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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Eliseo Solis Haro,

No. CV 12-00612-TUC-CKJ

10 Plaintiff,

11 v.

**ORDER**

12 Charles L. Ryan, et al.,

13 Defendants.  
14

15 Plaintiff Eliseo Solis Haro, who is currently confined in Arizona State Prison  
16 Complex (ASPC)-Tucson, brought this pro se civil rights case pursuant to 42 U.S.C.  
17 § 1983. (Doc. 87.) Defendants Esparza and Mulcahey move for summary judgment and  
18 Plaintiff opposes.<sup>1</sup> (Docs. 117, 126.)

19 The Court will grant Defendants' Motion for Summary Judgment and terminate  
20 this action.

**I. Background**

21  
22 Plaintiff's Second Amended Complaint asserted claims against Arizona  
23 Department of Corrections (ADC) officers Sergeant L. Esparza and Correctional Officer  
24 (CO) III Mulcahey. Plaintiff alleged in Count III that he was placed in segregation  
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27 <sup>1</sup> On July 10, 2015, the Court issued the Notice required under *Rand v. Rowland*,  
28 154 F.3d 952, 962 (9th Cir. 1998) (en banc), which informed Plaintiff of his obligation to  
respond to the Motion for Summary Judgment and the requirements under Federal Rule  
of Civil Procedure 56. (Doc. 119.)

1 detention at ASPC-Tucson for three months in 2010 and that Esparza and Mulcahey  
2 violated his Eighth Amendment rights while he was there. (Doc. 87 at 11.)<sup>2</sup>

3 Plaintiff claims that while he was housed in the Complex Detention Unit (CDU)  
4 from April 30 to June 4, 2010, Esparza housed him in a two-man cell which already had  
5 two inmates and so forced Plaintiff to sleep on the floor. (Doc. 87 at 16.) Plaintiff  
6 further alleged that while he was housed in the Cimarron Detention Unit (“Cimarron”)  
7 from June 4 to July 13, 2010, Mulcahey forced him to sleep on the floor on a wet  
8 mattress soaked with sewage matter and he was exposed to spider bites. (*Id.*) Plaintiff  
9 claims that Esparza and Mulcahey were informed of these conditions but deliberately  
10 kept him in the conditions, in violation of his Eighth Amendment rights. Plaintiff alleges  
11 that he tried grieving the matter but “was deprived of pursuing grievance.” (*Id.*) On  
12 screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated a claim  
13 and directed Esparza and Mulcahey to answer Count III.<sup>3</sup> (Doc. 89.)

14 On July 7, 2015, Defendants Esparza and Mulcahey filed their Motion for  
15 Summary Judgment, arguing that Plaintiff did not exhaust his administrative remedies,  
16 that his claim is barred by the statute of limitations, and that he will be unable to raise a  
17 genuine issue of material fact. (Doc. 117 at 1.)

## 18 **II. Summary Judgment**

19 A court must grant summary judgment “if the movant shows that there is no  
20 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
21 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23  
22 (1986). The movant bears the initial responsibility of presenting the basis for its motion  
23 and identifying those portions of the record, together with affidavits, if any, that it  
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25 <sup>2</sup> The citation refers to the document and page number generated by the Court’s  
26 Case Management/Electronic Case Filing system.

27 <sup>3</sup> In a September 15, 2014 Order, the Court granted summary judgment to another  
28 Defendant, Sergeant Rascon, on Plaintiff’s retaliation claim in Count I. (Doc. 88.) Count  
II was dismissed on screening of Plaintiff’s First Amended Complaint. (Doc. 8.)

1 believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at  
2 323.

3 If the movant fails to carry its initial burden of production, the nonmovant need  
4 not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d  
5 burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that  
6 the fact in contention is material, i.e., a fact that might affect the outcome of the suit  
7 under the governing law, and that the dispute is genuine, i.e., the evidence is such that a  
8 reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby,*  
9 *Inc.*, 477 U.S. 242, 248, 250 (1986); see *Triton Energy Corp. v. Square D. Co.*, 68 F.3d  
10 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact  
11 conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-  
12 89 (1968); however, it must “come forward with specific facts showing that there is a  
13 genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475  
14 U.S. 574, 587 (1986) (internal citation omitted); see Fed. R. Civ. P. 56(c)(1).

15 At summary judgment, the judge’s function is not to weigh the evidence and  
16 determine the truth but to determine whether there is a genuine issue for trial. *Anderson*,  
17 477 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence and  
18 draw all inferences in the nonmovant’s favor. *Id.* at 255. The court need consider only  
19 the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P.  
20 56(c)(3).

### 21 **III. Exhaustion**

#### 22 **A. Legal Standard**

23 Under the Prison Litigation Reform Act, a prisoner must exhaust “available”  
24 administrative remedies before filing an action in federal court. See 42 U.S.C.  
25 § 1997e(a); *Vaden v. Summerhill*, 449 F.3d 1047, 1050 (9th Cir. 2006); *Brown v. Valoff*,  
26 422 F.3d 926, 934-35 (9th Cir. 2005). The prisoner must complete the administrative  
27 review process in accordance with the applicable rules. See *Woodford v. Ngo*, 548 U.S.  
28 81, 92 (2006). Exhaustion is required for all suits about prison life, *Porter v. Nussle*, 534

1 U.S. 516, 523 (2002), regardless of the type of relief offered through the administrative  
2 process, *Booth v. Churner*, 532 U.S. 731, 741 (2001).

3 The defendant bears the initial burden to show that there was an available  
4 administrative remedy and that the prisoner did not exhaust it. *Albino v. Baca*, 747 F.3d  
5 1162, 1169, 1172 (9th Cir. 2014); *see Brown*, 422 F.3d at 936-37 (a defendant must  
6 demonstrate that applicable relief remained available in the grievance process). Once  
7 that showing is made, the burden shifts to the prisoner, who must either demonstrate that  
8 he, in fact, exhausted administrative remedies or “come forward with evidence showing  
9 that there is something in his particular case that made the existing and generally  
10 available administrative remedies effectively unavailable to him.” *Albino*, 747 F.3d at  
11 1172. The ultimate burden, however, rests with the defendant. *Id.* Summary judgment is  
12 appropriate if the undisputed evidence, viewed in the light most favorable to the prisoner,  
13 shows a failure to exhaust. *Id.* at 1166, 1168; *see Fed. R. Civ. P. 56(a)*.

14 If summary judgment is denied, disputed factual questions relevant to exhaustion  
15 should be decided by the judge; a plaintiff is not entitled to a jury trial on the issue of  
16 exhaustion. *Albino*, 747 F.3d at 1170-71. But if a court finds that the prisoner exhausted  
17 administrative remedies, that administrative remedies were not available, or that the  
18 failure to exhaust administrative remedies should be excused, the case proceeds to the  
19 merits. *Id.* at 1171.

## 20 **B. ADC Procedures for Exhaustion<sup>4</sup>**

21 The ADC Department Order (DO) 802 entitled “Inmate Grievance System,”  
22 governs the grievance procedure. (Doc. 118 ¶¶ 33, 147.) As part of orientation, inmates  
23 are instructed on how to use the grievance procedure. (*Id.* ¶ 36.) A copy of the grievance  
24 policy is available in the Inmate Resource Center in each prison facility and inmates may  
25 obtain grievance forms and assistance from their assigned CO III. (*Id.* ¶ 36.) Inmates  
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27 <sup>4</sup> The relevant facts are taken from Defendants’ Statement of Facts (Doc. 118) and  
28 Plaintiff’s Statement of Facts (Doc. 127). Plaintiff did not file a controverting statement  
of facts and so the Court will consider Defendants’ facts undisputed unless it is apparent  
from one of Plaintiff’s facts or evidence that there is a dispute.

1 may use the grievance process for “any aspect of institutional life or condition of  
2 confinement that directly and personally affects the inmate,” but not for disciplinary or  
3 classification issues which have separate appeal processes. (*Id.* ¶¶ 33, 37, 107; Doc. 118-  
4 1 at 128 (DO 802.01-1.1.)

5 To initiate a grievance, an inmate must submit an informal complaint by inmate  
6 letter within ten workdays from the date of the action which caused the complaint. (Doc.  
7 118 ¶ 110.) If the inmate’s complaint cannot be resolved informally, the inmate may  
8 submit a formal grievance within five working days from receipt of the response. (*Id.*)  
9 The Deputy Warden answers the formal grievance, and if the inmate is not satisfied with  
10 that response, he may file a grievance appeal to the Warden within five working days of  
11 receipt of the response. (*Id.*) The inmate has five working days from receipt of that  
12 response to appeal to the ADC Director, which is the final stage of the ADC Inmate  
13 Grievance System. (*Id.*) Unless there is an extension of the time frames, “the expiration  
14 of any time limit for a response at any stage in the process shall entitle the inmate  
15 grievant to move to the next step in the process. Extension at any step in the grievance  
16 process shall not exceed 15 working days.” (Doc. 127 at 24 ¶ 34; Doc. 128-1 at 49.)

### 17 **C. Plaintiff’s Attempts to Exhaust**

#### 18 **1. CDU**

19 According to Defendants, while Plaintiff was in the CDU from April 30 to June 4,  
20 2010, he was assigned a bottom bunk, not the floor, in cell number C04-DU-B219B.  
21 (Doc. 118 ¶¶ 12-14; Doc. 118-1 at 17 (Inmate Record).) Defendants assert that a  
22 different inmate, Benitez, was assigned to the floor, as indicated by his cell number, C04-  
23 DU-B219F.<sup>5</sup> (Doc. 118 ¶¶ 12, 57.) Plaintiff contends that he was the person on the floor  
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27 <sup>5</sup> Defendants explain that the letter “B” at the end of Plaintiff’s cell number refers  
28 to a “Bottom” bunk and that the “F” at the end of Benitez’s cell numbers refers to  
“Floor.” (Doc. 118 ¶ 11.)

1 and that the Inmate Record indicating he was assigned the bottom bunk was “fabricated  
2 in attempt to cover up the violations of constitutional magnitude.”<sup>6</sup> (Doc. 126 at 8.)

3 Defendant Sergeant Esparza served as the CDU supervisor during the time  
4 Plaintiff was in the CDU, and CO III Schmidt was the Grievance Coordinator. (Doc. 118  
5 at ¶¶ 3, 30.) Esparza asserts that he did not assign or require Plaintiff to occupy a bed  
6 space on the floor, that he did not receive any complaints from Plaintiff while he was in  
7 the CDU, and he did not receive any reports from his subordinates about Plaintiff being  
8 exposed to unsafe, unhealthy, or unsanitary conditions while he was in the CDU. (*Id.*  
9 ¶¶ 13, 29.) Plaintiff responds that he “addressed” Esparza several times and notified CO  
10 II officers on a daily basis so that they “could address or call Sgt. Esparza concerning  
11 overcrowding, hostil[e] living circumstance[s], and being forced-subjected to sleeping  
12 on floor.”<sup>7</sup> (Doc. 127 at 8 ¶ 11.)

13 Plaintiff did send several inmate letters to CO III Schmidt while he was in the  
14 CDU, but only one related to the conditions in the CDU. (*See* Doc. 118 ¶¶ 44-51.) In a  
15 May 10, 2010 Inmate Letter, Plaintiff requested to be moved from his cell because he is  
16 “not getting along with the inmates in here and there is a lot of tension[.]” (Doc. 128-5 at  
17 5.) Plaintiff did not say that he was sleeping on the floor, but he requested “a cell where  
18 [he has] a bed to sit on [and] space[;] I am on the ground and I need a place to sit down to  
19 write or even just to sit. I need to please be moved as soon as possible.” (*Id.*) The  
20 response states, “will be considered as space allows.” (*Id.*)

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23 <sup>6</sup> This particular dispute is found in Plaintiff’s Response, which does not cite to  
24 any admissible evidence. Plaintiff’s Declaration merely says that ADC “has falsified  
25 documentation of living placement in attempts to cover up the wrongful, negligent or  
26 deliberate overcrowding, forceful floor subjection to unsanitary conditions.” (Doc. 128 at  
27 16.)

28 <sup>7</sup> This dispute is found in Plaintiff’s Statement of Facts, which does not refer to  
any relevant, admissible evidence, such as a Declaration by Plaintiff, and only cites to the  
inmate grievance procedure found in DO 802.

1 On May 23, 2010, Plaintiff submitted an “informal grievance resolution attempt”  
2 asking why he was housed in a two-man cell with two other people and requesting  
3 Schmidt’s phone number so his family and attorney could contact Schmidt.<sup>8</sup> (Doc. 118  
4 ¶ 46.) Schmidt responded that due to overcrowding, a third bed space was allowed in  
5 detention units but that inmates were moved within detention units as space became  
6 available to alleviate the crowding situation.<sup>9</sup> (*Id.*; Doc. 118-1 at 39.) Plaintiff says he  
7 “never received a formal response to his informal resolution attempt dated May 23, 2010  
8 on behalf of [] CO III Schmidt.” (Doc. 127 at 15 ¶ 22.) Plaintiff did not submit any other  
9 correspondence to Schmidt or a formal grievance about being housed with two other  
10 inmates in a two-person cell while in the CDU. (Doc. 118 ¶ 47.) Schmidt checked the  
11 “currently available CDU grievance records and confirmed that that those records contain  
12 no indication that [Plaintiff] submitted any formal grievances at CDU in 2010.” (*Id.*  
13 ¶ 43.)

## 14 2. Cimarron

15 Defendants assert that while Plaintiff was in Cimarron from June 4 to July 13,  
16 2010, he was assigned a top bunk in cell number C13-CB2C20T and inmate Ceja was  
17 assigned to the floor in C13-CB2C20F. (Doc. 118 ¶¶ 79, 83-84.) Plaintiff, though,  
18 contends that he slept on the floor at Cimarron. (*See, e.g.*, Doc. 126 at 6.) Defendant

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19  
20 <sup>8</sup> Defendants state that they do not have a copy of Plaintiff’s May 23, 2010  
21 informal grievance. (Doc. 118 ¶ 46.) Defendants are apparently surmising what the  
22 informal grievance said based on an “electronic original” that Schmidt says he located of  
23 his response to a May 23, 2010 informal resolution from Plaintiff. (*Id.*; Doc. 118-1 at 24  
24 ¶ 18.)

25 <sup>9</sup> Schmidt states that it was his custom to respond to inmate letters and informal  
26 grievances within a couple of days and so he would have sent his response to Plaintiff by  
27 May 25. (Doc. 118 ¶ 46.) Plaintiff contends that the document Defendants submitted as  
28 Schmidt’s response to his informal grievance was “fabricated” because it has no signature  
or date and that he never received the response. (Doc. 126 at 8; Doc. 127 at 13-14 ¶ 21.)  
The record here is confusing because Defendants produced an undated, unsigned  
“electronic original” response to an informal grievance, but neither party has produced  
the grievance, and so the Court is left to guess at what the informal grievance actually  
said.

1 Mulcahey, a CO III at Cimarron, was Plaintiff's caseworker and the initial point of  
2 contact for Plaintiff in resolving his complaints or grievances. (Doc. 118 ¶¶ 74-75.)

3 Plaintiff submitted an Inmate Letter dated June 7, 2010, stating that he had started  
4 an "informal" at the CDU because "of three people being housed in cell when in fact  
5 these cells are not registered or made for three people." (Doc. 118 ¶ 86; Doc. 128-5 at 6.)  
6 Plaintiff wrote he sleeps on the floor and that he had "already caught a very big spider"  
7 and "almost got bit while on [the] floor." (Doc. 128-5 at 6.) Plaintiff said spiders come  
8 in from underneath the doors and he gave a spider to the morning shift on June 5 and  
9 asked for attention, but nothing was done. (*Id.*) Plaintiff wrote that he is "still exposed to  
10 floor and that means exposed to spiders as well." (*Id.*) Plaintiff said that "because of the  
11 continuation of this violation," he is compelled to start the grievance process and  
12 requested a copy of his letter with the CO III's response "and the grievance forms as  
13 well." (*Id.*) Plaintiff noted that he had discussed his issue with CO II Torres A. and "CO  
14 III Schmidt at Complex C.D.U." (*Id.*) Mulcahey responded to Plaintiff's Inmate Letter  
15 on June 8, stating that he was returning the Inmate Letter as unprocessed and that the  
16 grievance must be completed in the unit where it began, which Plaintiff had indicated  
17 was the CDU. (Doc. 118 ¶ 87; Doc. 118-1 at 67.)

18 Because Plaintiff was assigned to the top bunk in Cimarron, Mulcahey states he  
19 had no reason to believe Plaintiff was referring to conditions in Cimarron. (Doc. 118-1 at  
20 58 ¶ 17.) Mulcahey says he did not receive any follow-up correspondence from Plaintiff  
21 about being housed with two other people in a two-person cell, and Plaintiff did not  
22 advise Mulcahey that his Inmate Letter related to conditions at Cimarron. (*Id.* ¶ 18.)

23 The Grievance Coordinator for Cimarron, CO IV T. Bartuccio, maintains the  
24 records of all processed and unprocessed grievances at the unit. (Doc. 118 ¶ 113.)  
25 Bartuccio reviewed the grievance records for the period between June 4 and December  
26 12, 2012 and found no records indicating that Plaintiff initiated "any proper grievances  
27 regarding either Esparza or Mulcahey or about the conditions of his 2010 confinement at  
28 the CDU and Cimarron Detention Unit." (*Id.* ¶ 118; Doc. 118-1 at 74 ¶ 21.)



1 Plaintiff did submit an Inmate Grievance on June 29, 2010, and he attached his  
2 June 7, 2010 Inmate Letter to CO III Mulcahey. (Doc. 118 ¶ 119; Doc. 118-1 at 96-97.)  
3 Plaintiff said in this grievance that he had presented an “informal” to Mulcahey “to  
4 resolve the issue of being 3 inmates housed in one cell plus 1 being on floor where I had  
5 already almost been bitten by a big spider at night which I was able to kill and gave the  
6 officers in hope that I would get housed in a cell off the floor as regulations state. I have  
7 had water as well enter underneath or under door just about every night and water gets all  
8 over cell and have many times brought it to the attention of officers and nothing has been  
9 done.” (Doc. 118-1 at 96.) On July 12, 2012, Bartuccio returned the grievance to  
10 Plaintiff unprocessed because “the issue was addressed while at CDU [and] needed to be  
11 provided as part of this informal grievance process.” (Doc. 118 ¶ 119; Doc. 118-1 at 96.)  
12 Bartuccio did not receive any further correspondence from Plaintiff “disputing the  
13 rationale for her returning his grievance unprocessed.” (Doc. 118 ¶ 119; Doc. 118-1 at 74  
14 ¶ 18.)

15 In Plaintiff’s evidence is an Inmate Letter dated July 2, 2012, requesting grievance  
16 forms in order to pursue a grievance related to being left in a holding cage for an  
17 excessive amount of time at the Manzanita Unit. (Doc. 128-2 at 20.) Plaintiff wrote that  
18 CO III Schmidt never responded to Plaintiff’s “informal” regarding this issue; he also  
19 wanted to know why he had not been “housed to a bunk since [he] ha[d] been here for  
20 about a little over a month on floor[.]” (*Id.*) There is no response written on this Inmate  
21 Letter. A July 6, 2010 Inmate Letter relates to a telephone call, which the morning shift  
22 told Plaintiff was scheduled for 5:30 p.m. that day, but that the afternoon shift told him  
23 was scheduled for another day. (Doc. 128-2 at 21.) Plaintiff wrote that he feels that this  
24 is retaliation because he submitted a grievance “against this CDU for the violation of  
25 housing me on floor and being exposed to water every night that comes in and gets on  
26 mattress.” (*Id.*) There is no response on the Inmate Letter.

27 . . . .

28 . . . .

1                                   **3. Appeals to the ADC Director**

2                   The ADC Central Office log of appeals to ADC Director Ryan is maintained by  
3 Cheryl Dossett, who reviewed the Grievance Appeal Log and Grievance Appeal files for  
4 non-medical, final grievance appeals filed by Plaintiff for the period beginning April 30,  
5 2010 through June 30, 2015. (Doc. 118 ¶¶ 146, 154.) After reviewing the records,  
6 Dossett determined that Plaintiff did not file any final, non-medical grievance appeals to  
7 the Director during that time period “regarding Sergeant Esparza, CO III Mulcahey, or  
8 the conditions of his confinement in CDU or the Cimarron Detention Unit.” (*Id.* ¶ 155;  
9 Doc. 118-1 at 7 ¶ 12.) Dossett states that on October 8, 2010, Director Ryan wrote to  
10 Plaintiff regarding an incident at the ASPC-Tucson Manzanita Unit on April 29, 2010,  
11 when Plaintiff was held in an outdoor holding enclosure beyond allowable time limits.  
12 (Doc. 118 ¶ 156; Doc. 118-1 at 7 ¶ 13.) Dossett states that there is no record of this  
13 particular grievance in the logs maintained for “Director-level grievance appeals.” (*Id.*)

14                   Plaintiff provided a copy of Director Ryan’s October 8, 2010 Inmate Letter  
15 Response, in which Ryan wrote:

16                   I am in receipt of your inmate letter dated September 20, 2010 in which you  
17 have indicated that you are ‘open to negotiations’ regarding the violation of  
18 [ADC] policy that resulted in your detention in an outdoor holding  
19 enclosure beyond allowable time limits. I am not in a position to engage in  
20 any negotiation in this matter. In the event a matter is brought to me as a  
21 legal filing, the Attorney General’s office will be the agency to respond. I  
do, however, want to advise you of the actions I did take upon learning of  
the violation of the holding enclosure policy outlined in Department Order  
(DO) 704, *Inmate Regulations*.

22                   Several ADC employees received suspensions without pay. These  
23 employees will have this discipline in their permanent personnel files, and  
24 any further policy violations will result in more severe action. While I do  
not condone disorderly conduct on the part of inmates, I equally do not  
25 knowingly condone ADC staff violating policy. These violations are not  
tolerated and will continue to be dealt with harshly. Moreover, all  
26 correctional staff has been instructed on the proper use of holding  
27 enclosures, and the requirement that policy be followed without exception.

28                   I am by this letter acknowledging your attempt to grieve this matter  
properly and it should have been processed accordingly. I do not dispute

1 that your administrative remedy in this matter has been exhausted. I do not  
2 see any further remedial action that can be taken on the part of ADC  
3 beyond the discipline imposed upon the correctional employees involved. I  
4 believe this is a fair solution to this matter and in line with the violation  
5 committed by staff.

6 It is my understanding that you were seen by our medical staff and that you  
7 fortunately did not suffer serious harm or illness. The situation is  
8 regrettable but in my opinion it is resolved at this time.

9 (Doc. 128-2 at 56 (emphasis in original).) Neither party provided a copy of the Inmate  
10 Letter to which Ryan was responding.

#### 11 **D. Discussion**

12 Defendants presented evidence to the Court showing that administrative remedies  
13 were available and Plaintiff, too, cites to the administrative remedy procedures in DO  
14 802. (Doc. 118 ¶¶ 33, 110, 147; Doc. 127 at 11-12 ¶¶ 17-20.) Defendants argue that  
15 Plaintiff failed to exhaust those administrative remedies regarding his conditions of  
16 confinement (Doc. 117 at 3), and Plaintiff responds that he “attempted [] numerous times  
17 to have proper attention given to his inmate letters and grievances but was tolled [sic] and  
18 deprived to proceed in procedures and to a minimal [sic] have his concerns  
19 acknowledged[.]” (Doc. 126 at 6.)

20 The PLRA requires a prisoner to exhaust only those administrative remedies that  
21 are available; thus, exhaustion is not required “when circumstances render administrative  
22 remedies ‘effectively unavailable.’” *Sapp v. Kimbrell*, 623 F.3d 813, 822 (9th Cir. 2010)  
23 (citing *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010)). Improper screening of an  
24 inmate’s grievance, failing to provide grievance forms, and providing inaccurate  
25 information to an inmate during the grievance process have been found to constitute  
26 circumstances rendering administrative remedies unavailable. *Sapp*, 623 F.3d at 822  
27 (citing cases); *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009) (holding that if  
28 Plaintiff was unable to file grievance forms or if he was reliably informed that  
administrative remedies were not available, exhaustion is not required); *Brown*, 422 F.3d  
at 935.

1 Plaintiff contends that he sent multiple inmate letters and grievances “that CO III  
2 Schmidt did not properly proceed with,” even though it was Schmidt’s duty to notify  
3 supervisors and Esparza “of the conditions in violation[.]” (Doc. 126 at 7.)

4 The evidence reflects that Plaintiff possibly sent two Inmate Letters while housed  
5 in the CDU about the conditions of his confinement there. In his May 20, 2010 Inmate  
6 Letter to CO III Schmidt, Plaintiff asked to be moved from his cell because he was not  
7 getting along with the other inmates; he also requested “a cell where [he has] a bed to sit  
8 on [and] space[;] I am on the ground and I need a place to sit down to write or even just  
9 to sit.” (Doc. 128-5 at 5.) (*Id.*) The response states, “will be considered as space  
10 allows.” (*Id.*) Plaintiff does not say that he filed a grievance or any follow-up  
11 correspondence after receiving this response.

12 The evidence also reflects an Inmate Letter Response from Schmidt regarding  
13 Plaintiff’s “informal resolution dated 5-23-2010,” which questioned why Plaintiff was  
14 housed in a two-man cell with two other people. (Doc. 118-1 at 39.) Schmidt wrote that  
15 due to overcrowding, a third bed space was allowed in detention units but that inmates  
16 were moved within detention units as space became available to alleviate the crowding  
17 situation. (*Id.*) Neither party provided a copy of Plaintiff’s May 23, 2010 “informal  
18 resolution,” and Plaintiff says he “never received a formal response to his informal  
19 resolution attempt[.]” (Doc. 127 at 15 ¶ 22.) Plaintiff claims Schmidt’s Inmate Letter  
20 Response was “fabricated,” and so he “was deprived of [] correct grievance procedures.”  
21 (Doc. 126 at 8.) Plaintiff contends that because CO III Schmidt “never answered back,”  
22 he was deprived “of the opportunity to properly appeal or grieve to the highest level  
23 which is the director[’]s level to complete the exhaustion requirement.” (*Id.* at 10-11.)  
24 Neither party has introduced Plaintiff’s informal resolution as evidence, and it is not clear  
25 why Plaintiff is saying the response from Schmidt was fabricated, as that is the only  
26 evidence in the record that there may have been an informal grievance from Plaintiff  
27 dated May 23, 2010.

28

1 Plaintiff does not say that he ever attempted to appeal Schmidt’s response or that  
2 he ever filed a formal grievance. Plaintiff merely says that by not answering his May 23,  
3 2010 informal grievance, Schmidt “deprived Plaintiff of the opportunity to properly  
4 appeal or grieve to the highest level[.]” (Doc. 126 at 10-11.) Even taking Plaintiff’s  
5 assertion as true that Schmidt did not respond to an informal grievance, Plaintiff has cited  
6 the portion of DO 802 that allows an inmate to proceed with the grievance process in the  
7 absence of a response. (Doc. 127 at 24; Doc. 128-1 at 49 (DO 802.01-1.1).) Plaintiff  
8 does not explain why he did not proceed if, indeed, he did not receive a response to an  
9 informal grievance. Therefore, Plaintiff has failed to establish that administrative  
10 remedies were unavailable to Plaintiff while he was in the CDU.

11 Once Plaintiff was at the Cimarron Detention Unit, he sent an Inmate Letter on  
12 June 7, 2010 in which he wrote that he had started an “informal” at the CDU because “of  
13 three people being housed in cell when in fact these cells are not registered or made for  
14 three people.” (Doc. 118 ¶ 86; Doc. 128-5 at 6.) Plaintiff also wrote about spiders  
15 coming in from under the door and he requested grievance forms. (Doc. 128-5 at 6.)  
16 Mulcahey responded on June 8 that he was returning the Inmate Letter as unprocessed,  
17 stating that the grievance must be completed in the unit where it began, which Plaintiff  
18 had indicated was the CDU. (Doc. 118 ¶ 87; Doc. 118-1 at 67.) Plaintiff did not send  
19 any follow-up correspondence to tell Mulcahey he was disputing the reason for returning  
20 his informal grievance or that his complaint related to conditions at Cimarron. (Doc.  
21 118-1 at 58 ¶ 18.) Plaintiff does not explain why he did not dispute Mulcahey’s response  
22 or why he did not file a formal grievance, but merely argues that because he eventually  
23 won his disciplinary ticket and should not have been in the detention units, his due  
24 process rights were violated. (Doc. 126 at 11-12.)

25 Plaintiff submitted an Inmate Grievance on June 29, 2010, stating that on June 7  
26 he sent an informal to Mulcahey to “resolve the issue of being 3 inmates housed in one  
27 cell, plus being on floor where I had already almost been bitten by a big spider at night . .  
28 . . I have had water as well enter underneath or under door just about every night and

1 water gets all over cell and have many times brought it to the attention of officers and  
2 nothing has been done.” (Doc. 118-1 at 96-97.) On July 12, 2012, Bartuccio returned the  
3 grievance to Plaintiff unprocessed because “the issue was addressed while at CDU [and]  
4 needed to be provided as part of this informal grievance process.” (*Id.* at 96.) It is not  
5 clear why Bartuccio said Plaintiff’s issue was addressed at the CDU when Plaintiff was  
6 writing in the present tense while he was housed in Cimarron. Nevertheless, Bartuccio  
7 says she did not receive any further correspondence from Plaintiff “disputing the  
8 rationale for her returning his grievance unprocessed” (Doc. 118 ¶ 119), and Plaintiff  
9 does not say he ever attempted to appeal Bartuccio’s decision.

10 Plaintiff’s Response relies primarily on Ryan’s October 8, 2010 Inmate Letter  
11 Response, which Plaintiff argues is an admission by ADC that “the grievance procedures  
12 were not accordingly followed even thou[gh] should have processed accordingly and  
13 therefore supports Plaintiff’s claims of depriving through grievance procedure by tolling  
14 and allowing Plaintiff the proper levels of procedures to able to [be] appeal to the highest  
15 level—director’s level.” (Doc. 126 at 9.)

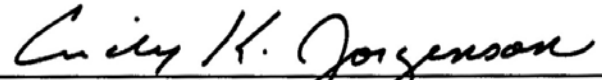
16 Ryan’s letter clearly addressed the issue of Plaintiff’s detention in an outdoor  
17 holding enclosure beyond allowable time limits and clearly waived the exhaustion  
18 requirement as to that issue. Ryan says nothing in his letter about Plaintiff complaining  
19 about conditions in the CDU or Cimarron, and neither party has provided the letter from  
20 Plaintiff that prompted Ryan’s response. Therefore, nothing in the record indicates that  
21 Ryan’s letter was addressing both the policy violation that resulted in Plaintiff being held  
22 in an outdoor holding enclosure, as well as all of the subsequent events that resulted in  
23 Plaintiff being held in the CDU and Cimarron.

24 The only other evidence in the record are Plaintiff’s conclusory assertions that he  
25 was somehow prevented from exhausting his administrative remedies, but he fails to  
26 provide any evidence that anyone prevented him from proceeding to the next level such  
27 as refusing to provide him with grievance or grievance appeal forms or threatening any  
28

1 sort of retaliation. Accordingly, the Court finds that Plaintiff failed to exhaust his  
2 administrative remedies and will grant summary judgment to Defendants.<sup>10</sup>

3 **IT IS ORDERED** that Defendants' Motion for Summary Judgment (Doc. 117) is  
4 **granted**, and the action is terminated with prejudice. The Clerk of Court must enter  
5 judgment accordingly.

6 Dated this 25th day of September, 2015.

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10 Cindy K. Jorgenson  
11 United States District Judge  
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27 \_\_\_\_\_  
28 <sup>10</sup> Because the Court finds that Plaintiff failed to exhaust his administrative  
remedies, the Court need not consider Defendants' additional argument that Plaintiff's  
claims are barred by the statute of limitations.