen, including one by Mr. Fryman.

1 communications. (*Id.* at ¶ 12, Ex. H).

2 Plaintiff filed two habeas petitions in the state courts in 2007 challenging his
3 1984 murder conviction.⁴ (Compl. Ex. A.) The first was denied on October 11, 2007,
4 on three grounds: it raised issues that had been decided previously, a purported “newly
5 discovered” declaration (by a woman named Dalia Bulnes) was not in fact new, and it
6 was untimely. (*Id.*) The second petition was denied on December 17, 2007, because it
7 was untimely and because the claims were based on affidavits that were not submitted
8 with the petition. (*Id.*)

9 DISCUSSION

10 I. Summary Judgment Standard

11 Summary judgment is proper where the pleadings, discovery and affidavits show
12 that there is “no genuine issue as to any material fact and [that] the moving party is
13 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A court will grant
14 summary judgment “against a party who fails to make a showing sufficient to establish
15 the existence of an element essential to that party’s case, and on which that party will
16 bear the burden of proof at trial . . . since a complete failure of proof concerning an
17 essential element of the nonmoving party’s case necessarily renders all other facts
18 immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material
19 if it might affect the outcome of the lawsuit under governing law, and a dispute about
20 such a material fact is genuine “if the evidence is such that a reasonable jury could
21 return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
22 242, 248 (1986).

23 Generally, the moving party bears the initial burden of identifying those portions
24 of the record which demonstrate the absence of a genuine issue of material fact. The
25 burden then shifts to the nonmoving party to “go beyond the pleadings, and by his own
26 affidavits, or by the ‘depositions, answers to interrogatories, or admissions on file,’
27 designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477

28 ⁴His direct appeals of the convictions were denied many years earlier.

1 U.S. at 324 (citations omitted). When the moving party bears the burden of proof and
2 persuasion on an issue at trial, it must at summary judgment “show that ‘the evidence is
3 so powerful that no reasonable jury would be free to disbelieve it.’” *Shakur v. Schriro*,
4 514 F.3d 878, 890 (9th Cir. 2008).

5 The court’s function on a summary judgment motion is not to make credibility
6 determinations or weigh conflicting evidence with respect to a disputed material fact.
7 *See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.
8 1987). The evidence must be viewed in the light most favorable to the nonmoving
9 party, and the inferences to be drawn from the facts must be viewed in a light most
10 favorable to the nonmoving party. *See id.* at 631.

11 A verified complaint may be used as an opposing affidavit under Rule 56, as
12 long as it is based on personal knowledge and sets forth specific facts admissible in
13 evidence. *See Schroeder v. McDonald*, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995)
14 (treating plaintiff’s verified complaint as opposing affidavit where, even though
15 verification not in conformity with 28 U.S.C. § 1746, plaintiff stated under penalty of
16 perjury that contents were true and correct, and allegations were not based purely on his
17 belief but on his personal knowledge). Plaintiff’s complaint was signed under penalty
18 of perjury and therefore may be considered in deciding the motion for summary
19 judgment.

20 **II. Plaintiff’s Claim**

21 Plaintiff claims that Defendants violated his right to access the courts by stealing
22 affidavits that he wanted to use to pursue an appeal of his conviction. Defendant
23 Murphy contends in his motion that he is entitled to summary judgment because on the
24 undisputed facts he did not violate Plaintiff’s right of access to the courts.

25 Prisoners have a constitutional right of access to the courts. *Lewis v. Casey*, 518
26 U.S. 343, 350 (1996). To establish a claim for any violation of the right of access to the
27 courts, the prisoner must prove that there was an inadequacy in the prison’s legal access
28 program that caused him an actual injury. *See id.* at 350-55. To prove an actual injury,

1 the prisoner must show that the inadequacy in the prison's program hindered his efforts
2 to pursue a non-frivolous claim concerning his conviction or conditions of confinement.
3 *Id.* at 354-55.

4 Murphy is entitled to summary judgment for two reasons. First, there is no
5 genuine dispute of fact as to whether or not Defendants stole Plaintiff's affidavits, as
6 Plaintiff claims. It is undisputed that Defendants initially removed all of Plaintiff's
7 property, including his legal papers, for the search. However, the records of the search
8 indicate that prison officials returned everything except for, at most, two books about
9 the Black Guerilla Family, and two memoranda concerning gang activity. (*See* Murphy
10 Decl. ¶¶ 5-6, & Exs. 1 & 2; Pl. Decl. Ex. A at 2-3.) There is no dispute that none of
11 these four items were related to Plaintiff's state habeas petitions, let alone that they were
12 the affidavits to which Plaintiff refers.

13 While Plaintiff states in his declaration that Defendants "stole" his affidavits, this
14 statement is unsupported by any records, other documentary evidence, or other
15 admissible evidence. Plaintiff's documentary evidence -- the records of his
16 administrative appeals -- show that the only property not returned to Plaintiff were the
17 two books and two memoranda about gang activity. (Pl. Decl. Ex. A at 2-3.) Plaintiff
18 offers declarations by three inmates stating that they overheard Plaintiff complain to
19 prison staff that the affidavits were missing when his property was returned. (*Id.* Ex.
20 D.) These are inadmissible hearsay statements, however, because Plaintiff offers them
21 to show the truth of the matter that was overheard, i.e. that the affidavits were in fact not
22 returned. *See* Fed. R. Evid. 801. As these statements are inadmissible hearsay, they
23 may not be considered on summary judgment. *See Orr v. Bank of America*, 285 F.3d
24 764, 773 (9th Cir. 2002) (inadmissible hearsay may not be considered on summary
25 judgment motion). Plaintiff's assertion that Defendants did not return the affidavits to
26 him does not, without any supporting admissible evidence, create a "genuine" factual
27 dispute to whether Defendants stole the affidavits from him particularly in light of the
28 records indicating that the property kept from Plaintiff did not include the affidavits.

Secondly, Plaintiff has failed to create a genuine issue of material fact as to
whether or not the Defendants caused Plaintiff any actual injury. Examples of actual

1 injury include a prisoner whose complaint was dismissed for failure to satisfy some
2 technical requirement which, because of deficiencies in the prison's legal assistance
3 facilities, he could not have known, and a prisoner who was so stymied by the
4 inadequacies of the library that he was unable even to file a complaint. *See Lewis*, 518
5 U.S. at 351; *see, e.g., Hebbe v. Pliler*, No. 07-17265, slip op. 18591, 18601 (9th Cir.
6 Nov. 19, 2010) (plaintiff demonstrated that denying him law library access while on
7 lockdown resulted in "actual injury" because he was prevented from appealing his
8 conviction).

9 Plaintiff was able to file both his state habeas petitions. The latter petition was
10 denied on December 17, 2007, because it was untimely, as well as because the
11 supporting affidavits were not included. (Compl. Ex. A.) Plaintiff's prior state habeas
12 petition was also denied as untimely to the extent it did not present claims and evidence
13 that had already been rejected. (*Id.*) Even assuming both that Defendants stole
14 Plaintiff's affidavits and that these were same as the affidavits that were missing from
15 the second state petition, Plaintiff's state habeas petitions were still untimely. Plaintiff
16 has not shown or supplied any evidence that the affidavits would have established the
17 petitions' timeliness under California law. He refers to the affidavits as "new"
18 evidence, but he does not submit any evidence that they are new or that they could not
19 have been discovered earlier with due diligence, much less does he cite to any authority
20 that they qualify for an exception to California's timeliness rules. In the absence of any
21 evidence that the petitions would have been accepted as timely with the affidavits, there
22 is no genuine issue of material fact as to whether Defendants' alleged actions caused
23 them to be denied or otherwise caused Plaintiff "actual injury" in violation of his right
24 to access the courts.

25 Moreover, while Plaintiff claims that the affidavits substantiated his claims of
26 prosecutorial and juror misconduct on their merits, he has far from established that this
27 was the case. Bell and Tole-Carr's affidavits, as described by Plaintiff, do not
28 "establish" that Mr. Johnson's testimony was false or that the prosecutor knew it to be
false, only that Mr. Carr thought it was false. There is no indication, let alone evidence,

1 as to how Mr. Fryman would have “substantiated” Plaintiff’s claim that a juror knew the
2 victim, or as to how Mr. Jones would have “corroborated” Mr. Johnson’s status as a
3 “known liar.”

4 Even viewing all of the evidence in a light most favorable to Plaintiff, he has
5 failed to create a genuine issue of material fact as to whether Defendants failed to return
6 his affidavits or caused him any actual injury. Consequently, Defendant Murphy’s
7 motion for summary judgment will be granted. Moreover, the allegations against
8 Dodson are the same as those against Murphy, and there is no suggestion in the
9 complaint or any of the papers filed by the parties that the analysis of Plaintiff’s claims
10 differs with respect to the two Defendants. Consequently, summary judgment will be
11 granted in Dodson’s favor as well. *See Columbia Steel Fabricators, Inc. v. Ahlstrom*
12 *Recovery*, 44 F.3d 800, 803 (9th Cir. 1995) (affirming district court's granting summary
13 judgment in favor of non-appearing defendant, where plaintiff, in response to motion
14 filed by defendant who had appeared, had "full and fair opportunity to brief and present
15 evidence" on dispositive issue as to claim against non- appearing defendant).

15 **III. Plaintiff’s Motions**

16 After Defendant Murphy filed his reply to the opposition to the motion for
17 summary judgment, Plaintiff filed a number of motions seeking to conduct discovery in
18 order to respond to the reply. Plaintiff has no right to respond to the reply brief. He
19 claims that Murphy “unfairly” raised “new” arguments in his reply, but the arguments in
20 the reply simply respond to the arguments and evidence raised in Plaintiff’s opposition
21 and supporting declaration. Moreover, Plaintiff had ample time to conduct discovery
22 and oppose the motion for summary judgment prior to filing his opposition: he was
23 granted permission to conduct discovery in the Order of Service, approximately nine
24 months before the opposition was filed. He has shown no reason that this was an
25 insufficient amount of time.

26 The discovery and arguments Plaintiff seeks to include in a supplemental reply
27 are, moreover, unnecessary. Plaintiff’s motion to file a response to the reply (docket
28 number 32), motion for an extension of time to conduct discovery (docket number 33),

1 and motion to compel (docket and 34) seek to obtain and present evidence that his
2 inmate witnesses could, from their cells, see Defendants search Plaintiff' cell and return
3 his property, and could overhear the conversations between Plaintiff and prison staff
4 about his missing property. Plaintiff does not need to present such evidence, even if he
5 had a right to do so, because the Court has not relied on Murphy's argument that they
6 could not see or overhear these things in granting summary judgment.

7 Plaintiff's other motions, for an evidentiary hearing and to order the state court to
8 produce documents (docket numbers 36 and 37),⁵ seek to respond to the argument in
9 Murphy's reply that it is unclear whether the affidavits referred to by the state superior
10 court in denying Plaintiff's state petition on December 17, 2007, were the same
11 affidavits that Plaintiff claims were stolen by Defendants. The Court has assumed in
12 this order that the affidavits were the same, but for the reasons discussed above Plaintiff
13 has not created a genuine issue of material fact as to whether Defendants actually stole
14 the affidavits or caused Plaintiff an actual injury. As a result, there is no need for an
15 evidentiary hearing or an order to produce documents on this issue.

16 Accordingly, Plaintiff's motions seeking to respond to the reply and for
17 discovery will be denied.

18 **CONCLUSION**

19 For the foregoing reasons, Defendants are entitled to judgment as a matter of law
20 on Plaintiff's claims. Defendant Murphy's motion for summary judgment (Docket No.
21 19) is GRANTED and summary judgment is also GRANTED in favor of Defendant
22 Dodson.

23 Plaintiff's motion for an extension of time to file an opposition (docket number
24 23) is GRANTED. His motion to file a response (docket number 32) to Defendant's
25 original reply brief, his request for an extension of time to do so (docket number 33),
26 and his motion to compel (docket number 34) are DENIED. His motion for an order to

27 ⁵Plaintiff seeks the state court's December 17, 2007, Order denying his habeas
28 petition, which he already presented here (*see* Complaint, Ex. A), and a motion for
reconsideration in that case, which he could get from the state court itself.

1 produce documents, and for an evidentiary hearing (docket numbers 36 and 37) are
2 DENIED. His motions to appoint counsel (docket numbers 27 and 31) are DENIED
3 because this case is not particularly complex nor was Plaintiff incapable of advancing
4 his claims on his own.

5 The Clerk shall enter judgment, terminate all pending motions, and close the file.

6 IT IS SO ORDERED.

7 DATED: _____

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9 JEFFREY S. WHITE
10 United States District Judge
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