

1 Nahuatl (a pre Columbian language)." (Id.) He claims that he "cannot communicate well in English
2 because Spanish and English are his second and third languages." (Id.) He claims that "[o]n many
3 occasions throughout his incarceration at PBSP he has had to depend solely on legal and translating
4 assistance from other prisoners because he does not understand or articulate himself well in
5 English" (Id.)

6 Plaintiff makes two separate claims in his complaint. First, Plaintiff alleges that he "has on
7 several occasions sought to have admittedly erroneous and prejudicial information expunged from
8 his prison central file (c-file) and each time Defendants have arbitrarily, capriciously failed to
9 remove said false information." (Id. at 4.) Specifically, Plaintiff claims that on June 12, 2004, he
10 conducted a review of his prison file and discovered that PBSP Institutional Teacher Corrine Perry
11 issued a CDC-128B informational chrono dated May 12, 2004 alleging "incorrect/false information
12 regarding Plaintiff having a GED certificate." (Id. at 6; Compl., Ex. 7.) In June of 2004, Plaintiff
13 filed a 602 appeal requesting "(1) that the CDC 128B Chrono dated 5/12/04 be expunged from [his]
14 c-file; (2) that a chrono be issued stating that [he] ha[d] no such GED or high school diploma; (3)
15 that [he] be provided with . . . any information by which Mrs. Perry determined that [he] ha[d] a
16 GED diploma." (Compl., Ex. 8.) On July 13, 2004, the appeal was granted in part as to (1) and
17 denied in part as to (2) and (3) at the informal level of review. (Id.) However, Plaintiff alleges
18 "Defendants have repeatedly failed to remove the papers containing false information and arbitrarily
19 have used and continue to use the information for purposes of decision making." (Compl. at 4.)
20

21 Plaintiff also alleges that "Defendants have denied plaintiff meaningful access to the courts."
22 (Id. at 1-2.) He claims that "prison procedures and practices governing Plaintiff's access to SHU law
23 library services and related legal assistance service program are enforced arbitrarily and capriciously
24 and are designed to inhibit and impede/interfere with prisoners." (Id. at 15.) He claims that he has
25 "on several occasions attempted to prepare legal papers for filing within the courts by requesting
26 legal assistance from other prisoners via the established PBSP legal assistance program or other
27 related services." (Id.) Specifically, Plaintiff claims that on December 14, 2004, he "attempted to
28 utilize such services by making a 'new request' for legal/translating assistance from inmate Vivero

1 who speaks Plaintiff's native language and is familiar with some of his legal issues." (Id. at 10.) On
2 December 17, 2004, PBSP Correctional Officer T. Dennis denied Plaintiff's request claiming he
3 already received 10 days assistance from another inmate (Ayala) on 11/8/04 thru [sic] 11/23/04 and
4 Plaintiff could receive further assistance only if there was a verified court deadline." (Id.) On the
5 same date he received the denial of his request, Plaintiff filed a 602 grievance form regarding these
6 allegations; on the form, he claimed that he had been denied "a request for legal assistance in
7 preparing a petition for habeas corpus, a civil rights complaint 1983, as well as to receive help in
8 ongoing case[s]." (Compl., Ex. 17.) On December 28, 2004, Officer Dennis, who also handled the
9 appeal at the informal level of review, denied Plaintiff's appeal on two grounds: first, Plaintiff had
10 already received legal assistance "from 11-8-04 to 11-23-04 with i/m Vivero² . . . but [Plaintiff]
11 failed to provide a verifiable deadline which allows an additional ten day extension;" and second,
12 Plaintiff was disqualified from inmate legal assistance because he was being represented by an
13 attorney.³ (Compl., Ex. 18.)

14 Plaintiff then appealed the denial to the first formal level of review. PBSP Correctional
15 Sergeant D. Skerik was assigned to review Plaintiff's appeal by the First Level Reviewer. Sergeant
16 Skerik interviewed Plaintiff on January 31, 2005. During the interview, Plaintiff "stated that the
17 Appeals Office removed several attachments to this appeal," and that he "wanted those attachments
18 to be returned to, and made a permanent part of, this appeal." (Compl., Ex. 20.) PBSP Facility
19 Captain S. C. Wheeler and Associate Warden L. Williams denied the appeal at the first formal level
20 on February 1, 2005 and February 2, 2005, respectively. (Id.) According to the First Level
21 Supplemental Page, "a check of [Plaintiff's] records in the Law Library was conducted." (Id.) It
22 further states that prior to Plaintiff's request for inmate assistance from Inmate Vivero, "it was
23 discovered that [Plaintiff] had applied for and received legal assistance on one of [his] court cases
24

25 ² The record is unclear about whether the inmate who assisted Plaintiff from "11-8-04 to 11-
26 23-04" was inmate Ayala, as mentioned in the complaint, or inmate Vivero, as mentioned in Exhibit
18. Nevertheless, the Court need not clarify this fact at this time.

27 ³ Based on the record, it appears that Officer Dennis denied Plaintiff legal assistance on the
28 basis that he was represented by an attorney in one case, "case no. HCPB03-5263." (Compl. Ex.
18.) However, Plaintiff's complaint challenges the denial of legal assistance on a different case, Del
Norte County Superior Court case number HCPB06-5033. (Compl. at 14, Ex. 31.)

1 from inmate Ayala" (Id.) Plaintiff's first formal level appeal was denied because as of the date
2 of the appeal response, Plaintiff had failed "to provide a verifiable court deadline," which would
3 justify his request for legal assistance from Inmate Vivero. (Id.) The second formal level review
4 decision was drafted by PBSP Warden Richard J. Kirkland, who "partially granted" Plaintiff's
5 request to receive legal assistance from Inmate Vivero provided that "any requests for legal
6 assistance will be reviewed and approved or disapproved based on the established policies and
7 procedures. (Compl., Ex. 22.) However, Plaintiff's "request that changes be made to the PBSP Law
8 Library program to ensure an adequate and meaningful Law Library program" was denied at the
9 second level. (Id.) Plaintiff alleges that he exhausted his appeal through to the Director's Level
10 Review.⁴ He also alleges that: "On approximately April 24, 2006, because plaintiff was unable to
11 prepare an adequate or timely petition, the Superior Court County of Del Norte denied his petition
12 for writ of habeas corpus to withdraw a guilty plea that resulted in a two-year prison sentence."
13 (Compl. at 14.) The superior court denied the petition filed in the Del Norte County Superior Court
14 Case No. HCPB06-5033 upon finding that "insufficient grounds have been established to grant relief
15 in this case" and that "petitioner's claims were not timely made."⁵ (Compl., Ex. 31.)

16 Plaintiff names the following Defendants: PBSP Warden Bob Horel, PBSP Institutional
17 Teacher Corinne Perry, PBSP Institutional Correctional Counselor D. Marvin, PBSP Correctional
18 Counselor B. Flowers, PBSP Correctional Officer T. Dennis, PBSP Correctional Sargent D. Skerik,
19 PBSP Correctional Captain S. C. Wheeler, Former PBSP Warden Richard Kirkland, PBSP
20 Employee M. Costella, Chief of Inmate Appeals Nancy Grannis and "John Doe, whos [sic] unlegible
21 [sic] signature appears on the CDC 602 appeal # C05-00084." (Compl. at 2-3.)

22 Plaintiff seeks a declaratory judgment, monetary damages, a ruling on the unconstitutionality
23

24 ⁴ On September 15, 2005, Nancy Grannis, Chief of the Inmate Appeals Branch, sent Plaintiff
25 a letter indicating that his correspondence relating to his 602 appeal had been "forwarded to the
26 Appeals Coordinator at your location for further review," but noting that Plaintiff should "receive
27 further resolution" from the appeals office after October 15, 2005. (Compl., Ex. 24.) Plaintiff
includes documentation that he never received any further resolution from the Inmate Appeals
Branch, and his subsequent appeals were rejected as incomplete or untimely. (Compl., Ex. 25-28.)

28 ⁵ The record does not reflect when Plaintiff filed his superior court habeas petition in Del
Norte County Superior Court Case No. HCPB06-5033.

1 of PBSP's library policies, a jury trial, and appointment of counsel. (Id. at 18-19.).

2 **DISCUSSION**

3 **I. Standard of Review**

4 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
5 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that
7 are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary
8 relief from a defendant who is immune from such relief. Id. § 1915A(b)(1), (2).

9 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
10 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the
11 alleged violation was committed by a person acting under the color of State law. West v. Atkins,
12 487 U.S. 42, 48 (1988). "[A] complaint should not be dismissed for failure to state a claim unless it
13 appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would
14 entitle him to relief." Terracom v. Valley National Bank, 49 F.3d 555, 558 (9th Cir. 1995) (quoting
15 Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Pro se pleadings must be liberally construed.
16 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

17 **II. Legal Claims**

18 **A. False Information in Central File**

19 Plaintiff's claim of false information being placed in his central file is not actionable.
20 First, the Court finds that Plaintiff has failed to sufficiently allege that he has exhausted this claim.
21 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (PLRA),
22 amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison
23 conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
24 prison, or other correctional facility until such administrative remedies as are available are
25 exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement is mandatory. Wyatt v. Terhune,
26 315 F.3d 1108, 1117 n.9 (9th Cir.), cert. denied, 124 S. Ct. 50 (2003). While nonexhaustion under
27 § 1997e(a) is an affirmative defense, a prisoner's concession to nonexhaustion is a valid ground for
28 dismissal, so long as no exception to exhaustion applies. Id. at 119-20. Accordingly, the court may

1 dismiss a claim without prejudice if it is clear from the record that the prisoner has conceded that he
2 did not exhaust administrative remedies. See id.

3 The State of California provides its inmates and parolees the right to appeal administratively
4 "any departmental decision, action, condition or policy perceived by those individuals as adversely
5 affecting their welfare." See Cal. Code Regs. tit. 15, § 3084.1(a). It also provides its inmates the
6 right to file administrative appeals alleging misconduct by correctional officers. See id. § 3084.1(e).
7 In order to exhaust available administrative remedies within this system, a prisoner must proceed
8 through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602
9 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level
10 appeal to the Director of the California Department of Corrections. See id. § 3084.5; Barry v.
11 Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the administrative remedies
12 exhaustion requirement under § 1997e(a). See id. at 1237-38.

13 With respect to Plaintiff's false information claim, it appears that he never exhausted his
14 administrative remedies. Plaintiff attaches copies of a prison grievance regarding his false
15 information claim and an informal level grant in response to this grievance, but he failed to appeal
16 this decision to any subsequent levels of appeal, once he suspected that the problem persisted.
17 Claims must be exhausted before they are raised in a federal civil rights action; otherwise, they must
18 be dismissed. 42 U.S.C. § 1997e(a); McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002).
19 Nothing in the body of his complaint or in his exhibits demonstrates that prison officials prevented
20 him from exhausting his claim.
21

22 Second, even if Plaintiff had exhausted this claim, or exhausts it in the future, the claim does
23 not concern a violation of a right secured by the Constitution or laws of the United States. See West,
24 487 U.S. at 48. Because California has created regulations from which a protected interest in
25 accurate personal information records could arise, a court must ask (1) whether the regulations
26 creating the right to accurate personal information records narrowly restrict the power of prison
27 officials to deprive inmates of accurate records, and (2) whether the deprivation suffered due to the
28 denial of accurate records is one of "real substance." See Sandin, 515 U.S. at 477-87.

1 California Code of Regulations title 15, section 3450 allows inmates to inspect personal
2 records and to request amendment to correct outdated, inaccurate or incomplete information. If a
3 request to correct information is denied, the inmate may have a statement of disagreement placed in
4 the record or file. See id. § 3450(c). These regulations do not contain substantive predicates or
5 mandatory language requiring any specific outcome when a determination on a request to amend
6 personal information in a prisoner's file is made. The regulations state no criteria, for example,
7 which must be found before an inmate's request will be granted or denied. A provision that merely
8 provides procedural requirements, even if mandatory, cannot provide the basis for a constitutionally
9 protected liberty interest. See Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461-62
10 (1989); Smith v. Noonan, 992 F.2d 987, 989 (9th Cir. 1993). Because the statutory language does
11 not meet the first prong of the Sandin test, no protected liberty interest requiring constitutional
12 protection is created. Therefore, Plaintiff's claim against Defendants Perry, Marvin, and Flowers is
13 DISMISSED with prejudice for failure to exhaust and for failure to identify a federal constitutional
14 claim.

15 **B. Meaningful Access to the Courts**

16 Plaintiff's claim of denial of access to the courts is actionable as stated against Defendant
17 Dennis. Prisoners have a constitutional right of access to the courts. See Lewis v. Casey, 518 U.S.
18 343, 350 (1996); Bounds v. Smith, 430 U.S. 817, 821 (1977). To establish a claim for any violation
19 of the right of access to the courts, the prisoner must prove that there was an inadequacy in the
20 prison's legal access program that caused him an actual injury. See Lewis, 518 U.S. at 350-55. To
21 prove an actual injury, the prisoner must show that the inadequacy in the prison's program hindered
22 his efforts to pursue a non-frivolous claim concerning his conviction or conditions of confinement.
23 See id. at 354-55.

24 In some instances, a law library or other program may not be sufficient for some of the
25 prisoners because of their special situations (e.g., illiteracy or inability to communicate in English).
26 See id. at 356. The right of access to the court is limited to the initiation of a court action. The state
27 is not required to enable the prisoner to discover grievances or to litigate effectively once in court.
28

1 See id. at 354. Nonetheless, prisoners may not be barred from receiving legal assistance from other
2 prisoners unless they are provided with a reasonable alternative to such assistance. See Johnson v.
3 Avery, 393 U.S. 483, 490 (1969); Storseth v. Spellman, 654 F.2d 1349, 1352 (9th Cir. 1981). The
4 state may, however, reasonably regulate the time when, and the place where, prisoner legal
5 assistance is dispensed. See Johnson, 393 U.S. at 490; see, e.g., Bellamy v. Bradley, 729 F.2d 416
6 (6th Cir. 1984) (requiring that prisoners meet with jailhouse lawyer in law library), cert. denied, 469
7 U.S. 845 (1984); Corpus v. Estelle, 409 F. Supp. 1090 (S.D. Tex. 1975) (confining activities of
8 jailhouse lawyers to specified writ room during set hours), aff'd, 551 F.2d 68 (5th Cir. 1977). But
9 the restrictions must be "reasonably related to legitimate penological interests." Turner v. Safley,
10 482 U.S. 78, 89 (1987). Limitations may not be imposed arbitrarily or without reason. See Bradley
11 v. Hall, 64 F.3d 1276, 1281-82 (9th Cir. 1995) (finding under Turner that prison "disrespect rule" as
12 applied to prisoner was not reasonably related to legitimate penological interests and therefore
13 impermissibly burdened his ability to file grievances).

14
15 Once he identifies the inadequacy in a legal access program, the plaintiff must demonstrate
16 that the alleged shortcomings in the program hindered his efforts to pursue a legal claim. See Lewis,
17 518 U.S. at 351. Examples of impermissible hindrances include: a prisoner whose complaint was
18 dismissed for failure to satisfy some technical requirement which, because of deficiencies in the
19 prison's legal assistance facilities, he could not have known; and a prisoner who had "suffered
20 arguably actionable harm" that he wished to bring to the attention of the court, but was so stymied by
21 the inadequacies of the library that he was unable even to file a complaint. See id. Mere delay in
22 filing papers would not be enough, for example, if they were nevertheless timely filed or accepted
23 and considered by the court. See Hudson v. Robinson, 678 F.2d 462, 466 (3d Cir. 1982). However,
24 the arbitrary denial by prison officials of access to materials the prison routinely made available to
25 inmates for the preparation of legal documents constitutes a denial of an inmate's right of access to
26 the courts where it results in the loss of a legal claim. Phillips v. Hust, 477 F.3d 1070, 1073 (9th Cir.
27 2007).

28 Here, Plaintiff has stated a constitutional claim about denial of access to the courts, based on

1 the fact that he alleges that Defendant Dennis denied him access to the legal assistance program.
2 See Johnson, 393 U.S. at 490; Storseth, 654 F.2d at 1352. Plaintiff has further alleged that he
3 suffered an actual injury based on this lack of access to the courts: his state habeas petition was
4 denied as untimely in April, 2006. See Lewis, 518 U.S. at 351; Phillips, 477 F.3d at 1073. Although
5 Plaintiff alleges he also needed help in "ongoing case[s]," including a "a civil rights complaint
6 1983," (Compl., Ex. 17), he does not allege any other specific injuries incurred due to Defendant
7 Dennis denying him access to legal assistance.

8 Plaintiff has therefore stated a COGNIZABLE claim for a violation of his right of access to
9 the courts -- based on the specific injury of his state habeas petition being denied as untimely.

10 **C. Claim Relating to Grievance Process**

11 Plaintiff also names Defendants Perry, Grannis, Kirkland, Wheeler, Skerik, and Costella,
12 who all took part in handling the 602 appeal relating to his claim of a denial of access to the courts.
13 By the time these Defendants were involved in handling Plaintiff's 602 appeal, any constitutional
14 violation -- presumably of his right of access to the courts -- was complete, so their actions did not
15 violate that right. Although there is a First Amendment right to petition government for redress of
16 grievances, there is no right to a response or any particular action. See Flick v. Alba, 932 F.2d 728
17 (8th Cir. 1991) ("Prisoner's right to petition the government for redress . . . is not compromised by
18 the prison's refusal to entertain his grievance."). Thus, the aforementioned Defendants' failure to
19 uphold Plaintiff's grievance, and any possible misrepresentation regarding the cause of the problem,
20 was not a constitutional violation. Plaintiff has therefore failed to state a claim against Defendants
21 Perry, Grannis, Kirkland, Wheeler, Skerik, and Costella. Accordingly, Plaintiff's claim relating to
22 the grievance process against Defendants Perry, Grannis, Kirkland, Wheeler, Skerik, and Costella is
23 DISMISSED with prejudice.

24 **D. Claim Against Doe Defendant**

25 Plaintiff identifies Defendant "John Doe," who signed the second level response of Plaintiff's
26 administrative appeal No. C05-00084, as a Doe Defendant whose name he intends to learn through
27 discovery. The use of Doe Defendants is not favored in the Ninth Circuit. See Gillespie v. Civiletti,

1 629 F.2d 637, 642 (9th Cir. 1980). However, where the identity of alleged defendants cannot be
2 known prior to the filing of a complaint the plaintiff should be given an opportunity through
3 discovery to identify them. Id. Failure to afford the plaintiff such an opportunity is error. See
4 Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).

5 Accordingly, Plaintiff's claim against Defendant "John Doe" is DISMISSED from this action
6 without prejudice. Should Plaintiff learn that Defendant's identity he may move to file an
7 amendment to the complaint to add him as a named defendant. See Brass v. County of Los Angeles,
8 328 F.3d 1192, 1195-98 (9th Cir. 2003). Plaintiff is again cautioned that there is no right to a
9 response or any particular action. See Flick, 932 F.2d at 728. Therefore, even if Plaintiff discovers
10 the name of "John Doe," merely alleging that he signed the second level response of Plaintiff's
11 administrative appeal No. C05-00084 is insufficient to state a cognizable claim for relief. See id.

12 **E. Supervisory Liability Claim**

13 Finally, Plaintiff names PBSP Warden Bob Horel as a Defendant in this action. Plaintiff
14 does not allege facts demonstrating that Defendant Horel violated his federal rights, but seems to
15 claim Defendant Horel is liable based on the conduct of his subordinate, Defendant Dennis. There
16 is, however, no respondeat superior liability under § 1983 solely because a defendant is responsible
17 for the actions or omissions of another. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A
18 supervisor generally "is only liable for constitutional violations of his subordinates if the supervisor
19 participated in or directed the violations, or knew of the violations and failed to act to prevent them."
20 Id. A supervisor may also be held liable if he or she implemented "a policy so deficient that the
21 policy itself is a repudiation of constitutional rights and is the moving force of the constitutional
22 violation." Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc).

24 Plaintiff's claim against Defendant Horel is DISMISSED with leave to amend. Plaintiff may
25 file an amendment to the complaint alleges supervisory liability under the standards explained
26 above. **III. Pending Motions**

27 **A. Motion for a Temporary Restraining Order and Preliminary Injunction**

1 Plaintiff's has filed a "Motion for a Temporary Restraining Order [TRO] and Preliminary
2 Injunction," alleging that he has not been afforded access to a translator during his classification
3 hearings in 2005 and 2007 (docket no. 8). He asks the Court to issue a TRO:

4 [T]o ensure that Defendants stop relying upon, generating and/or fabricating false or
5 erroneous information regarding my education . . . and to ensure that I be afforded all due
6 process protections and meaningful access to the courts when being subjected by defendants
to disciplinary charges and when taken before ICC Boards.

7 (Decl. in Support of Mot. for TRO at 1.)

8 First, the Court notes that the basis for this motion is not at issue in the instant action. The
9 Court also notes that the alleged constitutional violation during his 2007 classification hearing took
10 place well after the filing of this action. See Manning v. City of Auburn, 953 F.2d 1355, 1359-60
11 (11th Cir. 1992) (supplemental pleadings setting forth occurrences or events which happened after
12 the date of the original complaint are optional; claims not filed in a supplemental complaint may be
13 filed in a separate lawsuit). Moreover, Plaintiff cannot obtain a TRO or preliminary injunction
14 without first satisfying the notice requirements of Federal Rule of Civil Procedure 65. Prior to
15 granting a preliminary injunction, notice to the adverse party is required. Fed. R. Civ. P. 65(a)(1). A
16 motion for preliminary injunction therefore cannot be decided until the parties to the action are
17 served, and they have not yet been served here. See Zepeda v. INS, 753 F.2d 719, 727 (9th Cir.
18 1983). A TRO may be granted without written or oral notice to the adverse party or that party's
19 attorney if: (1) it clearly appears from specific facts shown by affidavit or by the verified complaint
20 that immediate and irreparable injury, loss or damage will result to the applicant before the adverse
21 party or the party's attorney can be heard in opposition, and (2) the applicant's attorney (plaintiff
22 himself in this case, as he proceeds pro se) certifies in writing the efforts, if any, which have been
23 made to give notice and the reasons supporting the claim that notice should not be required. Fed. R.
24 Civ. P. 65(b). Plaintiff has not satisfied both requirements.

25 Accordingly, Plaintiff's motion (docket no. 8) is DENIED.

26 **B. Motion for Appointment of Counsel**

27 Plaintiff also requests the Court to appoint counsel to assist him in this action. The Court is
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1 unable to assess at this time whether exceptional circumstances exist which would warrant seeking
2 volunteer counsel to accept a pro bono appointment. The proceedings are at an early stage and it is
3 premature for the Court to determine Plaintiff's likelihood of success on the merits. Moreover,
4 Plaintiff has been able to articulate his claims adequately pro se in light of the complexity of the
5 issues involved. See Agyeman v. Corrections Corp. of America, 390 F.3d 1101, 1103 (9th Cir.
6 2004). Accordingly, the request for appointment of counsel at this time is DENIED. This does not
7 mean, however, that the Court will not consider appointment of counsel at a later juncture in the
8 proceedings, that is, after Defendant has filed a dispositive motion and the Court has a better
9 understanding of the procedural and substantive matters at issue. Therefore, Plaintiff may file a
10 renewed motion for the appointment of counsel after Defendant's dispositive motion has been filed.
11 If the Court decides that appointment of counsel is warranted at that time, then it can seek volunteer
12 counsel to agree to represent Plaintiff pro bono.

13 CONCLUSION

14 For the foregoing reasons, the Court orders as follows:

- 15 1. Plaintiff's false information claim against Defendants Perry, Marvin, and Flowers is
16 DISMISSED with prejudice.
- 17 2. Plaintiff has stated a COGNIZABLE claim for a violation of his right of access to the
18 courts against Defendant Dennis.
- 19 3. Plaintiff's claim relating to the grievance process against Defendants Perry, Grannis,
20 Kirkland, Wheeler, Skerik, and Costella is DISMISSED with prejudice.
- 21 4. Plaintiff's claim against Defendant "John Doe" is DISMISSED from this action
22 without prejudice.
- 23 5. Plaintiff's supervisory liability claim against Defendant Horel is DISMISSED with
24 leave to amend. Within **thirty (30) days** of the date of this Order Plaintiff may file an amended
25 supervisory liability claim against Defendant Horel as set forth above in Section II(E) of this Order.
26 (Plaintiff shall resubmit only that claim and not the entire complaint.) The failure to do so will result
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Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact -- that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted [in favor of the defendant], your case will be dismissed and there will be no trial.

See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that because he bears the burden of proving his allegations in this case, he must be prepared to produce evidence in support of those allegations when he files his opposition to Defendant's dispositive motion. Such evidence may include sworn declarations from himself and other witnesses to the incident, and copies of documents authenticated by sworn declaration. Plaintiff is advised that if he fails to submit declarations contesting the version of the facts contained in Defendant's declarations, Defendant's version may be taken as true and the case may be decided in Defendant's favor without a trial. Plaintiff will not be able to avoid summary judgment simply by repeating the allegations of his complaint.

c. If Defendant wishes to file a reply brief, they shall do so no later than **fifteen (15) days** after the date Plaintiff's opposition is filed.

d. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

1 8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
2 Leave of Court pursuant to Rule 30(a)(2) is hereby granted to Defendant to depose Plaintiff and any
3 other necessary witnesses confined in prison.

4 In order to maintain the aforementioned briefing schedule, all discovery requests must be
5 served on the opposing party on or by **July 1, 2009** and all discovery responses must be served on or
6 by **August 2, 2009**. In the event that Defendant files a motion for summary judgment, Plaintiff shall
7 file his opposition to the motion for summary judgment even if he intends to file a motion to compel
8 discovery. The discovery motion shall be submitted together with Plaintiff's opposition to the
9 motion for summary judgment, and Defendant's response to the discovery motion shall be submitted
10 on or by the date their reply to Plaintiff's opposition is due. If the Court decides any filed discovery
11 motion in Plaintiff's favor, he will be granted the opportunity to file a supplemental opposition to the
12 motion for summary judgment.

13 9. All communications by Plaintiff with the Court must be served on Defendant, or his
14 counsel once counsel has been designated, by mailing a true copy of the document to Defendant or
15 his counsel.

16 10. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
17 informed of any change of address and must comply with the Court's orders in a timely fashion.
18 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal
19 Rule of Civil Procedure 41(b).

20 11. **No further extensions of time will be granted in this case absent exigent**
21 **circumstances.** If exigent circumstances exist, the party making a motion for an extension of time is
22 not relieved from his or her duty to comply with the deadlines set by the Court merely by having
23 made a motion for an extension of time. The party making the motion must still meet the deadlines
24 set by the Court until an order addressing the motion for an extension of time is issued. Any motion
25 for an extension of time must be filed no later than **fifteen (15) days** prior to the deadline sought to
26 be extended.

27 12. Plaintiff's "Motion for a Temporary Restraining Order and Preliminary Injunction" is
28

1 DENIED (docket no. 8).

2 13. Plaintiff's request for appointment of counsel is DENIED.

3 14. This Order terminates Docket no. 8.

4 IT IS SO ORDERED.

5 DATED: 5/11/09


SAUNDRA BROWN ARMSTRONG
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 SERGIO ALVAREZ,

5
6 Plaintiff,

7 v.

8 ROBERT HOREL et al,

9 Defendant.

Case Number: CV06-05631 SBA

CERTIFICATE OF SERVICE

10 _____/

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
12 Court, Northern District of California.

13 That on May 14, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
15 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
16 located in the Clerk's office.

17
18 Sergio Alvarez K42605
19 P.O. Box 7500
20 Crescent City, CA 95532-7500

21 Dated: May 14, 2009

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk

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