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

ANTOINE J. MCCULLOUGH,)	Case No. 1:10-cv-01465 LJO JLT (PC)
Plaintiff,)	
vs.)	ORDER ADOPTING FINDINGS AND
)	RECOMMENDATIONS DISMISSING THE
JAMES A. YATES, et al,)	MATTER WITHOUT PREJUDICE FOR
Defendants.)	FAILURE TO EXHAUST THE
)	ADMINISTRATIVE REMEDIES
)	(Doc. 11)
)	

Plaintiff is a state prisoner proceeding pro se and *in forma pauperis* with a civil rights action pursuant to 42 U.S.C. § 1983. In his lawsuit, Plaintiff alleges that he was subjected to excessive force related to an incident that occurred while he was housed at Kern Valley State Prison, on September 7, 2008. (Doc. 10) This proceeding was referred to the undersigned Magistrate Judge in accordance with 28 U.S.C. § 636(b)(1) and Local Rule 302.

On February 28, 2011, the Magistrate Judge filed Findings and Recommendations recommending that the matter be dismissed without prejudice because Plaintiff admitted in his First Amended Complaint that he did not exhaust his administrative remedies related to the September 7, 2008 events. (Doc. 11) Though, Plaintiff filed a grievance related to these events on September 13, 2008 (Doc. 1 at 9), the Magistrate Judge found that Plaintiff was paroled before the prison grievance appeal process was completed and he did not complete the process while on parole. (Doc. 11 at 3.) Finally, the Magistrate Judge found that Plaintiff waited until he was reincarcerated in March 2010, to file this current litigation.

1 (Doc. 11 at 3.) The Magistrate Judge found, “Though Plaintiff could have filed this litigation before he
2 was reincarcerated without exhausting the PLRA, because he filed it after his reincarceration, the PLRA
3 required him to exhaust his administrative remedies before he filed his complaint.” Id.

4 In making this finding, the Magistrate Judge noted that when Plaintiff was reincarcerated, he *did*
5 file a grievance related to his re-housing at KVSP on March 11, 2010 and that this grievance was fully
6 exhausted. (Doc. 11 at 4, n. 3.) However, the Magistrate Judge concluded that this new grievance
7 related to new acts and did not cure his failure to exhaust his administrative remedies as to the
8 September 13, 2008 grievance. Id. Thus, the Magistrate Judge concluded that Plaintiff’s lawsuit was
9 barred by the Prison Litigation Reform Act (“PLRA”). Id.

10 On March 14, 2011, Plaintiff filed his objections to the Findings and Recommendations. (Doc.
11 12.) Plaintiff argues that he exhausted his administrative remedies as to the March 11, 2010 grievance.
12 Id. Toward this end, Plaintiff attaches another copy of his March 11, 2010 grievance. Id. at 3-4. It
13 makes clear that in the March 11, 2010 grievance, Plaintiff was complaining only about his placement
14 at KVSP. Id. The relief sought by Plaintiff was to be removed from the endorsement list for KVSP and
15 endorsed to a different facility. Id. Notably, this March 11, 2010 grievance does not relate to the claims
16 raised in Plaintiff’s First Amended Complaint. (Doc. 10). Because the September 13, 2008
17 grievance—which *does* relate to Plaintiff’s First Amended Complaint—was not exhausted, Plaintiff’s
18 lawsuit is barred by the PLRA.

19 Therefore, in accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C) and Britt v. Simi
20 Valley United School Dist., 708 F.2d 452, 454 (9th Cir. 1983), this Court has conducted a *de novo* review
21 of the case. Having carefully reviewed the entire file, the Court finds that the findings and
22 recommendation are supported by the record and by proper analysis.

23 Accordingly, IT IS HEREBY ORDERED that:

- 24 1. The amended findings and recommendations filed February 28, 2011, are **ADOPTED**
25 **IN FULL;**
- 26 2. The matter is **DISMISSED WITHOUT PREJUDICE.**

27 The clerk is directed to close the action.

28 IT IS SO ORDERED.

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Dated: March 21, 2011

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE