NO:

Supreme court of The united states

William Dixon Petitioner

-VS-

Robert Lagrand respondant

APPENDIX A

Pg 1- last court NOV, 30-17 Opinion
9th cir court Rehearing

Pg 2-4- Denial - opinion of court 9th circuit.

- App A - Last court Ruled NOV-30-17

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 30 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

WILLIAM ROBERT DIXON, Plaintiff-Appellant, v. ROBERT LeGRAND, Warden; et al., Defendants-Appellees.	No. 15-16728 D.C. No. 3:13-cv-00586-RCJ-VPC District of Nevada, Reno ORDER

Before: GOODWIN, FARRIS, and FERNANDEZ, Circuit Judges.

Dixon's petition for panel rehearing (Docket Entry No. 27) is denied.

Dixon's motion for leave to file a supplemental brief (Docket Entry No. 30) is denied.

No further filings will be entertained in this closed case.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM ROBERT DIXON, Plaintiff-Appellant, v. ROBERT LeGRAND, Warden; et al., Defendants-Appellees.	No. 15-16728 D.C. No. 3:13-cv-00586-RCJ-VPC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Submitted February 14, 2017**

Before: GOODWIN, FARRIS, and FERNANDEZ, Circuit Judges.

Nevada state prisoner William Robert Dixon appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging constitutional claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004). We may affirm on any

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A pg 2

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basis supported by the record, *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008), and we affirm.

Summary judgment on Dixon's access-to-courts claim was proper because Dixon failed to raise a genuine dispute of material fact as to whether defendants' alleged refusal to request Dixon's legal materials from Ohio in a timely manner caused his injury. *See Lewis v. Casey*, 518 U.S. 343, 348-49 (1996) (access-to-courts claim requires actual prejudice to contemplated or existing litigation, such as inability to meet a filing deadline or to present a claim); *see also Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008) ("In a § 1983 action, the plaintiff must . . . demonstrate that the defendant's conduct was the actionable cause of the claimed injury.").

The district court properly granted summary judgment on Dixon's claim alleging denial of mail because Dixon failed to raise a genuine dispute of material fact as to whether he properly exhausted administrative remedies or whether administrative remedies were effectively unavailable to him. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006) ("[P]roper exhaustion of administrative remedies . . . means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)." (emphasis, citation, and internal quotation marks omitted)); *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (a prisoner who does not exhaust administrative remedies must show that

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"there is something particular in his case that made the existing and generally available administrative remedies effectively unavailable to him . . . .").

We do not consider documents not filed with the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

We do not consider issues or arguments not specifically and distinctly raised in the opening brief or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

All pending motions and requests are denied.

AFFIRMED.

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No_____

Supreme court of The united states

William Dixon - Petitioner

-vs-

Robert Lagrand - Respondent

APPENDIX B

Pg1-3 Dist court opinion

Pg4-28 Original complaint to Dist Court

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM ROBERT DIXON,

Plaintiff,

vs.

ROBERT LEGRANDE et al.,

Defendants.

3:13-cv-00586-RCJ-VPC

ORDER

Plaintiff is a prisoner formerly in the custody of the Nevada Department of Corrections. The Magistrate Judge has submitted a Report and Recommendation ("R&R") as to cross motions for summary judgment. The Court respectfully adopts the R&R in part, but rejects it as to Count III, granting Defendants' motion for summary judgment as against all remaining claims.

The Court need not determine whether *Heck v. Humphrey*, 512 U.S. 477 (1994) bars Plaintiff's First Amendment right-of-access-to-the-courts claim (Count III) against Defendants based on their alleged failure to forward certain legal documents to him for his habeas corpus proceedings in Ohio, because the underlying habeas corpus claims have been adjudicated to have been frivolous, and therefore no right-of-access-to-the-courts claim can lie. *See Lewis v. Casey*, 518 U.S. 343, 353–55 & n.3 (1996). The Court respectfully disagrees that the underlying habeas corpus claims were arguably meritorious. Although the Court of Appeals for the Sixth Circuit

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(the "Court of Appeals") did not characterize the claims as frivolous, neither did it characterize them as non-frivolous, and it noted that the claims "clearly lack merit." (*See* Order 2, ECF No. 52-1). The Court of Appeals denied Plaintiff's motion to proceed in forma pauperis on appeal—the only matter before it that would have required it to determine whether the claims were frivolous—as moot because it had quickly rejected the claims on the merits and did not need to address the potentially more complex and time-consuming issue of frivolity. (*See id.* 5). But the only reason a motion to proceed in forma pauperis on appeal would have been before the Court of Appeals in the first place is if the U.S. District Court for the Southern District of Ohio (the "District Court") had already denied a similar motion, *see* Fed. R. App. P. 24(a)(4)–(5), which the District Court could only have done based on a finding of frivolity, *see* 28 U.S.C. § 1915(a)(3). That is indeed what the District Court ruled, (*see* Order, ECF No. 22 in S.D. Ohio Case No. 3:11-cv-150), and the Court of Appeals for the Sixth Circuit did not upset that ruling. That precludes any argument here that the underlying habeas corpus claim was non-frivolous, and the right-of-access-to-the-courts claim therefore necessarily fails under *Lewis*.

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CONCLUSION

IT IS HEREBY ORDERED that the R&R (ECF No. 63) is ADOPTED IN PART and REJECTED IN PART.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (ECF No. 52) is GRANTED, and Plaintiff's Motion for Summary Judgment (ECF No. 50) is DENIED.

IT IS FURTHER ORDERED that the Motion (ECF No. 61) is DENIED as moot.

IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

IT IS SO ORDERED.

Dated this 6th day of July, 2015.

ROBERT C. JONES
United States District Judge

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No _____

Supreme court of The united States

William Dixon Petitioner

-vs-

Warden Robert Lagrand Respondent

APPENDIX C

Pg 1-14 - Magstrate Judge Report-

App C.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM ROBERT DIXON,

Plaintiff,

v.

ROBERT LEGRAND, *et al.*,

Defendants.

3:13-cv-00586-RCJ-VPC

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment (#52). Plaintiff opposed (#56), and defendants replied (#57). Also before the court is plaintiff's motion for summary judgment (#50). Defendants opposed (#51), and plaintiff replied (#54). Having reviewed the motions and papers, the court hereby recommends that defendants' motion be granted and denied in part, and plaintiff's motion be denied in its entirety.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

William Robert Dixon ("plaintiff") is an inmate who was once in the custody of the Nevada Department of Corrections ("NDOC"). Presently, he is incarcerated at the Toledo Correctional Institution in Toledo, Ohio, but he previously served periods of incarceration at Ely State Prison ("ESP") in Ely, Nevada, and also Lovelock Correctional Center ("LCC") in Lovelock, Nevada, pursuant to an inmate transfer arrangement with Ohio prisons. (*See* #52 at 2.) Pursuant to 42 U.S.C. § 1983, plaintiff brings several civil rights claims against NDOC officials.

The District Court screened plaintiff's complaint on November 19, 2014 and permitted only four claims to proceed (#34). First, in count II, plaintiff alleges violations of his First Amendment right to receive mail, against defendants Kelly Bellanger, James Keener, Michelle Moore, James Cox, and the NDOC Offender Management Division Director, due to their alleged destruction of letters from his wife. (#34 at 6.) Second, in count III, plaintiff contends that

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defendants Robert LeGrand and Tara Carpenter violated his constitutional right to access the federal courts by refusing to timely request that Ohio prison officials deliver a box of legal materials while litigating his post-conviction *habeas* petition. (*Id.* at 7-9.) Third, in count X, plaintiff brings inadequate medical care claims under the Eighth Amendment against Dr. John Scott and a hereto unnamed physician at ESP. (*Id.* at 9-11.)

II. LEGAL STANDARD

Summary judgment allows the court to avoid unneeded trials. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court properly grants summary judgment when the record discovered by the parties demonstrates that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986). A dispute is "genuine" only where a sufficient evidentiary basis would allow a reasonable jury to find for the nonmoving party. *Id.* "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)). Conclusory statements, speculative opinions, pleading allegations, or other assertions uncorroborated by facts are insufficient to establish a genuine dispute. *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996).

Summary judgment proceeds in burden-shifting steps. When the moving party bears the burden of proof at trial, it must support its motion "with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal quotation omitted). In contrast, a moving party who does not bear the burden of proof "need only prove that there is an absence of evidence to support the non-moving party's case[,]" *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376,

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387 (9th Cir. 2010), and such a party may additionally produce evidence that negates an essential element of the nonmoving party's claim or defense, *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the moving party must demonstrate, on the basis of authenticated evidence, that the record forecloses the possibility of a reasonable jury finding in favor of the nonmoving party as to disputed material facts. *Celotex*, 477 U.S. at 323; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). The court views all evidence and any inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014).

Where the moving party meets its burden under Rule 56, the nonmoving party must "designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one." *In re Oracle Corp.*, 627 F.3d at 387 (internal citation omitted). "The non-moving party must show more than the mere existence of a scintilla of evidence. . . . In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *Id.* (internal citations omitted). The nonmoving party may defeat the summary judgment motion only by setting forth specific facts that illustrate a genuine dispute that requires a factfinder's resolution. *Liberty Lobby*, 477 U.S. at 248; *Celotex*, 477 U.S. at 324. Although the nonmoving party need not produce authenticated evidence, *see* Fed. R. Civ. P. 56(c), mere assertions, pleading allegations, and "metaphysical doubt as to the material facts" will not defeat a properly-supported summary judgment motion, *Orr*, 285 F.3d at 783.

III. DISCUSSION

A. Plaintiff's Motion for Summary Judgment

The court recommends that plaintiff's motion (#50) be denied because he fails to satisfy his burden, as the moving party who bears the burden of proof at trial, as to the relevant elements for the surviving claims. Rather than setting forth the relevant facts for each of the claims in a reasonably clear manner—let alone stating the applicable standards for each of his claims—plaintiff submits several state and federal judicial decisions from his direct criminal appeal and *habeas* actions, along with court transcripts and other documents that appear to be related to his

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underlying criminal conviction. In the few pages dedicated to articulating arguments, he focuses solely on arguing why these courts erred. Charitably viewed, these documents relate only to this count III claim. However, absent from his motion is sufficient evidence that establishes beyond dispute the elements of this claim. Accordingly, the motion should be denied.

B. Defendants' Motion for Summary Judgment

Defendants raise, in essence, three arguments for summary judgment on plaintiff's claim. First, as to counts II and the Eighth Amendment claim against the unnamed ESP physician in count X, they argue that plaintiff failed to exhaust available administrative remedies. Second, as to the count III right-of-access claim, they argue that the claim is *Heck* barred. Finally, as to the remaining count X medical care claim, they argue that the record forecloses plaintiff's ability to establish the necessary elements. The court analyzes each argument below.

1. Counts II and X: Failure to Exhaust

a. Legal Standard

Under the PLRA, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement is mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Failure to exhaust is an affirmative defense, and the defendants bear the burden of proof. *Jones v. Bock*, 549 U.S. 199, 216 (2007). Within the Ninth Circuit, the proper vehicle for raising exhaustion is no longer a motion to dismiss, unless exhaustion—which need not be pled—is plain on the face of the complaint. *Albino*, 747 F.3d at 1168-69. Otherwise, defendants move for summary judgment on the basis of exhaustion, which "should be decided, if feasible, before reaching the merits of a prisoner's claims." *Id.* at 1169-70.

The PLRA requires "proper exhaustion" of an inmate's claims. Proper exhaustion is the use of "'all steps that the [prison] holds out, ..." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). The inmate must pursue these remedies "'*properly* (so that the agency addresses the issues on the merits).'" *Id.* (quoting *Pozo*, 286 F.3d at 1024) (emphasis original). Thus, exhaustion "demands compliance with an

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agency's deadlines and other critical procedural rules because no adjudication system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90-91. Applicable procedural rules for proper exhaustion "are defined not by the PLRA, but by the prison grievance process itself." *Jones*, 549 U.S. at 218.

"The level of [factual] detail in an administrative grievance necessary to properly exhaust a claim is determined by the prison's applicable grievance procedures." *Morton v. Hall*, 599 F.3d 942, 946 (9th Cir. 2010) (citing *Jones*, 549 U.S. at 218). "[W]hen a prison's grievance procedures are silent or incomplete as to factual specificity, 'a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.'" *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)); *see also Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010). Because the purpose of the grievance "is not to lay the groundwork for litigation[,]" but rather "to alert the prison to a problem and facilitate its resolution," the grievance "need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being grieved." *Griffin*, 557 F.3d at 1120. In other words, the grievance suffices as long as it sufficiently places prison officials on notice of facts by which they can determine the "root cause" of the issue, whatever may be the inmate's legal theories or claims should litigation ensue. *See McCollum v. Cal. Dep't of Corrs. and Rehab.*, 647 F.3d 870, 876-77 (9th Cir. 2011); *Akhtar v. Mesa*, 698 F.3d 1202, 1211 (9th Cir. 2012).

Upon the defendants' showing of an unexhausted available remedy, the burden shifts to the inmate "to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him." *Albino*, 747 F.3d at 1172. A remedy is "available" when, as a practical matter, it is capable of use. *Brown v. Valoff*, 422 F.3d 926, 936-37 (9th Cir. 2005). Where prison officials render administrative remedies "effectively unavailable" under the circumstances, an inmate's failure to exhaust is excused. *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010).

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b. The NDOC's Grievance Process

Inmates incarcerated within NDOC institutions may grieve "conditions of institutional life" pursuant to AR 740.[1] Inmates must grieve "[w]ithin six (6) months if the issue involves personal property damages or loss, personal injury, medical claims or any other tort claims, including civil rights claims[,]" AR 740.05(4). AR 750 supplements AR 740's deadlines when the issue pertains to inmate mail.[2] AR 750.07(1) requires that the institutional mailroom officer give notice to the inmate of unauthorized mail, and the inmate has ten days, pursuant to AR 750.07(2), to inform the mailroom officer of his desired disposition. "The inmate grievance process will be used to appeal [the mailroom officer's] decision." AR 750.07(3). Where the inmate grieves the issue, as otherwise provided in AR 740, the relevant mail pieces are held until completion of the grievance process. AR 750.07(3)(B)-(C). Where the inmate fails to act within the ten-day period, however, the items are destroyed in accordance with the requirements of AR 750.07.

Ordinarily, the NDOC grievance process begins at the informal level. If the inmate is unable to resolve the issue through discussion with an institutional caseworker, *see* AR 740.04, the inmate is to file an informal grievance. An inmate who is dissatisfied with the informal response may appeal to the formal level within five days. AR 740.05(12). At the first formal level, officials of a higher level respond. *See* AR 740.06(1). The inmate "shall provide a signed, sworn declaration of facts that form the basis for a claim that the informal response is correct. . . . Any additional relevant documentation should be attached at this level." AR 740.06(2). Within five days of a dissatisfactory first-level response, the inmate may appeal to the second level, which is subject to still-higher review. *See* AR 740.07(1).

c. Analysis

i. Count II

In this count, plaintiff alleges that defendants repeatedly stole or destroyed his mail. (#32 at 11-12.) Defendants move for summary judgment on the basis that plaintiff failed to exhaust his

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[1] Defendants submitted an authenticated copy of AR 740 (#59-2) as ordered by the court.
[2] Defendants also submitted an authenticated copy of AR 750 (#52-6).

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claims. In support of their argument, they provide Carpenter's sworn affidavit regarding the unauthorized mail, in which she indicates that plaintiff provided a desired disposition of sixteen letters and failed to act within ten days as to the other three. (#52-6 at 4-5.) Accordingly, they argue that the record establishes, at most, that only four letters were destroyed—one at his direction—and his failure to act within ten days, as required by AR 750, constitutes his abandonment of his claims as to the others.

Plaintiff opposes on the basis that he requested a hold of one item because he was in segregation at the time, and was unable to access stamps such that the letter could be returned to its sender. (#56 at 5.) Otherwise, he opposes on the basis of repetitive statements that defendants destroyed most of his mail on purpose. (*See id.* at 5-6.) Defendants counter that plaintiff's opposition and exhibits, which consist of various kites related to his mail and also two informal grievances dated October 24 and 30, 2013, fail to demonstrate that plaintiff exhausted his claims.

Defendants are entitled to summary judgment. As an initial matter, prisoners have "a First Amendment right to send and receive mail." *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995). Yet this right is subject to restrictions that serve legitimate penological interests, as set forth by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89 (1987). Defendants indicate that nineteen pieces of mail, at most, were not delivered at plaintiff, and he does not contest this point. Nor does he genuinely contest their characterization of the mail pieces as unauthorized under AR 750. As such, there is no issue in this case about whether the infringement upon plaintiff's right to receive mail was permissible under *Turner*. Were this not the case, however, the court observes that it has analyzed AR 750 under the *Turner* factors in the past and held constitutionally firm AR 750's limitations on this right. *See Sikorski v. Whorton*, 631 F. Supp. 2d 1327 (D. Nev. 2009).

The record in this case demonstrates that plaintiff failed to exhaust his administrative remedies. Plaintiff provided a requested disposition for sixteen pieces of mail. (#52-6 at 4-5.) Plaintiff does not raise issue with defendants' evidence on this point. His directed dispositions were unaccompanied by grievances about defendants' decision to deem the mail unauthorized, as required by AR 750. Accordingly, he failed to grieve the withholding of this mail and his claims are barred by the PLRA.

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Similarly, as to the three letters that defendants destroyed, plaintiff failed to timely act as required by AR 750. Thus, he failed to properly grieve this claim. Although he provides some evidence suggesting that he was unable to secure stamps to mail the letters himself due to his placement in segregation, the evidence fails to raise a genuine issue of the grievance system's unavailability. In his correspondence regarding those pieces—assuming, of course, that it pertained to the three destroyed letters—he easily could have directed the mail be sent on his behalf. That is, there is no particular reason that plaintiff needed to affix a stamp himself to the letters, for AR 750 plainly indicates that prison officials will complete this step. In either case, AR 750 is clear that requesting a hold on mail, until such time the inmate is able to take such an action, is not a permissible response. The inmate must inform the mailroom officer of the disposition within ten days, and also file a grievance if he disagrees that the mail is unauthorized. (#52-6 at 31.) Plaintiff's suggestion that he lacked proper paperwork while in segregation is unsupported and conclusory, and it fails to raise a genuine issue. At bottom, the record establishes that he failed to utilize an available procedure for contesting the handling of his mail, and the PLRA consequently bars his claims. Defendants' motion for summary judgment should, therefore, be granted as to count II.

ii. Count X

Plaintiff alleges that an unnamed ESP physician denied him physical therapy or pain medication during his time at ESP. (#32 at 22.) Defendants move for summary judgment on the basis that plaintiff failed to grieve the purported denial of care. (#52 at 15.) In support thereof, they provide an informal grievance, to which officials assigned a log number of 2006-29-71889, pertaining to medical care at ESP. (#52-4 at 5-9.) Although they argue that the actual issue is plaintiff's disagreement with the physician's refusal to prescribe him opioid medication, they move for summary judgment on the basis that plaintiff grieved the issue only through the first formal level, rather than the second. (#52 at 15). In his opposition, plaintiff concedes that he did not grieve the issue fully against the unnamed physician at ESP, but seemingly argues that he should be excused from his failure to exhaust because he grieved a similar issue against Dr. Scott. (#56 at 7.)

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Defendants are entitled to summary judgment on the claim. The claim against the ESP physician is distinctly different. It arises from a different set of facts, and however similar their prescription choices might be, plaintiff was required to separately grieve the ESP incident. Because he concedes he did not do so, summary judgment is warranted.

2. Count III: *Heck* Bar

a. Legal Standard

In *Heck v. Humphrey*, the Supreme Court held that,

> in order to recover damages for . . . harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.*

512 U.S. 477, 486-87 (1994) (emphasis added). In other words, where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," then "the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487.

The Court clarified in *Edwards v. Basilok*, 520 U.S. 641 (1997) that the *Heck* bar applies irrespective of the form of remedy sought. "[A] claim for declaratory relief and money damages . . . that necessarily impl[ies] the invalidity of the punishment imposed[] is not cognizable under § 1983." *Id.* at 648; *see also Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) ("a state prisoner's § 1983 action is barred . . . if success in that action would necessarily demonstrate the invalidity of confinement or its duration."). As the Ninth Circuit has summarized, the "sole dispositive question is whether a plaintiff's claim, if successful, would imply the invalidity of his conviction." *Whitaker v. Garcetti*, 486 F.3d 572, 584 (9th Cir. 2007).

b. Analysis

Plaintiff's claim does not attack or imply the invalidity of his sentence. Prisoners have a constitutionally guaranteed right to access the federal courts. *See Lewis v. Casey*, 518 U.S. 343, 346 (1996). "The heart of the anti-interference right is 'the presentation of constitutional, civil

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rights and habeas corpus claims[.]" *Blaisdell v. Frappiea*, 729 F.3d 1237, 1243 (9th Cir. 2013) (quoting *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004)). The right encompasses the ability to "'pursue legal redress for claims that have a reasonable basis in law or fact.'" *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011) (quoting *Snyder*, 380 F.3d at 291). Such a claim requires the inmate to identify the loss of a nonfrivolous, arguable underlying claim, an official act that frustrated the litigation, and an available remedy that is "not otherwise available in some suit that may yet be brought." *Christopher v. Harbury*, 536 U.S. 403, 415, 417 (2002).

In this case, plaintiff may establish a violation of his access right without demonstrating that his criminal conviction is invalid. Under *Lewis* and its progeny, plaintiff need not show that he lost a claim that would have succeeded; instead, he need only show the loss of an *arguable* claim. It is true that the subject of the underlying *habeas* claim goes to the very heart of the conviction's validity. But the relevant inquiry for an access claim is merely whether that *habeas* claim had sufficient merit to rise above frivolity. In other words, in deeming his *habeas* claim "arguable" for the purposes of an access claim, the court need not cast judgment on the ultimate merits in a way that would imply the conviction's invalidity. Further, it may well be that plaintiff's claim is not arguable or that the particular act—defendants' alleged role in withholding his legal box—did not "frustrate" his claim, such that the First Amendment claim lacks merit, but defendants have not raised that argument. Consequently, the court declines to consider it in absence of briefing on the issue. At bottom, defendants are entitled not entitled to summary judgment under *Heck*, and the court recommends that motion be denied as to count III.

3. Count X: Eighth Amendment Elements

a. Legal Standard

The Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency" by prohibiting imposition of cruel and unusual punishment by state actors. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). The Constitution's stricture on the "unnecessary and wanton infliction of pain" encompasses deliberate indifference by state officials to the medical needs of prisoners. *Id.* at 104. It is well-settled law that "deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." *Id.* at 105.

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Courts in this Circuit employ a two-part test when analyzing deliberate indifference claims. First, the plaintiff must satisfy "an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and [also] a subjective standard—deliberate indifference." *Colwell*, 763 F.3d at 1066 (quoting *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012)) (internal citations and quotation marks omitted). The objective component examines whether the plaintiff has a "serious medical need," such that the state's failure to provide treatment could result in further injury or cause unnecessary and wanton infliction of pain. *Jett v. Penner*, 439 F.3d 1090, 1096 (9th Cir. 2006). Serious medical needs are those "that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities' or the existence of chronic and substantial pain." *Colwell*, 763 F.3d at 1066 (citation and internal punctuation omitted).

Second, the subjective element considers the defendant's state of mind, the extent of care provided, and whether the plaintiff was harmed. Only where a prison "official 'knows of and disregards an excessive risk to inmate health and safety'" is the subjective element satisfied. *Id.* (quoting *Toguchi v. Chung*, 391 F.3d 1050, 1057 (9th Cir. 2004)). Not only must the defendant prison official have actual knowledge from which he or she can infer that a substantial risk of harm exists, but he or she "must also draw that inference." *Id.* at 837. The standard lies "somewhere between the poles of negligence at one end and purpose or knowledge at the other[,]" *id.* at 836, and does not include "accidental or unintentional failures to provide adequate medical care . . . ," *Estelle*, 429 U.S. at 105. Accordingly, the defendants' conduct must consist of "more than ordinary lack of due care." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

Moreover, the medical care due to prisoners is not limitless. "[S]ociety does not expect that prisoners will have unqualified access to health care." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Accordingly, prison officials are not deliberately indifferent simply because they selected or prescribed a course of treatment or care different than the one the inmate requests or prefers. *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992), *overruled on other grounds by WMX Techs. v. Miller*, 104 F.2d 1133, 1136 (9th Cir. 2007). Only where the prison's chosen course of

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treatment is "medically unacceptable under the circumstances" are the officials' medical choices constitutionally infirm. *Colwell*, 763 F.3d at 1068 (quoting *Snow*, 681 F.3d at 988) (internal quotation marks omitted). Only where infirm treatment decisions result in harm to the plaintiff—though the harm need not be substantial—does Eighth Amendment liability arise. *Jett*, 439 F.3d at 1096.

b. Analysis

Plaintiff claims that Dr. Scott was deliberately indifferent to his medical needs during his time at LCC by denying him physical therapy and pain medication. (#32 at 22.) Defendants move for summary judgment on the basis that the record forecloses plaintiff's ability to establish the necessary elements of an Eighth Amendment claim. (#52 at 16-17.) First, they argue that plaintiff's medical records and condition presented no serious medical injury, as required by the objective element. (*Id.* at 17.) Second, they argue that Scott examined plaintiff only once and prescribed him Naproxen due to plaintiff's complaints of pain, but declined to order an addictive opioid medication that plaintiff requested. (*Id.*) Dr. Scott's alternative treatment decision does not constitute a failure to act sufficient to create liability under the subjective prong. (*Id.*) Plaintiff opposes on the basis that he was housed in a medical unit prior to his transfer to the NDOC's custody, and had suffered various serious injuries. Defendants counter that plaintiff's conclusory statements are unsupported by evidence and fail to raise a genuine issue of fact as to the inadequacy of the care Dr. Scott provided. (#57 at 9.)

Defendants are entitled to summary judgment. Although they do not submit plaintiff's medical records, such that they have foreclosed his ability to demonstrate the presence of an objectively serious medical condition, they have established through Scott's affidavit that plaintiff complained of pain during participation in certain physical activities. (#52-5 at 2-3.) Scott attests that he examined plaintiff and observed no objective injuries or loss of function that demanded any particular treatment aside from pain management. (*Id.* at 3.) Therefore, he prescribed Naproxen, a pain-reliever, that plaintiff refused on the mistaken basis that the medication was "bad for his liver." (*Id.*) Scott refused to prescribe Tramadol, which is addictive and not part of

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the NDOC formulary. (*Id.*) Plaintiff does not contest this evidence, and as such, there is no basis for a reasonable jury to conclude that plaintiff was, in fact, denied care.

Plaintiff's statements in opposition—that he had suffered grievous injuries in Ohio and that defendants knew about his pain—fail to raise a genuine issue of fact. Even assuming that he had an objectively serious condition, he fails to allege, let alone support with evidence, that Scott knew of a health condition that would require greater care than pain management. At bottom, the refusal by NDOC officials to satisfy plaintiff's predilection for an addictive medication is not a violation of his Eighth Amendment rights. *McGuckin*, 974 F.2d at 1060. Summary judgment on this claim is appropriate because the record forecloses his ability to prevail.

IV. CONCLUSION

Defendants are entitled to summary judgment on counts II and X because plaintiff failed to exhaust available administrative remedies, and also because the record forecloses a reasonable jury from finding any dispute of fact by which plaintiff could prevail. However, because defendants rested their motion for summary judgment as to count III solely on an unavailing argument under *Heck*, they are not entitled to summary judgment on that claim. Plaintiff's cross-motion lacks merit entirely and should be denied on that basis.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

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V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendants' motion for summary judgment (#52) be **DENIED** as to count III and **GRANTED** as to counts II and X;

IT IS FUTHER RECOMMENDED that plaintiff's motion for summary judgment (#50) be **DENIED**.

DATED: July 1, 2015.

Valerie P. Cooke

UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.