

1 As previously stated, on July 17, 2019, Defendants filed a motion for summary judgment.
2 Plaintiff did not file an opposition and the time to do so has expired. Local Rule 230(l). Therefore, the
3 motion is deemed submitted for review without oral argument. Local Rule 230(l).

4 **II.**

5 **LEGAL STANDARD**

6 **A. Statutory Exhaustion Requirement**

7 The Prison Litigation Reform Act (PLRA) of 1995, requires that prisoners exhaust “such
8 administrative remedies as are available” before commencing a suit challenging prison conditions.” 42
9 U.S.C. § 1997e(a); see Ross v. Blake, ___ U.S. ___ 136 S.Ct. 1850 (June 6, 2016) (“An inmate need
10 exhaust only such administrative remedies that are ‘available.’”). Exhaustion is mandatory unless
11 unavailable. “The obligation to exhaust ‘available’ remedies persists as long as *some* remedy remains
12 ‘available.’ Once that is no longer the case, then there are no ‘remedies ... available,’ and the prisoner
13 need not further pursue the grievance.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (emphasis
14 in original) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).

15 This statutory exhaustion requirement applies to all inmate suits about prison life, Porter v.
16 Nussle, 534 U.S. 516, 532 (2002) (quotation marks omitted), regardless of the relief sought by the
17 prisoner or the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and
18 unexhausted claims may not be brought to court, Jones v. Bock, 549 U.S. 199, 211 (2007) (citing Porter,
19 534 U.S. at 524).

20 The failure to exhaust is an affirmative defense, and the defendants bear the burden of raising
21 and proving the absence of exhaustion. Jones, 549 U.S. at 216; Albino v. Baca 747 F.3d 1162, 1166
22 (9th Cir. 2014). “In the rare event that a failure to exhaust is clear from the face of the complaint, a
23 defendant may move for dismissal under Rule 12(b)(6).” Albino, 747 F.3d at 1166. Otherwise, the
24 defendants must produce evidence proving the failure to exhaust, and they are entitled to summary
25 judgment under Rule 56 only if the undisputed evidence, viewed in the light most favorable to the
26 plaintiff, shows he failed to exhaust. Id.

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1 are required to exhaust CDCR's administrative remedy process prior to filing suit in federal court.
2 Woodford v. Ngo, 548 U.S. 81, 85-86 (2006); Sapp v. Kimbrell, 623 F.3d 813, 818 (9th Cir. 2010).

3 CDCR's administrative grievance process for non-medical appeals consists of three levels of review:
4 (1) first level formal written appeals; (2) second level appeal to the Warden or designees; and (3) third
5 level appeal to the Office of Appeals (OOA). Inmates are required to submit appeals on a standardized
6 form (CDCR Form 602), attach necessary supporting documentation, and submit the appeal within thirty
7 days of the disputed event. Cal. Code Regs. tit. 15, §§ 3084.2, 3084.3(a), 3084.8(b). The California
8 Code of Regulations also requires the following:

9 The inmate or parolee shall list all staff member(s) involved and shall describe their
10 involvement in the issue. To assist in the identification of staff members, the inmate or parolee
11 shall include the staff member's last name, first initial, title or position, if known, and the dates
12 of the staff member's involvement in the issue under appeal. If the inmate or parolee does not
13 have the requested identifying information about the staff member(s), he or she shall provide
any other available information that would assist the appeals coordinator in making a
reasonable attempt to identify the staff member(s) in question.

14 Cal. Code Regs. tit. 15, § 3084.2(a)(3).

15 **B. Allegations of Complaint**

16 On March 28, 2017, Plaintiff was stabbed in the neck by another inmate and suffered an injury
17 to his neck.

18 J. Eakir and L. Ramirez passed out razors to inmates and failed to check and ensure that all the
19 razors were collected from the inmates. Plaintiff contends that if an inmate has a razor it is used to
20 attack another inmate or officer. Plaintiff contends that by failing to make a list of all inmates who
21 possessed razors and thereafter collect those razors Defendants were deliberately indifferent to his
22 safety.

23 While Plaintiff was prone out on the floor with blood flowing from his neck wound, Defendant
24 Vasquez sprayed Plaintiff with pepper spray. As Plaintiff was laying on the floor, he did not make any
25 aggressive moves and there was no need for Vasquez to pepper spray him.

26 Defendant Agiani witnessed Plaintiff being assaulted by the other inmate with a razor but
27 failed to stop the inmate and merely watched the incident take place.

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1 **C. Statement of Undisputed Facts**

2 1. Plaintiff Kavasio Hall (T-99389) is an inmate in the custody of the California
3 Department of Corrections and Rehabilitation (CDCR). (First Am. Compl., ECF No. 14 at 1.)

4 2. At all time relevant to this case, Plaintiff was housed at Kern Valley State Prison
5 (KVSP). (ECF No. 14 at 1.)

6 3. At all times relevant to this case, Defendant Agbayani was employed at KVSP. (ECF
7 No. 14 at 3-4.)

8 4. At all times relevant to this case, Defendant Vasquez was employed at KVSP. (ECF
9 No. 14 at 3.)

10 5. Plaintiff filed the original complaint on February 26, 2018. (ECF No. 1.)

11 6. Plaintiff filed the operative first amended complaint on June 1, 2018. (ECF No. 14.)

12 7. At all times relevant to this case, CDCR has provided its inmates with a comprehensive
13 administrative appeals process in which inmates may appeal a decision, action, condition, policy, or
14 omission made by the Department or its staff, which the inmate believes has had a material adverse
15 effect on their welfare. (Decl. of T. Ramos (Ramos Decl.) ¶ 3.)

16 8. The CDCR Office of Appeals (OOA) receives, reviews, and maintains all third level
17 inmate appeals concerning non-medical issues. This is the final level of review in CDCR's
18 administrative appeals process, and a final decision at this level is generally required to exhaust an
19 inmate's administrative remedies for an appeal. (Ramos Decl. ¶ 4.)

20 9. Plaintiff is aware of CDCR's administrative appeals process and availed himself of that
21 process on multiple occasions. (ECF No. 1 at 3; Ramos Decl. Ex. A.)

22 10. Plaintiff's administrative appeal history shows that between March 28, 2017, and June
23 1, 2018, Plaintiff filed and exhausted one non-medical appeal with the OOA regarding issues arising
24 from his incarceration at KVSP. That administrative appeal is identified as Appeal Log No. KVSP-
25 17-02626 (TLR 1714793). (Ramos Decl. ¶ 10; Ramos Decl. Exs. A-B.)

26 11. Plaintiff's administrative appeal history shows that between March 28, 2017, and June
27 1, 2018, Plaintiff submitted four non-medical appeals to KVSP's Appeals Coordinator's Office for the
28 first- or second-levels of review. Those appeals are: Appeal Log No. KVSP-O-17-00415; Appeal Log

1 No. KVSP-O-17-00902; Appeal Log No. KVSP-O-17-1637; and Appeal Log No. KVSP-O-17-02626.
2 (Decl. of A. Leyva (Leyva Decl.) ¶ 4.)

3 12. Plaintiff did not appeal the cancellation of Appeal Log No. KVSP-O-17-01637.
4 (Ramos Decl. Exs. A-B; Leyva Decl. Exs. A-E.)

5 **D. Defendants' Motion**

6 Defendants argue that Plaintiff's administrative appeal history demonstrates that he exhausted
7 only one administrative appeal related to his confinement at KVSP during the relevant time period,
8 and the appeal did not address the excessive force or failure to protect claims against Vasquez and
9 Agbayani.

10 It is undisputed Plaintiff is aware of CDCR's administrative appeals process and availed
11 himself of that process on multiple occasions. (ECF No. 1 at 3; Ramos Decl. Ex. A.) Indeed, Plaintiff
12 filed and exhausted one non-medical appeal between March 28, 2017 and June 1, 2018, regarding
13 issues related to his confinement at KVSP. (Ramos Decl. ¶ 10; Ramos Decl. Exs. A & B.) Further, in
14 the original complaint, Plaintiff acknowledged that an administrative remedy process was available at
15 his institution and that he filed and completed the appeals process at the third level of review. (ECF
16 No. 1 at 3.)

17 It is further undisputed that Plaintiff only exhausted one administrative appeal regarding issues
18 related to his confinement at KVSP – Appeal Log No. KVSP-17-02626 – and this appeal did not
19 address Plaintiff's failure to protect or excessive force claims against Defendants Agbayani and
20 Vasquez. Although Plaintiff filed Appeal Log No. KVSP-O-17-01637, on May 16, 2017, relating to
21 the incident on March 28, 2017, it was screened out and cancelled at the first level of review because it
22 was filed more than thirty calendar days after the incident occurred. (Leyva Decl. Ex. E; see Cal.
23 Code Regs. tit. 15, § 3084.6(c)(4) (appeal may be cancelled if time limits for submitting the appeal are
24 exceeded). Plaintiff has failed to present any evidence that prison officials improperly screened out
25 the appeal or that he ever appealed the cancellation decision. See Cal. Code. Regs. tit. 15, § 3084.6(e)
26 (inmate can appeal cancellation decision separately, and if inmate prevails, cancelled appeal can be
27 considered at the discretion of appeals coordinator); Wilson v. Zubiate, 718 F. App'x 479, 482 (9th
28 Cir. 2017).

1 Plaintiff did not file an opposition and there is no evidence before the Court that something in
2 this case made the existing administrative remedies effectively unavailable to Plaintiff. The Ninth
3 Circuit has held that there are exceptions to the general PLRA exhaustion requirement where the
4 actions of prison staff render a prisoner's administrative remedies "effectively unavailable." See
5 Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010) (a Warden's rejection based upon mistaken
6 reliance on a regulation "rendered [the prisoner's] administrative remedies effectively unavailable");
7 Sapp v. Kimbrell, 623 F.3d at 823 (prison officials can render "administrative remedies effectively
8 unavailable by improperly screening a prisoner's grievances"); Albino v. Baca, 747 F.3d at 1177
9 (failure to inform a prisoner of the administrative appeals process following multiple requests for
10 instruction rendered his administrative remedy effectively unavailable); McBride v. Lopez, 807 F.3d
11 982, 987 (9th Cir. 2015) ("the threat of retaliation for reporting an incident can render the prison
12 grievance process effectively unavailable."); Brown v. Valoff, 422 F.3d at 940 (plaintiff not required
13 to proceed to third level where appeal granted at second level and no further relief was available).
14 Specifically, there is no evidence that Plaintiff was unaware of the prison's administrative grievance
15 procedure, or that any prison official erred in the interpretation of any regulation in deciding the
16 administrative appeals. Accordingly, Defendants' motion for summary judgment should be granted,
17 and the action should be dismissed, without prejudice, for failure to exhaust the administrative
18 remedies.

19 III.

20 RECOMMENDATIONS

21 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 22 1. Defendants' motion for summary judgment be granted; and
- 23 2. The instant action be dismissed, without prejudice, for failure to exhaust the
24 administrative remedies.

25 These Findings and Recommendations will be submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-one (21)**
27 **days** after being served with these Findings and Recommendations, the parties may file written
28 objections with the Court. The document should be captioned "Objections to Magistrate Judge's

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Findings and Recommendations.” The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: September 12, 2019


UNITED STATES MAGISTRATE JUDGE