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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PERRY WASHINGTON, et al,

Plaintiffs,

v.

FRESNO COUNTY SHERIFF, et al.,

Defendants.

Case No. 1:14-cv-00129-SAB

ORDER GRANTING COUNSEL’S MOTION
TO WITHDRAW AS ATTORNEY

(ECF Nos. 145, 148)

MEMORANDUM DECISION GRANTING
DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT FOLLOWING EVIDENTIARY
HEARING

I.

PROCEDURAL HISTORY

Plaintiff Perry Washington, filed this civil rights action pursuant to 42 U.S.C. § 1983 on January 29, 2014. The action is proceeding on Plaintiff’s claims against Defendant Veloz alleging deliberate indifference in violation of the Eighth Amendment and retaliation in violation of the First Amendment. Defendant filed a motion for summary judgment which was denied on December 6, 2017. Defendant filed a motion for reconsideration which was granted on February 21, 2018. In Albino v. Baca, 747 F.3d 1162, 1170-1171 (9th Cir. 2014), the Ninth Circuit held that “[i]f a motion for summary judgment is denied, disputed factual questions relevant to exhaustion should be decided by the judge, in the same manner a judge rather than a jury decides disputed factual questions relevant to jurisdiction and venue.” (citations omitted). Accordingly, an evidentiary hearing was set for April 10, 2018, to hear evidence on:

- 1 1. Whether Plaintiff was provided with an inmate handbook upon his incarceration at Fresno County Jail;
- 2 2. Whether jail officials refused to accept Plaintiff's grievance against Defendant Veloz;
- 3 3. Whether Plaintiff thereafter attempted to grieve the alleged acts through Internal Affairs;
- 4 4. Whether Defendant Veloz threatened Plaintiff and offered him a bribe to drop his grievance; and
- 5 5. Whether Plaintiff withdrew his grievance against Defendant Veloz.

6 (ECF No. 138.)

7 An evidentiary hearing has held on April 10, 2018. Counsel William Schmidt and Jeffrey
8 W. Eisinger appeared for Plaintiff Perry Washington and counsel Scott Hawkins appeared for
9 Defendant Veloz. At the hearing, the Court heard testimony of witnesses and took evidence in
10 relation to the issues outlined above.

11 Following the hearing, the Court took the matter under submission for the issuance of the
12 following order to resolve whether Plaintiff exhausted his administrative remedies as to the claims
13 presented in this action.

14 On April 20, 2018, Plaintiff's counsel filed a motion to withdraw as attorney of record and
15 a request to hear the matter on shortened time. The Court granted the request to hear the motion
16 on shortened time. All pending dates were vacated, and the parties were ordered to file any
17 opposition to the motion to withdraw on or before May 4, 2018. Further, counsel was ordered to
18 serve a copy of the motion on Plaintiff. On April 24, 2018, a certificate of service was filed. On
19 May 4, 2018, Defendant filed a response to the motion to withdraw.

20 Oral argument on counsel's motion to withdraw was held on May 11, 2018. Counsel
21 William Schmidt and Jeffrey W. Eisinger appeared with Plaintiff and counsel Scott Hawkins
22 appeared for Defendant Veloz.

23 II.

24 MOTION TO WITHDRAW AS ATTORNEY

25 Counsel seeks to withdraw from his representation of Plaintiff in this action because it
26 became apparent to him after the Albino hearing that Officer Veloz was not the individual who
27 committed the acts alleged in the complaint. Plaintiff testified that the individual involved was
28 Sgt. Diaz and at the hearing determined that Sgt. Diaz and Officer Veloz were not the same

1 individuals. Counsel states that in researching whether to file an amended complaint, defense
2 counsel has provided records which show that Sgt. Diaz was not working at the time of the
3 incident that is the basis for this litigation. Therefore, Plaintiff’s counsel contends that there is no
4 identifiable individual that can be substituted in good faith for Defendant Veloz. Counsel has
5 discussed the issue with Plaintiff and he is unwilling to dismiss this action. Counsel seeks to
6 withdraw as counsel in this matter due to his obligations under the Rules of Professional Conduct
7 and Rule 11 of the Federal Rules of Civil Procedure.

8 The Local Rules of the Eastern District of California provides that:

9 Unless otherwise provided herein, an attorney who has appeared may not
10 withdraw leaving the client in propria persona without leave of court upon noticed
11 motion and notice to the client and all other parties who have appeared. The
12 attorney shall provide an affidavit stating the current or last known address or
13 addresses of the client and the efforts made to notify the client of the motion to
14 withdraw. Withdrawal as attorney is governed by the Rules of Professional
15 Conduct of the State Bar of California, and the attorney shall conform to the
requirements of those Rules. The authority and duty of the attorney of record
shall continue until relieved by order of the Court issued hereunder. Leave to
withdraw may be granted subject to such appropriate conditions as the Court
deems fit.

16 L.R. 182(d).

17 The California Rules of Professional Conduct state that an attorney may not withdraw from
18 employment in a proceeding without the permission of the court. Cal. Rules of Professional
19 Conduct 3-700(A)(1). To withdraw counsel must take reasonable steps to avoid prejudicing the
20 rights of the client, including providing notice, allowing time for the client to employ other
21 counsel, and complying with applicable laws and rules. Cal. Rules of Professional Conduct 3-
22 700(A)(2).

23 The Rules further provide that an attorney may withdraw from representation of a client
24 where the client “insists upon presenting a claim or defense that is not warranted under existing
25 law and cannot be supported by good faith argument for an extension, modification, or reversal of
26 existing law. . . .” Cal. Rules of Professional Conduct 3-700(C)(1)(a). The California Rules of
27 Court require a noticed motion and declaration to be served on the client and all parties who have
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1 appeared in the case. Cal. Rules of Court 3.1362.

2 It is within the Court's discretion whether to grant withdrawal. L.S. ex rel. R.S. v. Panama
3 Buena Vista Union Sch. Dist., No. 1:12-CV-00744 LJO, 2012 WL 3236743, at *2 (E.D. Cal. Aug.
4 6, 2012). "Factors the Court may consider include: (1) the reasons for withdrawal, (2) prejudice
5 that may be caused to other litigants, (3) harm caused to the administration of justice, and (4) delay
6 to the resolution of the case caused by withdrawal." Id.

7 Here, all parties have been served with notice of the motion to withdraw. Plaintiff's
8 counsel seeks to withdraw because it became apparent during the Albino hearing that Defendant
9 Veloz is not the individual who committed the acts alleged in the complaint. Further, upon
10 investigation it has been determined that, although Plaintiff's testimony at the Albino hearing
11 identified Sgt. Diaz as the individual involved, he was not working at the time and there is no
12 individual that can be substituted for Defendant Veloz in this action.

13 At the hearing Plaintiff's counsel stated that defense counsel had provided records from the
14 jail and after review of the records there is no identifiable defendant that can be substituted in place
15 of Defendant Velos. Plaintiff has been advised of the issue and he refuses to dismiss the action.

16 The Court finds that there will be no prejudice to other litigants due to counsel's
17 withdrawal. The Court notes that counsel was appointed in this action because Plaintiff had been
18 declared incompetent in his criminal action. However, based on the Albino hearing the Court
19 found no issues with Plaintiff's competency. Therefore, the reason requiring the appointment of
20 counsel no longer exists. Further, based on the findings below, this action will be dismissed for
21 failure to exhaust administrative remedies so there will be no harm to the administration of justice
22 or delay to the resolution of the case.

23 The Court notes that counsel was not retained in this matter. He was appointed pro bono to
24 represent Plaintiff after this action had been filed, the complaint had been screened and found to
25 state a cognizable claim, and defendant had filed an answer. At the time that counsel entered the
26 action, Plaintiff had been declared to be incompetent to stand trial in his criminal case, although he
27 was later found to have returned to competency and his criminal matter was resolved. Counsel has
28

1 adequately represented the interests of Plaintiff, including opposing the current motion for
2 summary judgment. The Court grants the request to withdraw as counsel for Plaintiff.

3 **III.**

4 **LEGAL STANDARD FOR FAILURE TO**
5 **EXHAUST ADMINISTRATIVE REMEDIES**

6 The Prison Litigation Reform Act (PLRA) of 1995, requires that prisoners exhaust “such
7 administrative remedies as are available” before commencing a suit challenging prison
8 conditions.” 42 U.S.C. § 1997e(a); see Ross v. Blake, ___ U.S. ___, 136 S. Ct. 1850 (June 6, 2016)
9 (“An inmate need exhaust only such administrative remedies that are ‘available.’”). Exhaustion is
10 mandatory unless unavailable. “The obligation to exhaust ‘available’ remedies persists as long as
11 some remedy remains ‘available.’ Once that is no longer the case, then there are no ‘remedies . . .
12 available,’ and the prisoner need not further pursue the grievance.” Brown v. Valoff, 422 F.3d
13 926, 935 (9th Cir. 2005) (emphasis in original) (citing Booth v. Churner, 532 U.S. 731, 739
14 (2001)). This statutory exhaustion requirement applies to all inmate suits about prison life, Porter
15 v. Nussle, 534 U.S. 516, 532 (2002) (quotation marks omitted), regardless of the relief sought by
16 the prisoner or the relief offered by the process, Booth, 532 U.S. at 741, and unexhausted claims
17 may not be brought to court, Jones v. Bock, 549 U.S. 199, 211 (2007) (citing Porter, 534 U.S. at
18 524).

19 The failure to exhaust is an affirmative defense, and the defendant bears the burden of
20 raising and proving the absence of exhaustion. Jones, 549 U.S. at 216; Albino, 747 F.3d at 1166.
21 “In the rare event that a failure to exhaust is clear from the face of the complaint, a defendant may
22 move for dismissal under Rule 12(b)(6).” Albino, 747 F.3d at 1166. Otherwise, the defendants
23 must produce evidence proving the failure to exhaust, and they are entitled to summary judgment
24 under Rule 56 only if the undisputed evidence, viewed in the light most favorable to the plaintiff,
25 shows he failed to exhaust. Id.

26 Defendant must first prove that there was an available administrative remedy and that
27 Plaintiff did not exhaust that available remedy. Williams v. Paramo, 775 F.3d 1182, 1191 (9th Cir.
28 2015) (citing Albino, 747 F.3d at 1172) (quotation marks omitted). The burden then shifts to

1 Plaintiff to show that something in his particular case made the existing and generally available
2 administrative remedies effectively unavailable to him. Williams, 775 F.3d at 1191 (citing Albino,
3 747 F.3d at 1172) (quotation marks omitted). The ultimate burden of proof on the issue of
4 exhaustion remains with Defendant. Id. (quotation marks omitted).

5 **IV.**

6 **FIRST AMENDED COMPLAINT ALLEGATIONS**

7 Plaintiff contends that due to lawsuits filed against the Fresno County SPCA in 2012,
8 Fresno County responded in an unlawful way and used many other branches of and departments
9 within Fresno County. While in the custody of the Fresno County Sheriff Department at the
10 Fresno County Jail, Perry Washington was illegally beat up and threatened to drop his 2012
11 lawsuit. (First Am. Compl. 6, ECF No. 11.)

12 After a trial in the SPCA suit, the Fresno County District Attorney reinstated charges that
13 had been dropped against Perry Washington and arrested him. (Id.) Perry Washington was late
14 for a hearing and went to jail on January 21, 2014.¹ (Id. at 7.) While in custody, Perry
15 Washington asked to be removed from his cell because he was being threatened by his cellmate.
16 Defendant Velos refused to move Perry Washington to another cell or give him a grievance form.
17 (Id.) Perry Washington was attacked by a group of inmates and an unidentified officer refused to
18 come when Perry Washington hit the emergency button. Perry Washington was beaten and his eye
19 was punctured. Defendant Veloz threw the grievance form down in Perry Washington's blood and
20 said, "This is what happens to people who ask for grievance forms." (Id.)

21 **V.**

22 **ANALYSIS AND FINDINGS ON EXHAUSTION OF**
23 **ADMINISTRATIVE REMEDIES**

24 As relevant to the current hearing, Plaintiff alleges that administrative process was
25 unavailable to him due to the statements and actions of Defendant Velos and that jail staff

26 _____
27 ¹ While the complaint alleges that Perry Washington is in jail for being late for a court hearing, a review of the
28 Fresno County Inmate Search shows he is in custody on one felony and five misdemeanor warrants. Fresno County
Sheriff's Office, Inmate Search, <http://www.fresnosheriff.org/records/inmate-search.html> (last visited April 4,
2014).

1 interfered with his ability to access the grievance process by not providing him with an inmate
2 handbook, refusing to accept his grievance forms, telling him he could not grieve retaliation; and
3 forging his signature on forms stating that he withdrew his grievance. The Court conducted an
4 evidentiary hearing on April 10, 2018, to determine whether Plaintiff was obstructed from
5 exhausting his administrative remedies. At the evidentiary hearing, exhibits B1 through B10, B15
6 through B20, C1, C2, C11, G through G6, F0 through F23, and H1 through H11 were admitted
7 into evidence. Plaintiff testified on his own behalf and Defendant presented the testimony of
8 Defendant Veloz, Sgt. Roger Oliver, Todd Browning, Lt. Michael Porter, and Lt. Elias Lopez
9 Mendez. For the reasons discussed below, the Court finds that Plaintiff failed to exhaust
10 administrative remedies prior to filing this action.

11 If “summary judgment is not appropriate,” as to the issue of exhaustion “the district judge
12 may decide disputed questions of fact in a preliminary proceeding.” Albino, 747 F.3d at 1168.
13 “[O]ne of the purposes of an evidentiary hearing is to ‘enable [] the finder of fact to see the
14 witness’s demeanor, and to hear the tone of the witness’s voice.’” United States v. Mejia, 69 F.3d
15 309, 315 (9th Cir. 1995). Indeed, it is only in “rare instances . . . that credibility may be
16 determined without an evidentiary hearing.” Earp v. Ornoski, 431 F.3d 1158, 1169-70 (9th Cir.
17 2005).

18 Failure to exhaust may be excused where the administrative remedies have been rendered
19 “unavailable,” and in such a case, the plaintiff bears the burden of demonstrating that the grievance
20 process was unavailable to him through no fault of his own. Sapp v. Kimbrell, 623 F.3d 813, 822-
21 23 (9th Cir. 2010); see also Ward v. Chavez, 678 F.3d 1042, 1044-45 (9th Cir. 2012) (exhaustion
22 excused where futile); Nunez v. Duncan, 591 F.3d 1217, 1224 (9th Cir. 2010) (warden’s mistake
23 rendered prisoner’s administrative remedies “effectively unavailable”); Brown, 422 F.3d at 939-40
24 (plaintiff not required to proceed to third level where appeal granted at second level and no further
25 relief was available). Aside from this single exception, “the PLRA’s text suggests no limits on an
26 inmate’s obligation to exhaust—irrespective of any ‘special circumstances.’... [a]nd that
27 mandatory language means a court may not excuse a failure to exhaust, even to take such
28 circumstances into account.” Ross, 136 S. Ct. at 1856.

1 The test for deciding whether a grievance procedure was unavailable uses an objective
2 standard. Albino, 697 F.3d at 1035. “[A]ffirmative actions by jail staff preventing proper
3 exhaustion, even if done innocently, make administrative remedies effectively unavailable.” Id. at
4 1034. An inmate may demonstrate the unavailability of remedies by showing “(1) that jail staff
5 affirmatively interfered with his ability to exhaust administrative remedies or (2) that the remedies
6 were unknowable.” Id. at 1033. The inmate must make “a good-faith effort” to determine and
7 comply with a prison’s grievance procedures. Id. at 1035.

8 **A. Fresno County Jail Administrative Grievance Process**

9 Fresno County Jail has inmate grievance procedures and inmates are provided with an Inmate
10 Orientation Handbook that describes the process upon admission to the facility. (Decl. of Lt. Russell
11 Duran ¶¶ 32, 34, ECF No. 114-4.) Inmates can receive a grievance form by requesting one from staff
12 or by submitting an Inmate Request Form asking for one. (Id. at ¶ 36.) The form is provided either
13 immediately or at the soonest available opportunity, but in no case later than the end of the staff
14 member’s shift who received the request. (Id. at ¶ 37.) Inmates may grieve any condition of
15 confinement at the jail, including officer conduct, disciplinary actions, food, mail, medical care, legal
16 services and telephone. (Id. at ¶ 38.) An inmate may also pursue a grievance for any alleged or
17 threatened act of retaliation by Fresno County Jail staff. (Id. at ¶ 40.)

18 An inmate has 14 days from the date of the alleged incident to submit a grievance form. (Id. at
19 ¶ 42.) The inmate is required to provide specific information related to the grievance, including the
20 name of the employee involved, the identity of any witnesses, the date and time of the incident being
21 grieved, the specific type of grievance which is limited to only type per grievance, and a description of
22 the important details of the alleged problem or event, and other relevant information supporting the
23 grievance. (Id. at ¶ 43.) The inmate must personally sign the grievance form. (Id. at 44.) If an inmate
24 has trouble or needs assistance with completing the form or the grievance process may obtain
25 assistance of jail staff or another inmate. (Id. at ¶ 45.) The staff involved in the grievance is expected
26 to take an active role in resolving complaints or problems informally through discussion before an
27 inmate resorts to the grievance process if possible. (Id. at 46.)

28 A grievance is to be investigated and processed for review within a reasonable time, usually

1 within fourteen calendar days. (Id. at ¶ 48.) Once a grievance form is received from an inmate, it is
2 placed in the grievance bin in the Distribution room prior to the end of the employee’s shift, even if the
3 grievance has been resolved or is withdrawn by the inmate. (Id. at ¶ 49.) After the initial investigation,
4 the investigating staff member will make a recommendation to either sustain or not sustain the
5 grievance. (Id. at ¶ 50.) The grievance form and the recommendation is then reviewed by a Lieutenant
6 or Manager/Supervisor who makes the final determination to either sustain or not sustain the grievance.
7 (Id.) A copy of the outcome is provided to the inmate. (Id. at ¶ 51.)

8 An inmate may voluntarily withdraw a grievance should he choose that option at any time
9 during the grievance process, even after receipt of the outcome. (Id. at ¶ 52.) The grievance form
10 contains a specific space for the inmate to sign indicating the decision to withdraw the grievance. (Id.
11 at ¶ 53.)

12 Any grievance that does not meet any requirement may be rejected and returned to the inmate
13 without investigation and without addressing the substantive issue. (Id. at ¶ 54.) A grievance may be
14 rejected on procedural grounds for not being submitted within the established time perimeters; not
15 being properly completed or lacking specific details; failing to request relief or requesting relief that is
16 unclear or not available; or for any other reason that fails to comply with the inmate grievance
17 procedures. (Id. at ¶ 55.)

18 An inmate who is not satisfied with the outcome received by the grievance process may submit
19 an appeal within five calendar days from the date the response was received. (Id. at ¶ 56.) The result
20 of the appeal is final and constitutes exhaustion within the agency. (Id. at ¶ 57.)

21 If an inmate reasonably believes that the grievance is of a nature that would pose a threat to the
22 safety of the inmate, staff, or other inmate, he may submit the grievance in a sealed envelope directly to
23 the Bureau Commander. (Id. at ¶ 58.) An inmate must completely exhaust the internal grievance and
24 appeals process prior to filing an action in court.² (Id. at ¶ 59.)

25 **B. Findings of Fact and Conclusions of Law Based on Evidentiary Hearing**

26 On February 7, 2014, at 6:11, Plaintiff submitted the grievance at issue in this matter.
27

28 ² The testimony presented at the hearing was considered and found to be consistent with the declaration of Lt. Duran.

1 (Exhibit B7.) The grievance named Defendant Veloz and indicated that the incident occurred
2 “Jan. 22 or around that time?” (Id.) The grievance states:

3 I asked for a grievance from officer and was ignored. Asked to leave cell due to
4 threats made on my life. I was told by Velos [sic] that I could not leave until I
5 was bleeding. I was taken in cell and beat up by inmates. Officer Velos [sic] then
6 took me out of cell bleeding then through [sic] a grievance on the floor in my
7 blood. I was told “That’s what I get” in the middle of other officers in the gym.
8 He then said, “I better not complain anymore.” He then had me classified and
9 sent to a bulldog dorm where I was assaulted by more of his friends including a
10 commanding officer. They put me in a dorm and I was beat up and taken to
11 hospital. . . .

12 (Id.)

13 According to the inmate grievance procedure, once this grievance was received a staff
14 member would meet with Plaintiff to attempt to resolve the issue at the lowest level.

15 The document notes “Not grievable it went past time to grieve.” (Id.) Additionally, the
16 grievance contains a signature in the area indicating that the inmate would like to withdraw the
17 grievance. (Id.) However, the testimony at the hearing demonstrates that the officer who
18 completed this form has been unable to be identified. The form itself contains what appears to be
19 an “R” and pursuant to the testimony this would be the signature of the officer as it is in ink and
20 inmates do not have access to pens. However, since the officer did not put a computer number on
21 the form for identification purposes and the signature is illegible, the Fresno County Jail has been
22 unable to determine who completed this form.³

23 Plaintiff testified that he was unable to remember how he submitted grievances, and he
24 would not identify if it was his signature on grievance forms.

25 The grievance form itself shows that it was submitted on February 7, 2014. There are two
26 separate incidents that form the basis of the dispute in this matter. On January 26, 2014, Plaintiff
27 was housed on the 3rd Floor. Plaintiff was assaulted by some inmates and Defendant Veloz was
28 involved in the investigation into the assault. Plaintiff was subsequently moved and housed on the
29 2nd Floor. At approximately 4:10 a.m. on January 27, 2014, Plaintiff was observed being
30 assaulted by several inmates.

³ The Court notes that in looking at the documents filed in this matter the signature on this grievance appears to be that of Sgt. Diaz. There was no evidence presented that any inquiry was made to Sgt. Diaz regarding whether he was the individual that processed this document.

1 During the hearing, Plaintiff testified that on January 26 or 27, 2014, he told an officer who
2 was wearing a badge identifying him as “Sgt. Diaz” that he was being threatened by his cellmates
3 and requested that he be moved to another housing unit. “Sgt. Diaz” told him that he knew how to
4 fight because he was black and refused to move him. Plaintiff asked for a “complaint form” and
5 after Plaintiff had been beaten up by the inmates, “Sgt. Diaz” returned with a grievance form,
6 threw it in his blood, and told him that is what got for complaining. Plaintiff testified that the
7 officer wearing the badge “Sgt. Diaz” was actually Defendant Veloz.

8 Defendant Veloz has never worn a badge identifying him as Sgt. Diaz. Defendant Veloz
9 has never been a sergeant and the sergeants wear a different badge than the other deputies. When
10 he is working, Defendant Veloz wears a name tag that identifies him as A. Veloz and contains his
11 identification number.

12 Although the grievance form that Plaintiff submitted regarding this incident stated that it
13 had occurred on January 22 or around that time, the incident that Plaintiff was grieving was the
14 incident that occurred the morning of January 27, 2014, involving “Sgt. Diaz.”

15 The original complaint in this action was filed on January 29, 2014. As relevant here, the
16 complaint alleges that Perry Washington is being retaliated against, beaten in jail, and refused help.
17 (Compl. 2,⁴ ECF No. 1.) Plaintiff alleged that Officer Jose Yang denied Plaintiff a grievance form
18 on January 26, 2014, at 7:15 a.m. (Id.)

19 Plaintiff filed an amended complaint alleging that it was an unidentified officer who
20 refused to provide him with the grievance form and retaliated against him. (ECF No. 11.) On
21 February 11, 2015, Plaintiff filed a notice informing the Court that the unidentified officer who
22 threw his grievance in his blood was Officer Veloz.⁵ (ECF No. 60.)

23 Although Defendant did not argue that Plaintiff filed this action prior to exhausting his
24

25 ⁴ All references to pagination of specific documents pertain to those as indicated on the upper right corners via the
CM/ECF electronic court docketing system.

26 ⁵ Plaintiff testified at the hearing that he clearly remembers the badge of the officer that was involved in these
27 incidents contained the name Sgt. Diaz. It is unclear why Plaintiff named Defendant Veloz in this action and why
28 he never moved to amend the complaint to correctly identify the individual involved. However, as discussed infra,
Plaintiff filed this action two days after the incident and before making any attempt to file a grievance. Therefore,
Plaintiff did not exhaust the claim brought in this action prior to filing suit.

1 administrative remedies, pursuant to the PLRA, Plaintiff was required to exhaust his administrative
2 remedies prior to filing suit in this action. 42 U.S.C. § 1997e(a); see Ross, 136 S. Ct. 1850.
3 Following the evidentiary hearing, it is clear that Plaintiff did not exhaust his administrative
4 remedies prior to filing this action.

5 Plaintiff filed this action on January 29, 2014, alleging the claims which were eventually
6 found to be cognizable. However, Plaintiff did not submit his grievance to the Fresno County Jail
7 until February 7, 2014, nine days after this action was filed. The Supreme Court has held that the
8 PLRA requires that all available remedies must be exhausted before a complaint challenging
9 conditions of confinement can be entertained regardless of the relief offered through the
10 administrative process. Booth, 532 U.S. at 739, 741; Porter, 534 U.S. at 524. The exhaustion
11 requirement applies to all prisoner suits about inmate life. Porter, 534 U.S. at 532; Woodford v.
12 Ngo, 548 U.S. 81, 85 (2006). The purposes of the PLRA are to allow a prison to address
13 complaints about the programs administered before being subjected to suit, to reduce the litigation
14 to the extent that complaints are satisfactorily resolved, and to improve the litigation that does
15 occur by leading to preparation of a useful record. Jones, 549 U.S. at 219; Ngo, 548 U.S. at 89.
16 Exhaustion prior to commencement of the action is an indispensable requirement. McKinney v.
17 Carey. 311 F.3d 1198, 1199 (9th Cir. 2002). Therefore, Plaintiff must have properly exhausted the
18 claims that are proceeding in this action prior to filing suit in order to comply with the PLRA.
19 Jones, 549 at 224; Ngo, 458 at 93; cf. Cano v. Taylor, 739 F.3d 1214, 1220 (9th Cir. 2014)
20 (allowing new claims included in amended complaint that were exhausted prior to filing amended
21 complaint).

22 Here, Plaintiff filed this action prior to submitting an inmate grievance and the Court finds
23 no credible evidence that he was obstructed from doing so. On the contrary, Plaintiff did submit a
24 grievance regarding the incident after this action was filed. Plaintiff presented no evidence that he
25 made any attempt to grieve the incident prior to filing this action in federal court. Where the court
26 concludes that the prisoner has failed to exhaust administrative remedies prior to filing suit, the
27 proper remedy is dismissal without prejudice, even where there has been exhaustion while the suit
28 is pending. Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006); Lira v. Herrera, 427 F.3d

1 1164, 1171 (9th Cir. 2005); McKinney, 311 F.3d at 1200-01; see also Maiden v. LA Cty. Sheriff's
2 Dep't Men's Cent. Jail, 334 F. App'x 76, 77 (9th Cir. 2009) (unpublished) (finding district court
3 properly dismissed action because inmate did not complete the grievance process prior to filing
4 suit and failed to demonstrate that he was obstructed from doing so.)

5 Defendant has raised the issue of failure to exhaust and since Plaintiff filed this action on
6 January 29, 2014, and did not submit a grievance to the Fresno County Jail until February 7, 2014,
7 for the claims that were alleged in the original complaint, he had not exhausted administrative
8 remedies prior to filing suit. Requiring dismissal without prejudice when there has been no presuit
9 exhaustion provides a strong incentive that furthers the Congressional objectives of the PLRA.
10 McKinney, 311 F.3d at 1200-01. Because it is clear that Plaintiff did not exhaust administrative
11 remedies prior to instituting this action in federal court, this action must be dismissed. 42 U.S.C. §
12 1997e(a).⁶

13 **VI.**

14 **ORDER**

15 Based on the foregoing, IT IS HEREBY ORDERED that:

- 16 1. Counsel's motion to withdraw as attorney of record for Plaintiff is GRANTED and
17 the Clerk of the Court shall terminate William L. Schmidt as attorney for Plaintiff;
- 18 2. Defendant Veloz motion for summary judgment on the grounds of exhaustion of
19 administrative remedies is GRANTED;
- 20 3. Plaintiff's action is DISMISSED WITHOUT PREJUDICE FOR FAILURE to
21 exhaust administrative remedies;
- 22 4. The Office of the Clerk is DIRECTED to serve a copy of this order on Plaintiff at
23 1133 E. San Madele, Fresno, California 93710; and
24

25 ⁶ As the Court finds that Plaintiff filed this action prior to exhausting his administrative remedies, it need not address
26 whether the grievance was timely filed. However, based on the evidence presented at the hearing, the Court does
27 find that Plaintiff has presented no credible evidence that jail officials obstructed Plaintiff from filing his grievance.

28 Further, based upon the evidence presented at the hearing, Defendant Veloz was not the officer who did he acts that
are alleged in the complaint. Whether subsequent action is now precluded by the limitations period is not an issue
before this Court.

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5. The Clerk of the Court is DIRECTED to close this action.

IT IS SO ORDERED.

Dated: May 11, 2018



UNITED STATES MAGISTRATE JUDGE