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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 GUILLERMO CRUZ TRUJILLO,

11 Plaintiff,

12 v.

13 GOMEZ, et al.,

14 Defendants.

Case No. 1:14-cv-01370-LJO-EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT PLAINTIFF'S
CASE BE DISMISSED FOR FAILURE TO
EXHAUST AVAILABLE
ADMINISTRATIVE REMEDIES

OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE DAYS

ORDER DENYING PLAINTIFF'S
REQUEST TO FILE ADDITIONAL
EXHIBITS

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19 **I. BACKGROUND**

20 Guillermo Trujillo ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma*
21 *pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983. This action now
22 proceeds on Plaintiff's Third Amended Complaint (ECF No. 17), on Plaintiff's claims against
23 Officers Gomez, Juarez, and Fernandez for excessive force in violation of the Eighth
24 Amendment. (ECF Nos. 19, 21, & 98). These claims stem from Plaintiff's allegation that
25 defendant Gomez used unprovoked force against Plaintiff when he slammed Plaintiff against a
26 wall and twisted Plaintiff's arms, and the allegation that defendants Juarez and Fernandez used
27 unprovoked force against Plaintiff when they pepper sprayed Plaintiff.

28 On August 11, 2017, Defendants filed a motion for summary judgment on the ground

1 that Plaintiff failed to exhaust his administrative remedies. (ECF Nos. 81 & 82). Defendants’
2 motion was denied because there was a genuine dispute of material fact regarding whether
3 administrative remedies were available to Plaintiff (ECF Nos. 94 & 99), but Defendants were
4 given the opportunity to request an evidentiary hearing “on the issue of whether Plaintiff
5 properly submitted grievances that prison officials improperly failed to process” (ECF No. 99,
6 p. 2).

7 On April 4, 2018, Defendants requested an evidentiary hearing. (ECF No. 102). The
8 Court held the evidentiary hearing on June 29, 2018. After the hearing, the Court allowed the
9 parties to file supplemental briefing. (ECF No. 113). On August 15, 2018, Defendants filed
10 their supplemental brief. (ECF No. 118). Plaintiff did not file a supplemental brief.

11 Based on the evidence presented at the hearing, the Court finds that Plaintiff failed to
12 exhaust his available administrative remedies. Accordingly, the Court will recommend that
13 Plaintiff’s case be dismissed because Plaintiff failed to exhaust his available administrative
14 remedies.

15 **II. LEGAL STANDARDS**

16 **A. Exhaustion**

17 “The California prison grievance system has three levels of review; an inmate exhausts
18 administrative remedies by obtaining a decision at each level.” Reyes v. Smith, 810 F.3d 654,
19 657 (9th Cir. 2016) (citing Cal. Code Regs. tit. 15, § 3084.1(b) (2011) & Harvey v. Jordan, 605
20 F.3d 681, 683 (9th Cir. 2010)). See also Cal. Code Regs. tit. 15, § 3084.7(d)(3) (“The third
21 level review constitutes the decision of the Secretary of the California Department of
22 Corrections and Rehabilitation on an appeal, and shall be conducted by a designated
23 representative under the supervision of the third level Appeals Chief or equivalent. The third
24 level of review exhausts administrative remedies....”).

25 Section 1997e(a) of the Prison Litigation Reform Act of 1995 (“PLRA”) provides that
26 “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any
27 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
28 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

1 Prisoners are required to exhaust the available administrative remedies prior to filing
2 suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201
3 (9th Cir. 2002) (per curiam). The exhaustion requirement applies to all prisoner suits relating
4 to prison life. Porter v. Nussle, 534 U.S. 516, 532 (2002). Exhaustion is required regardless of
5 the relief sought by the prisoner and regardless of the relief offered by the process, unless “the
6 relevant administrative procedure lacks authority to provide any relief or to take any action
7 whatsoever in response to a complaint.” Booth v. Churner, 532 U.S. 731, 736, 741 (2001);
8 Ross v. Blake, 136 S.Ct. 1850, 1857, 1859 (2016).

9 “Under the PLRA, a grievance suffices if it alerts the prison to the nature of the wrong
10 for which redress is sought. The grievance need not include legal terminology or legal theories,
11 because [t]he primary purpose of a grievance is to alert the prison to a problem and facilitate its
12 resolution, not to lay groundwork for litigation. The grievance process is only required to alert
13 prison officials to a problem, not to provide personal notice to a particular official that he may
14 be sued.” Reyes, 810 F.3d at 659 (alteration in original) (citations and internal quotation marks
15 omitted).

16 As discussed in Ross, 136 S.Ct. at 1862, there are no “special circumstances”
17 exceptions to the exhaustion requirement. The one significant qualifier is that “the remedies
18 must indeed be ‘available’ to the prisoner.” Id. at 1856. The Ross Court described this
19 qualification as follows:

20 [A]n administrative procedure is unavailable when (despite what
21 regulations or guidance materials may promise) it operates as a
22 simple dead end—with officers unable or consistently unwilling
23 to provide any relief to aggrieved inmates. See 532 U.S., at 736,
24 738, 121 S.Ct. 1819. . . .

25 Next, an administrative scheme might be so opaque that it
26 becomes, practically speaking, incapable of use. . . .

27 And finally, the same is true when prison administrators thwart
28 inmates from taking advantage of a grievance process through
machination, misrepresentation, or intimidation. . . . As all those
courts have recognized, such interference with an inmate's pursuit
of relief renders the administrative process unavailable. And
then, once again, § 1997e(a) poses no bar.

1 Id. at 1859–60.

2 “When prison officials improperly fail to process a prisoner's grievance, the prisoner is
3 deemed to have exhausted available administrative remedies.” Andres v. Marshall, 867 F.3d
4 1076, 1079 (9th Cir. 2017).

5 The defendants have the initial burden to prove “that there was an available
6 administrative remedy, and that the prisoner did not exhaust that available remedy.” Albino II,
7 747 F.3d at 1172. If the defendants carry that burden, “the burden shifts to the prisoner to
8 come forward with evidence showing that there is something in his particular case that made
9 the existing and generally available administrative remedies effectively unavailable to him.”
10 Id. However, “the ultimate burden of proof remains with the defendant.” Id.

11 If the Court concludes that Plaintiff has failed to exhaust his available administrative
12 remedies, the proper remedy is dismissal without prejudice of the portions of the complaint
13 barred by section 1997e(a). Jones, 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76
14 (9th Cir. 2005).

15 **III. SUMMARY OF RELEVANT PORTIONS OF PLAINTIFF’S THIRD AMENDED**
16 **COMPLAINT**

17 Plaintiff’s Third Amended Complaint (“TAC”) alleges that on December 23, 2013,
18 Plaintiff was confined at Kern Valley State Prison (“KVSP”) when prison officials started
19 harassing and fomenting rumors of “getting” Plaintiff, and targeting him because Plaintiff had
20 filed 602 grievances, which were never logged and were returned to Plaintiff.

21 On October 22, 2014, Plaintiff went to school and told Officer Gomez that Plaintiff
22 needed to get his legal copies of a motion to file with the courts. On Plaintiff’s way back to the
23 building from class due to not feeling well, Plaintiff stopped at the law library for legal copies.
24 On the way back from the law library, Officer Gomez approached Plaintiff from behind and
25 asked if Plaintiff was going to school. Plaintiff responded no. Officer Gomez became very
26 upset and slammed Plaintiff against the concrete wall next to the library outside window, face-
27 first, and twisted his arms to place them in restraints. Plaintiff felt pain on the left side of his
28 face and his shoulders.

1 Officer Gomez told Plaintiff to go to the facility program holding cell area for a strip
2 search. Plaintiff complied. After the search and still naked inside the holding cage, Officers
3 Juarez and Fernandez took out their pepper spray and sprayed Plaintiff for 4 to 5 seconds.
4 Plaintiff believes the officers used force out of retaliation and harassment.

5 Plaintiff's TAC only named Biter in the list of defendants. However, at times, when
6 Plaintiff discussed Officer Gomez, he referred to him as "Defendant Gomez." And, while
7 Plaintiff never indicated in his complaint that Sergeant Juarez or Fernandez were meant to be
8 included as defendants, he later clarified that Gomez, Juarez, and Fernandez were meant to be
9 included as defendants (ECF No. 20).

10 **IV. SUMMARY OF EVIDENCE PRESENTED AT EVIDENTIARY HEARING**

11 Plaintiff appeared on his own behalf. Counsel Derek Lee appeared on behalf of
12 Defendants.

13 Plaintiff called himself as a witness. Defendants called Aaron Gomez and Jorge
14 Fernandez as witnesses.¹

15 As evidence, Defendants submitted the processing history and underlying appeal for
16 Log Nos. KVSP-O-17-00197 (Exhibit E),² KVSP-O-14-03684 (Exhibit B), KVSP-16-00999
17 (Exhibit D), KVSP-15-00020 (Exhibit H), KVSP-15-02069 (Exhibit I), and KVSP-15-02070
18 (Exhibit J); Plaintiff's complaint filed September 2, 2014 (Exhibit F); and Plaintiff's amended
19 complaint filed May 11, 2015, which was filed in Case No. 1:14-cv-01797, E.D. CA (Exhibit
20 G).

21 Plaintiff did not submit any of his own evidence.³

23 ¹ Defendants requested that the evidentiary hearing be continued because one of their witnesses would not
24 be able to attend the hearing. (ECF No. 110). That request was denied (ECF No. 111), and Defendants were not
25 able to call that witness at the hearing. However, given that the Court is recommending that this case be
dismissed, the Court finds that there was no prejudice to Defendants in holding the hearing even though
Defendants were not able to call one of their witnesses.

26 ² Plaintiff introduced Defendants' Exhibit E into evidence. Tr. at 14:23-16:11. Exhibit E includes a copy
of the 602 Plaintiff submitted in support of his opposition to Defendants' motion for summary judgment (ECF No.
27 87, pgs. 5-7).

28 ³ Plaintiff did state that he was not allowed to bring all of his exhibits with him to court, and so requested
leave to submit them. Tr. at 16:11-25; 41:24-42:2. Plaintiff's request will be denied. Plaintiff did not include
these exhibits in his opposition to Defendants' motion for summary judgment. Thus, it appears that Plaintiff did
not believe that they were relevant to the issue of whether he exhausted his administrative remedies. But more

1 A. Undisputed Facts

2 At the evidentiary hearing, the parties agreed that the following facts are undisputed:

- 3 1. “At all times relevant to the allegations in the third amended complaint,
4 Plaintiff Guillermo Trujillo, AA-2974, was a state inmate incarcerated at Kern
5 Valley State Prison, KVSP, in Delano, California.” Transcript of Proceedings
6 before Magistrate Judge Erica P. Grosjean, June 29, 2018 (“Tr.”) at 4:17-5:21.
- 7 2. “Plaintiff filed the third amended complaint, the operative complaint, on
8 February 16, 2016.” Id. at 5:24-6:2; 5:17-21.
- 9 3. “The conduct at issue in the third amended complaint took place on October
10 22nd, 2014.” Id. at 6:3-6; 5:17-21.
- 11 4. “Plaintiff filed the initial complaint on September 2nd, 2014.” Id. at 6:7-9; 5:17-
12 21.
- 13 5. “Plaintiff filed the third amended complaint on February 16th, 2016.” Id. at
14 6:10-12; 5:17-21.
- 15 6. “Plaintiff alleges Defendant Gomez shoved him against a wall and twisted his
16 arms to place them in restraints on October 22nd, 2014, when plaintiff informed
17 him he was not going to school.” Id. at 6:16-21; 5:17-21.
- 18 7. “Plaintiff claims Defendants Fernandez and Juarez excessively pepper sprayed
19 him while he was naked in a holding cage.” Id. at 7:1-4; 5:17-21.
- 20 8. “Kern Valley State Prison has an inmate grievance process for custody appeals,
21 which contains three levels of review. An inmate must process his grievance
22 through the third level of review in order to exhaust administrative remedies.”
23 Id. at 7:5-10; 5:17-21.

24 B. Summary of Evidence Presented at Evidentiary Hearing

25 *i. Plaintiff’s Testimony*

26 Plaintiff testified that he filed his 602 on October 22, 2014. Id. at 18:5-7. (Notably,
27

28 importantly, the Court gave the parties a deadline to file exhibit lists (ECF No. 104, p. 3), and Plaintiff failed to file such a list. Accordingly, Plaintiff’s request to file additional exhibits is DENIED.

1 Plaintiff never admitted into evidence any copy of the supposed 602 that he says he filed about
2 this incident.) Plaintiff testified that he submitted that original 602 about the events alleged in
3 the complaint while he was in ASU1. Id. at 13:8-9. Plaintiff testified that he never received a
4 response to that 602, despite Plaintiff filing 602s regarding the loss or delay of his original 602.
5 Id. at 13:9-18. To date, Plaintiff testified that his 602 is still under review at the first-level
6 screening because he never received a response. Id. at 13:19-20.

7 Plaintiff introduced into evidence Defendants' Exhibit E, which Plaintiff testified was a
8 copy of a 602 he filed complaining of the loss or delay of his original 602. Id. at 14:15-16:11.
9 The 602 he admitted into evidence was titled "Lost or Delay 602 Appeal." Exhibit E, p. 2. It
10 was dated October 22, 2014—the same date as the alleged incident. Id. at 2-3; ECF No. 17. In
11 other words, it was dated on the date of the incident yet purported to complain that a 602 about
12 that same incident had been lost and not responded to. The text of this 602 did not mention
13 anything about a lost 602—instead it described the underlying claim of excessive force.⁴
14 Plaintiff testified that he filed this 602, dated on the same the date of the incident, in order to
15 track down his original 602, which he no longer has. Id. at 14:23-15:3; 15:17-25.

16 Plaintiff also testified that in his original 602 he forgot to write down the facts regarding
17 the incident with defendant Gomez. Id. at 17:6-9. He "just wrote down the incident that
18 happened while we were inside the holding cell where [he] never stated the facts regarding to
19 what led to the excessive force being applied on me in the holding cell by Sergeant Castro --

21 ⁴ Specifically, in the section of the 602 titled "Explain your issue," Plaintiff
22 stated: "On the morning of Oct-22-14 I went to school and informed C/O Gomez that I was a
23 (PLU) and needed to make legal copies of my motion to file with the courts. After I check in
24 with instructor Mr. Hernandez ABE 1 Class I went to law library to received my legal copies,
25 C/O Gomez told me that if I was going to school? I then told him I was not he immediately
26 became upset and slam me face first to concrete wall next to the law library twisted both arms
27 to place them in restraint's at that point Officer Gomez told me that he wanted me to go to
28 Facility A program cage for a strip search and I complied. After the strip search was done and
still naked inside holding cage, Sgt Juarez, and Fernandez came to the holding cage I was in
and took out their weapon's of O/C pepper spray and started spraying me inside the cage for 4
to 5 second's. I did nothing to justified the use of force nor did I violate any C.D.C.R. rules.
Officer Gomez also took my legal documents which denied access to the courts." Exhibit E,
pgs. 2-3.

1 Juarez and Fernandez.” Id. at 17:10-14. When asked by the Court, “[w]hat is your best
2 memory to what you wrote in that 602,” Plaintiff stated “[t]hat Officer Gomez, Sergeant Juarez
3 and Fernandez use of excessive force applied on me.” Id. at 18:8-11.

4 When asked by the Court, “[a]nything else that you remember that you wrote,” Plaintiff
5 responded “[n]o. That's basically it, that I went out to class, I informed the instructor. And just
6 due to the fact that I was sent back because I wasn't feeling good that Officer Gomez,
7 Fernandez and Sergeant Juarez used excessive force against me.” Id. at 18:12-18. Plaintiff did
8 not introduce a copy of the original 602 he allegedly filed on October 22, 2014, into evidence.

9 When asked by the Court, “[a]nything -- any other facts that you want to say in your
10 testimony,” Plaintiff responded “[n]o. That’s basically it.” Id. at 18:19-21.

11 *ii. Cross-examination of Plaintiff*

12 On cross, Plaintiff admitted that Exhibit B included another 602, which he submitted on
13 October 22, 2014—the same date of the incident and the same date of the purported 602 about
14 a lost 602 (id. at 19:21-22; 21:2-5), and that that 602 related to at least some of his allegations
15 in this case. Id. at 21:17-23. Plaintiff admitted that he in fact received a response to this 602,
16 dated on the date of the incident and covering at least some of the underlying conduct, but
17 Plaintiff testified that he also submitted another 602 which had not received a response. Id. at
18 22:2-14. When asked, “[s]o it's fair to say that you received a response to your allegations
19 regarding Defendant Gomez,” Plaintiff responded “[r]ight.” Id. at 23:1-3. Plaintiff never
20 testified that he appealed this 602 to the third level of review.

21 Plaintiff also admitted that a separate case involving the same allegations against
22 Defendants was dismissed for failure to exhaust. Id. at 26:21-29:9.

23 Plaintiff was also asked about the “Motion to Squash Defendants’ Motion for Summary
24 Judgment for Non-Exhaustion” that he filed in this case. Id. at 30:8-11. When asked, “is it fair
25 to say that this document is suggesting that you have now exhausted administrative remedies in
26 this case,” Plaintiff responded “[r]ight.” Id. at 31:1-3. However, when asked about the four
27 grievances cited to in the motion to “squash” that Plaintiff alleged showed that he exhausted his
28 administrative remedies in this case, Plaintiff admitted that none of them included allegations

1 of excessive force against Defendants related to the October 22 incident. Id. at 31:7-37:18.

2 *iii. Aaron Gomez's Testimony*

3 Mr. Gomez testified that he is a correctional officer at Kern Valley State Prison, and
4 that he has held that position for twelve years (including during 2014). Id. at 43:16-22.

5 Mr. Gomez further testified that he has no responsibilities regarding the appeals process
6 or the handling of appeals. Id. at 44:5-7.

7 Plaintiff did not cross-examine Mr. Gomez. Id. at 45:22-24.

8 *iv. Jorge Fernandez's Testimony*

9 Mr. Fernandez testified that he is a correctional officer as Kern Valley State Prison, and
10 that he has held that position going on thirteen years (including during 2014). Id. at 46:22-
11 47:3. Mr. Fernandez worked at the facility in which Plaintiff was housed. Id. at 47:4-6.

12 Mr. Fernandez further testified that he has no responsibilities regarding processing of
13 grievances or interacting with appeals staff. Id. at 47:22-48:3.

14 Plaintiff did not cross-examine Mr. Fernandez. Id. at 48:22-24.

15 **V. Analysis of Evidence**

16 It is undisputed that the California Department of Corrections and Rehabilitation has an
17 inmate grievance process for custody appeals, and that an inmate must process his grievance
18 through the third level in order to exhaust administrative remedies.⁵ Tr. at 7:5-10. It is also
19 undisputed that Plaintiff submitted an appeal covering the allegations in the complaint, and
20 received a response from the prison, yet Plaintiff did not pursue that 602 all stages of this
21 administrative process needed to exhaust his administrative remedies. As Defendants have
22 carried their burden to show that there was an available administrative remedy and that Plaintiff
23 did not exhaust that available remedy, “the burden shifts to the prisoner to come forward with
24 evidence showing that there is something in his particular case that made the existing and
25 generally available administrative remedies effectively unavailable to him.” Albino II, 747
26 F.3d at 1172. However, “the ultimate burden of proof remains with the defendant.” Id.

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28 ⁵ Inmate appeals or grievances are also referred to as “602s.”

1 Thus, the question is whether the grievances procedures were “available” to Plaintiff, in
2 light of Ninth Circuit law that “[w]hen prison officials improperly fail to process a prisoner's
3 grievance, the prisoner is deemed to have exhausted available administrative remedies.”
4 Andres, 867 F.3d at 1079.

5 Here, Plaintiff failed to meet his burden. Plaintiff testified that he submitted a different
6 602 covering the allegations in the complaint, but that the appeals office failed to respond to
7 that other 602, thus rendering the process unavailable to him. Plaintiff provided as evidence his
8 testimony that on October 22, 2014, he filed a 602 related to the incidents described in the
9 complaint. Plaintiff also provided a purported 602 related to the incidents described in the
10 complaint (Exhibit E), which he alleged he submitted to follow-up on the loss or delay of his
11 original appeal. However, Plaintiff’s testimony is not credible.

12 To begin, while Plaintiff testified that he filed the 602 that is included in Exhibit E in
13 order to inquire about the 602 he filed on October 22, 2014, the 602 does not support Plaintiff’s
14 testimony. It is true that the subject of the appeal was listed as “Lost or Delay 602 Appeal,” but
15 the 602 itself does not mention or inquire about any prior 602s. Instead, it related to the
16 excessive force incidents described in the complaint. Moreover, Plaintiff dated the grievance
17 October 22, 2014, which is the day of the alleged incident. Accordingly, the 602 does not
18 support Plaintiff’s testimony that Plaintiff submitted it in order to follow-up on a prior
19 grievance. The Court doubts the authenticity of this document.

20 Additionally, in Plaintiff’s opposition to Defendants’ motion for summary judgment,
21 Plaintiff (mis)represented to the Court that the 602 included in Exhibit E was the original 602
22 he submitted. (ECF No. 87, p. 1). In that opposition, Plaintiff stated that he “filed a 602
23 grievance on Oct-22-2014,” and referred the Court to the 602 he attached. (Id.). The 602 that
24 Plaintiff attached is the same 602 as the one included in Exhibit E. Id. at 6-7; Exhibit E, pgs. 2-
25 3. The Court relied on this representation when denying Defendants’ motion for summary
26 judgment. (ECF No. 94, pgs. 9-10; ECF No. 99). However, at the evidentiary hearing Plaintiff
27 testified, on the contrary, that he thought the 602 was “the second or third 602 regarding [] the
28 lost or delay of the original 602,” and that Plaintiff filed it “to track down the original 602.” Tr.

1 at 15:18-25. Given that the issue listed in the 602 was “Lost or Delay 602 Appeal,” and
2 Plaintiff’s testimony at the evidentiary hearing, it appears that this 602 was not the original 602
3 Plaintiff submitted. Plaintiff did not provide an explanation as to why he misrepresented the
4 follow-up 602 as the original in his opposition to Defendants’ motion for summary judgment.

5 Plaintiff’s misrepresentations do not end there. Plaintiff initially testified that he did not
6 receive a response to his 602s related to the incidents described in the complaint. However, on
7 cross examination, Plaintiff admitted that he did in fact receive a response to at least one of the
8 602s he filed (the response, as well as the 602 Plaintiff submitted, were admitted as Exhibit B).⁶
9 It thus appears that Plaintiff received a response to his 602 in a timely manner (see below), and
10 that Plaintiff had an opportunity to appeal that response but failed to do so. Thus, the
11 administrative remedy was available to Plaintiff, he simply failed to avail himself of the
12 process. Plaintiff failed to provide an explanation as to why he testified that he never received
13 a response even though he did receive a response, or why he did not file an appeal after
14 receiving the response.

15 Finally, the Court is skeptical of Plaintiff’s allegations regarding delays in processing
16 his 602s. Plaintiff testified about delays in the processing of his 602s related to the incident
17 described in his complaint, but he did not challenge the admissibility or accuracy of the
18 documents admitted as Exhibit B. And, according to those documents, Plaintiff’s 602 dated
19 October 22, 2014, was received on November 5, 2014, and Plaintiff was interviewed by R.
20 Speidell related to the allegations in the 602 on November 18, 2014 (Exhibit B, pgs. 1-3).
21 While it is not entirely clear when Plaintiff actually received the response, it does not appear
22 that there was any significant delay in the processing of this 602.

23 Thus, while Plaintiff was respectful and responsive, given the discrepancies in
24 Plaintiff’s testimony the Court finds that Plaintiff’s testimony was not credible.

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27 ⁶ The Court notes that the facts alleged in the 602 are similar to the facts alleged in the complaint,
28 including the date of the incident, the use of force by defendant Gomez, an ordered strip search, and Plaintiff
getting pepper sprayed for four to five seconds. Exhibit B, p. 5. However, in the 602, Plaintiff alleges that it was
Correctional Officer Gutierrez that pepper sprayed him. Id. There is no mention of defendants Juarez or
Fernandez. Id. at 3-5

1 For the foregoing reasons, the Court finds that Plaintiff failed to meet his burden of
2 showing that the generally available administrative remedies were unavailable to him.
3 Therefore, the Court will recommend that this case be dismissed for failure to exhaust.

4 **VII. RECOMMENDATIONS**

5 Accordingly, based on the foregoing, IT IS HEREBY RECOMMENDED that:

- 6 1. This action be dismissed because Plaintiff failed to exhaust his available
7 administrative remedies before filing this action; and
- 8 2. The Clerk of Court be directed to close this case.

9 These findings and recommendations are submitted to the United States district judge
10 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within twenty-**
11 **one (21) days** after being served with these findings and recommendations, any party may file
12 written objections with the court. Such a document should be captioned “Objections to
13 Magistrate Judge's Findings and Recommendations.” Any reply to the objections shall be
14 served and filed within seven days after service of the objections. The parties are advised that
15 failure to file objections within the specified time may result in the waiver of rights on appeal.
16 Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
17 F.2d 1391, 1394 (9th Cir. 1991)).

18 IT IS SO ORDERED.

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20 Dated: November 7, 2018

21 /s/ Eric P. Grogan
22 UNITED STATES MAGISTRATE JUDGE
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