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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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ROBERT ALAN BAILEY,

2:06-cv-0639-LDG-LRL

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Plaintiff,

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v.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER**

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FRAN ABRAMO; et al.,

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Defendants.

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This cause having come on for hearing before the Honorable Lloyd D. George, District Judge, on the 5th day of April, 2010, plaintiff Robert Alan Bailey being present, LeeAnn Phouthavongsay, Deputy Attorney General of the State of Nevada, and Rona-Kaye Tuitele, Deputy Attorney General of the State of Nevada, being present on behalf of defendants Celia Chacon, Ted D'Amico, Joseph Ferro, Rogelio Herrera, Robert LeGrand, Patricia Leonhardt, John Macinnis, David Peden, William Sandie, and John Scott, and the court having considered the matter, including arguments of counsel, the evidence adduced at trial, and the documents on file herein, now therefore, the court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

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1. Plaintiff Robert Alan Bailey was incarcerated within the Nevada Department of Corrections ("NDOC") under inmate BAC #75226 from approximately March 2002 to November 2009. The claims set forth in plaintiff's second amended complaint are based upon the conditions

1 of his confinement and alleged violation of his rights under the United States Constitution while
2 housed at Lovelock Correctional Center (“Lovelock”) located in Lovelock, Nevada.

3 2. In November 2009, plaintiff was released from NDOC custody following the
4 expiration of the term of imprisonment for which plaintiff was sentenced in 2001 for his
5 underlying criminal convictions. Plaintiff, who had proceeded in proper person since the
6 inception of this case, represented himself and presented his case in chief without the assistance of
7 counsel.

8 3. The record indicates that on March 31, 2010, during a pretrial hearing in this case,
9 Chief Judge Roger Hunt ruled that responses to discovery requests and excerpts from the internet
10 and publications could be used at trial only during cross-examination and impeachment, but are
11 not admissible as evidence. Chief Judge Hunt further ruled that for grievances to be admitted,
12 plaintiff would be required to have another witness testify that they were prepared by plaintiff, and
13 to whom they were delivered, etc., before they would be admissible. Chief Judge Hunt also
14 denied plaintiff’s petitions for writs of habeas corpus ad testificandum for lack of supporting
15 affidavits indicating what the testimony is, why it is necessary and why the probative value of the
16 testimony outweighs the expense and security risks involved. Chief Judge Hunt ruled that,
17 regarding plaintiff’s claim that he was denied the right to speak with the individuals or obtain their
18 affidavits, plaintiff would likely be permitted to testify that he was refused permission to do so.

19 4. Shortly before the start of trial, this court ruled that plaintiff had failed to timely
20 subpoena the defendants, who were not present during his case. However, plaintiff was permitted
21 to testify during trial regarding certain admissions made by defendants.

22 5. During the presentation of his case, plaintiff testified that his underlying criminal
23 convictions for burglary (felony) and attempted kidnapping in the first degree (felony) were the
24 result of what plaintiff characterized as his "obsessive personality.” Plaintiff, an avid comic book
25 collector, testified that while he resided in Reno, Nevada, comic books valued at \$100,000 had
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1 been stolen from him, and that he had made repeated requests to law enforcement and government
2 authorities for an investigation into the alleged theft, which requests went unanswered. Plaintiff
3 testified that the police told him that no assistance would be given because the police had not
4 concluded that a crime had been committed. Accordingly, plaintiff vowed that "[I]f they want a
5 crime, I'll give 'em a crime."

6 6. Plaintiff further likened his then state-of-mind to that of a "dog with a bone to
7 pick," and following plaintiff's private investigation and ultimate location of his comic books at a
8 local comic book store, plaintiff approached the store on March 22, 2001, and attempted to take
9 the female owner hostage by use of a stun gun and handcuffs. A scuffle ensued and the female
10 owner managed to escape and call for help. Plaintiff then barricaded himself in the store with a
11 homemade explosive devise consisting of 3500 firecrackers, lamp oil, and multiple bottles of
12 propane. After negotiating with local law enforcement officials, plaintiff eventually surrendered.
13 He was thereafter charged with, and pleaded guilty to, the aforementioned crimes.

14 7. Plaintiff testified that he entered the NDOC system with pre-existing mental health
15 issues, admitting that prior to his detention in the county jail during the course of his criminal case,
16 he was neither taking prescribed medication nor consulting a mental health counselor to address
17 these mental health issues. Upon admission to county jail, plaintiff was administered Prozac for
18 his mental health condition, which medication was continued upon admission into the NDOC
19 system in late 2001.

20 8. During his testimony, plaintiff conceded that he was systematically provided with
21 his dosages of Prozac for the duration of his tenure with NDOC from 2002 to 2009, with the
22 exception of June 22, 2004, and November 29, 2004. Plaintiff also conceded that as a result of the
23 consistent administration of the Prozac, he was "stabilized" in prison and consequently, "pretty
24 mellow."
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1 9. On June 22, 2004, the unit in which plaintiff was housed was in lockdown status
2 due to safety and security concerns. While the inmates in plaintiff's unit were not free to go to pill
3 call to obtain their daily medication, the inmates were personally provided their respective
4 medication by a nurse and an accompanying correctional officer, who administered pill call in the
5 unit by approaching each respective inmate's cell with their medication, and provided the
6 medication only if the inmate was appropriately dressed with his identification card in hand. If an
7 inmate was not ready to receive his daily medication during pill call, the nurse would wait for an
8 appropriate time, and then proceed to the next cell for pill call. Plaintiff testified that, in this
9 instance, the nurse did not approach his cell to administer his daily dosage of Prozac.

10 10. Plaintiff further testified that, after he realized the nurse had left his unit without
11 providing him with his daily dosage of Prozac, he notified Correctional Officer David Peden.
12 Plaintiff indicated that Officer Peden called the medical unit to inquire about plaintiff's
13 medication, after which plaintiff was informed that no make-up pill call would be permitted, and
14 that plaintiff would not receive his Prozac on that day.

15 11. Thereafter, from June 22, 2004, to September 13, 2004, plaintiff stated that he filed
16 inmate requests and grievances 1) requesting the missed Prozac dosage, 2) seeking an explanation
17 for the missed Prozac dosage, 3) informing the custody and medical staff of the alleged violation
18 of his constitutional rights, and 4) informing the same of his intent to file suit against the NDOC.
19 Based on the prior evidentiary ruling of Chief Judge Hunt, however, plaintiff was not permitted to
20 introduce these documents into evidence. Plaintiff conceded that prison officials responded to his
21 grievances by informing him that one missed dosage of Prozac was not serious or life-threatening,
22 and therefore, plaintiff would not be injured by the missed dosage regardless of the reason that he
23 may have been skipped by the nurse. Plaintiff testified that he was dissatisfied with these
24 responses, causing anger and obsession to "build up in [his] mind" about the missed-dosage
25 incident.

1 12. On September 15, 2004, plaintiff was treated at, admitted to, and later released
2 from the LCC infirmary after threatening to jump off of the second tier of his unit if he was not
3 immediately provided medical care for a skin rash that was ultimately diagnosed as Shingles.
4 Beginning on September 15, 2004, plaintiff was provided medical treatment for the Shingles,
5 which included anti-itch medication and shots of pain medication. Plaintiff testified that he was
6 systematically provided with daily dosages of Neurontin to treat the pain associated with the
7 Shingles, which was administered beginning approximately September 18, 2004.

8 13. On or about September 21, 2004, plaintiff incurred a notice of charges by the
9 female psychiatric nurse arising out of an incident in which plaintiff, during a follow-up
10 consultation and referral for anger issues, pulled his pants down and exposed his genitals while
11 describing his emotional state, and thereafter refused to pull his pants up. Plaintiff contended that
12 he was merely relaying what occurred during an incident on September 18, 2004, in which
13 plaintiff was handcuffed and being escorted outside his unit, and his pants fell down because he
14 did not have a belt, at which time the escorting guards bounced him up and down "like a sack of
15 potatoes" while trying to pull his pants up, causing the brief exposure of plaintiff's genitals before
16 he was clothed. Plaintiff testified that he became extremely frustrated and angry over the incident,
17 which was one of the reasons for his referral to the psychiatric nurse for a consultation.

18 14. Sometime between September 15 and September 22, 2004, plaintiff possessed
19 photographs of his nude upper body which he claimed were taken at the canteen to document the
20 existence and extent of his condition at the time. Plaintiff testified that on or about September 22,
21 2004, some of the photographs of plaintiff's nude upper body were confiscated after plaintiff was
22 transported to disciplinary segregation as a result of the charges filed by the psychiatric nurse.
23 Plaintiff had attached these same to a grievance that was submitted to authorities. Plaintiff was
24 informed by prison officials that photographs depicting a nude body, either in whole or in part,
25 constituted contraband and as such, plaintiff was not permitted to keep the photographs of his
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1 nude upper body in his possession. Plaintiff was further informed that the photographs of his nude
2 upper body were improperly taken by an inmate working in the canteen, who was not permitted to
3 take such photographs. At trial, plaintiff introduced three of the aforementioned photographs as
4 exhibits that he kept from prison officials, which the court admitted and received into evidence as
5 plaintiff's exhibit #1 over defendants' objection.

6 15. On or about November 12, 2004, plaintiff testified that his unit was placed on
7 lockdown status due to internal conflicts between various gangs within the institution, and that for
8 the following sixteen (16) days he received his daily dosages of Prozac and Neurontin while his
9 unit was on lockdown status, except that on November 29, 2004, plaintiff did not receive his
10 morning dosage of Prozac and Neurontin as morning and lunch pill calls were cancelled. Plaintiff,
11 however, was administered the Neurontin during evening pill call that same night, and the Prozac,
12 which plaintiff received once a day in the morning, the following morning on November 30, 2004.

13 16. Plaintiff further testified that from April 2005 through June 2005, he was subjected
14 to routine cell inspections and compliance checks conducted by Officer John Macinnis, the unit
15 correctional officer. While plaintiff conceded that such inspections are both necessary and
16 appropriate to ensure that inmates are not in possession of contraband and to provide for the safety
17 of all individuals in the unit, he claims that the cell inspection was improperly motivated by
18 certain negative comments regarding Correctional Officer Macinnis made during a discussion
19 between plaintiff and his cell-mate, which Officer Macinnis purportedly overheard. Plaintiff
20 claimed to have mailed a letter and grievance to the Inspector General's Office in Carson City,
21 Nevada, recounting the details of the cell inspection and presumably his suspicions of improper
22 motive.

23 17. On or about June 21, 2005, a notice of charges was issued against plaintiff by
24 Officer Macinnis for improperly sleeping on his bed during a cell inspection. Plaintiff testified
25 that the issuance of the notice of charges was retaliatory conduct improperly motivated by the
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1 comments overheard by Officer Macinnis and possibly the letter and grievance plaintiff forwarded
2 to Carson City, Nevada, regarding the inspection of his cell.

3 18. Plaintiff also testified that on or about July 6, 2005, plaintiff was issued a notice of
4 charges for the improper solicitation of information regarding staff, namely Officer Macinnis, and
5 causing a disruption/disturbance in the unit. Plaintiff indicated that the charges stemmed from his
6 attempt to obtain affidavits from other inmates, which he drafted or intended to draft in a lawsuit
7 regarding the falsity of the charges filed against plaintiff by Officer Macinnis.

8 19. Plaintiff testified that prior to the July 6, 2005, write-up, he had met with Celia
9 Chacon, the unit caseworker who, after having received complaints from other inmates, directed
10 plaintiff to cease and desist any further attempts to obtain affidavits from inmates regarding
11 Officer Macinnis while Officer Macinnis was on duty. Plaintiff refused to comply with Chacon's
12 request, and met with Chacon, again, along with Officer Macinnis. At that meeting, plaintiff was
13 ordered, due to the disturbance that his conduct created amongst the other inmates in the unit, to
14 stop any further attempts at obtaining affidavits in the unit while Officer Macinnis was on duty.
15 Plaintiff was offered the alternative of obtaining affidavits on the yard or any other place outside
16 of the unit, but maintained at trial that Chacon's and Officer Macinnis' directive to cease and
17 desist his attempts to obtain the affidavits in the unit while Mr. Macinnis was on duty violated his
18 right to access the courts. Plaintiff further claimed a violation of his right to access to the courts
19 when Chacon and Officer Macinnis prohibited any further correspondence with the Inspector
20 General's Office in Carson City as it circumvented the grievance process, and in directing plaintiff
21 to utilize the administrative regulations for complaints. At the court's inquiry, plaintiff, who was
22 concededly not a notary public, indicated that the affidavits were intended for use at trial, to which
23 the court responded that such documents, even if appropriately drafted, were typically
24 inadmissible at trial under the Federal Rules of Evidence.

1 5. Deliberate indifference may be manifested in two ways. It may appear when prison
2 officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the
3 way in which prison physicians provide medical care. However, mere negligence in diagnosing or
4 treating a medical condition alone does not violate a prisoner's Eighth Amendment rights.

5 McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1992), overruled on other grounds, WMX
6 Techs. Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997).

7 6. Mere disagreements as to the proper diagnosis and treatment are not
8 constitutionally cognizable. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989).

9 7. Viewed in the light most favorable to him, and drawing all inferences in his favor, a
10 reasonable juror could not have found in plaintiff's favor regarding his claims of deliberate
11 indifference to his serious medical needs. Plaintiff, himself, testified that he timely received all
12 necessary medications and received all necessary medical care on or about June 22, 2004, despite
13 the single, missed dosage of Prozac on that date, while the unit was in lockdown. Further, plaintiff
14 conceded that he was systematically provided with the Prozac from admittance into the NDOC
15 system to the time of his discharge, with the exception of June 22, 2004, and November 29, 2004.
16 Moreover, notwithstanding plaintiff's personal difference of opinion, plaintiff did not establish at
17 trial that the responses to his inquiries regarding the missed Prozac on June 22, 2004, that 1) one
18 missed dosage of Prozac was not a life threatening condition, 2) the missed dosage was clearly not
19 injurious to plaintiff's health, and 3) in light of such, the missed dosage would not be issued
20 pursuant to a make-up pill call was inadequate or not medically sound. Nor did plaintiff present
21 evidence establishing that the missed dosage itself threatened his health. Finally, plaintiff did not
22 present evidence concerning the security considerations during the lockdown, or the official
23 responses to his written grievances related to the missed dosages.

24 8. Plaintiff also failed to prove deliberate indifference regarding his medical
25 complaints of missed medications on November 20, 2004, after his unit's lockdown status
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1 beginning November 12, 2004. As plaintiff testified, he was systematically provided with his
2 medications (Prozac and Neurontin) during the preceding sixteen days before the missed dosage
3 on November 29, 2004; he admitted to receiving the missed morning dosage of Prozac and
4 Neurontin as morning and lunch pill calls were cancelled, but was administered the Neurontin
5 during evening pill call that same night, and the Prozac, which plaintiff received once a day in the
6 morning, on the following morning on November 30, 2004. As with his deliberate indifference
7 claims related to the missed dosage of Prozac on June 22, 2004, plaintiff presented no evidence
8 indicating that the missed dosage itself threatened his health. Nor would a reasonable jury find
9 that the delayed dosage of Neurontin, under the conditions of the lockdown, would have shown
10 deliberate indifference to plaintiff's serious medical needs. At most, regarding the isolated missed
11 dosages of his medication, plaintiff claimed a difference of opinion regarding whether such
12 medical treatment was appropriate. Finally, plaintiff did not present evidence concerning the
13 security considerations during the lockdown, or the official responses to his written grievances
14 related to the missed dosages.

15 9. Nor would a reasonable juror find in plaintiff's favor regarding his claim that
16 prison officials were deliberately indifferent to his serious medical needs as a result of the
17 treatment, or non-treatment, rendered to plaintiff following the outbreak of his Shingles during
18 September 2004. Plaintiff testified that while his previous medical complaints were responded to,
19 he was unhappy with the responses provided and his dissatisfaction with the responses caused him
20 to stress, obsess, and become angry. It was this self-induced stress, and unreasonable over-
21 reaction to the handling of his medical complaints to which plaintiff, during trial, attributed his
22 Shingles outbreak, not deliberate indifference of prison officials.

23 10. Regarding plaintiff's claim that prison officials delayed in addressing his outbreak
24 of Shingles, plaintiff testified that when he went to sick call the day of the outbreak, he was
25 refused admission. Plaintiff failed, however, to provide evidence as to the reason that he was not
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1 seen at that time. Plaintiff further testified that on several occasions while he was waiting for an
2 appointment to come through to see the doctor, he inquired of the CO about the appointment, and
3 merely surmised that his requests were not being referred up the chain of command. Moreover,
4 plaintiff testified that he continued to inquire about why he was not initially seen at sick call
5 during his scheduled medical appointment, but did not testify as to reasons given by the medical
6 staff. Nor did plaintiff rely during trial on any other documentation or facts developed during
7 discovery as to his failure to be initially admitted to sick call. Under these circumstances,
8 plaintiff's speculations fail to establish that officials were deliberately indifferent to his serious
9 medical needs when he was not initially admitted to sick call, or that officials did not properly
10 respond to his requests or were made aware of any change of plaintiff's medical status from his
11 initial report to sick call. Plaintiff also testified that responses to his grievances during that time
12 period exhibited deliberate indifference. However, based on plaintiff's preclusion from presenting
13 the responses to his grievances, his proof fails as to his claims for deliberate indifference of
14 officials during the several-days' time period before he began receiving medical attention.

15 11. Plaintiff testified that he ultimately forced prison officials to provide him medical
16 attention by threatening to commit suicide by jumping off a prison tier, after which he was taken
17 to the infirmary for medical evaluation. Plaintiff testified that he saw the doctor and received pain
18 shots for several days in succession. After several days of pain shots, plaintiff testified that on one
19 occasion he asked for an emergency grievance because his morning pain shot had worn off.
20 Plaintiff testified that he was eventually taken to the infirmary, given a pain shot, and given the
21 option of staying in the infirmary or returning to his cell. He chose to return to his cell, and was
22 allowed to file an emergency grievance. Although plaintiff was not treated as he would have
23 preferred during this course of events, he did receive pain medication and elected to return to his
24 unit. He failed to establish deliberate indifference.

1 12. Plaintiff continued to be given pain medication for Shingles until he was seen at the
2 prison clinic by Dr. Scott. Dr. Scott indicated that the medications plaintiff was receiving for his
3 Shingles could potentially cause liver damage, and wrote a different prescription for plaintiff.
4 However, the prison did not have the specified medication on hand, and had to order it. Plaintiff
5 claims that the delay in getting the newly prescribed medication exhibited deliberate indifference.
6 However, plaintiff presented no evidence establishing that the prison medical personnel
7 deliberately delayed the receipt of the medication, or that the delay was not justified considering
8 the potential liver damage had plaintiff continued with his original medication. Plaintiff presented
9 no medical witnesses or evidence during his case. While plaintiff may have a difference of
10 opinion about whether he should have been allowed to continue on his initial medication pending
11 the receipt of the newly prescribed medication, such does not establish deliberate indifference.

12 13. A reasonable juror could not find in favor of plaintiff on his deliberate indifference
13 claim related to prison officers not allowing him to sleep during cell check. Plaintiff testified that
14 cell checks were proper at the prison. While plaintiff testified that no administrative regulation
15 prohibits sleeping during such cell check, no reasonable juror would find that prison officials
16 violated prison guidelines or were deliberately indifferent to plaintiff's physical needs by not
17 allowing him to sleep during cell check. Moreover, plaintiff testified that when he attempted to
18 get medical orders indicating that he should be permitted to sleep during the day, the medical staff
19 made an accommodation by allowing him to receive medication later in the evening so that he
20 could get a full night's sleep. Under those circumstances, plaintiff has not maintained a claim for
21 deliberate indifference.

22 14. Of fundamental import to prisoners are their First Amendment rights to file prison
23 grievances and to pursue civil rights litigation in the courts. Rhodes v. Robinson, 408 F.3d 559,
24 567 (9th Cir. 2005). Without these bedrock constitutional guarantees, inmates would be left with
25 no viable mechanism to remedy prison injustices. Id.
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1 15. Within the prison context, a viable claim of First Amendment retaliation entails
2 five basic elements: (1) an assertion that a state actor took some adverse action against an inmate
3 (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
4 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
5 correctional goal. Rhodes, 408 F.3d at 567-68. The prisoner plaintiff "bears the burden of
6 pleading and proving the absence of legitimate correctional goals for the conduct of which he
7 complains." Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995). The right of access to the courts
8 is a right to bring petitions or complaints to federal court and not a right to discover such claims or
9 even to litigate them effectively once filed with a court. Lewis v. Casey, 518 U.S. 343, 354
10 (1996).

11 16. A reasonable juror would not find in plaintiff's favor regarding his claims of denial
12 of access to the courts and retaliation. Plaintiff failed to show that the confiscation of certain
13 photographs depicting his nude upper body were unauthorized or that they did not constitute
14 contraband within the institution. Plaintiff conceded that cell inspections and compliance checks
15 that are conducted to ensure that inmates are not in possession of contraband are necessary and
16 appropriate as inmates should not be in possession of contraband. Furthermore, plaintiff conceded
17 that the confiscation of contraband is appropriate to further penological goals of safety and
18 security within the institution. Even if the confiscation of some of plaintiff's photographs was
19 inappropriate, plaintiff was not damaged in his access to the courts claim because plaintiff
20 introduced three photographs depicting his upper torso which plaintiff contends were taken at the
21 same time and at the same place as the confiscated photographs, which were admitted into
22 evidence as plaintiff's exhibit #1.

23 17. Regarding plaintiff's claims of retaliation with respect to the notices of charges
24 filed against him for failure to abide by applicable housing rules by sleeping during a cell
25 inspection, plaintiff conceded that he was aware of the requirement that inmates be awake during
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1 cell inspection, and did not show that he had properly documented a medical approval to sleep
2 during the inspections to the unit officers and staff. Furthermore, plaintiff conceded that the
3 housing rule was appropriate and did not show that they were unsustainable as furthering
4 penological goals of safety and security within the institution.

5 18. Similarly, plaintiff failed to prove a retaliation claim as to the notice of charges
6 based upon plaintiff's improper solicitation of information regarding staff and causing disruption
7 and disturbance on the tier. Plaintiff did not establish that the enforcement of those regulations
8 was not justified by the prevention of disruptions in the unit, and the maintenance of organization
9 in furthering the penological goals of safety and security within the institution.

10 19. Nor would a reasonable juror find that plaintiff proved a retaliation claim regarding
11 the order to cease his correspondence with the Inspector General's Office in Carson City, Nevada.
12 Plaintiff was instructed to follow the proper inmate grievance process set forth in the
13 administrative regulations, and has not established that such a process is not the appropriate
14 mechanism for pursuing prison grievances.

15 20. Finally, plaintiff failed to prove the absence of legitimate correctional goals for his
16 claims that he was prohibited from soliciting affidavits from other inmates to document his
17 treatment. Plaintiff testified that he was instructed pursuant to prison guidelines and in the interest
18 of security not to solicit statements from other inmates regarding correctional officers during those
19 officers' shifts. As plaintiff's testimony indicated, his claims against correctional officers for
20 conducting allegedly retaliatory cell checks were based on his suspicions, and were not an
21 improper exercise of prison authority.

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ORDER

Based on the above Findings of Fact and Conclusions of Law, the arguments of the parties and the evidence presented by plaintiff at trial, that defendants' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) is GRANTED.

Dated this 20 day of December, 2010.



Lloyd D. George
United States District Judge