

1 are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available
2 administrative remedies prior to filing suit, *Jones v. Bock*, 549 U.S. 199, 211 (2007); *McKinney v.*
3 *Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002), regardless of the relief sought by the prisoner
4 and regardless of the relief offered by the process, *Booth v. Churner*, 532 U.S. 731, 741 (2001).
5 The exhaustion requirement applies to all suits relating to prison life. *Porter v. Nussle*, 435 U.S.
6 516 (2002). Exhaustion under § 1997(e) is an affirmative defense, *Jones*, at 216, most commonly
7 raised by a defendant in a motion for summary judgment under Rule 56 of the Federal Rules of
8 Civil Procedure, *Albino v. Baca*, 747 F.3d 1162, 1169-70 (9th Cir. 2014).

9 However, “the PLRA mandates early judicial screening of prisoner complaints and
10 requires prisoners to exhaust prison grievance procedures before filing suit.” *Jones*, at 202.
11 Exhaustion is an issue of “judicial administration” that is “appropriately decided early in the
12 proceeding.” *Albino*, at 1170 (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51
13 (1938) (referring to the “long-settled rule of judicial administration that no one is entitled to
14 judicial relief for a supposed or threatened injury until the prescribed administrative remedy has
15 been exhausted”). Where, as here, a prisoner’s failure to exhaust is clear from the face of the
16 complaint, it is properly addressed at screening for failure to state a claim upon which relief may
17 be granted. *Albino*, at 1168-69.

18 As noted in the OSC, though Plaintiff checked the boxes indicating that he exhausted
19 available administrative remedies through the highest level, this assertion cannot be truthful as
20 Plaintiff signed the Complaint on the same day that the incident occurred -- June 13, 2017 -- and
21 it was filed in this Court three days later. (*See* Doc. 1.) It is physically impossible for Plaintiff to
22 have filed an inmate appeal and pursued it to the highest level on the same date that the incident
23 he complains of occurred. Thus, it appears Plaintiff filed suit prematurely without first
24 exhausting in compliance with section 1997e(a). *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir.
25 2003) (“A prisoner’s concession to nonexhaustion is a valid ground for dismissal. . . .”). This
26 action must be dismissed without prejudice because of Plaintiff’s admitted failure to exhaust
27 available administrative remedies prior to filing suit.

28 Accordingly, the Court RECOMMENDS that this action be dismissed without prejudice

1 for Plaintiff's failure to exhaust available administrative remedies prior to filing suit. 42 U.S.C. §
2 1997e(a). The Clerk's Office is directed to assign a district judge to this action.

3 These Findings and Recommendations will be submitted to the United States District
4 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within 21**
5 **days** from the date of service of these Findings and Recommendations, Plaintiff may file written
6 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
7 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
8 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,
9 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

10 IT IS SO ORDERED.

11 Dated: August 30, 2017

12 /s/ Jennifer L. Thurston
13 UNITED STATES MAGISTRATE JUDGE
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