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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

MICHAEL A. RISENHOOVER,

Plaintiff,

v.

WARDEN OF SALINAS VALLEY  
STATE PRISON, et al.,

Defendants.

Case No. 1:18-cv-00432-BAM (PC)

ORDER DISCHARGING ORDER TO SHOW  
CAUSE  
(ECF No. 13)

ORDER DIRECTING CLERK OF COURT TO  
RANDOMLY ASSIGN DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS  
REGARDING DISMISSAL OF ACTION FOR  
FAILURE TO EXHAUST  
ADMINISTRATIVE REMEDIES

**FOURTEEN (14) DAY DEADLINE**

Plaintiff Michael A. Risenhoover (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff initiated this action on January 10, 2018, and the case was transferred from the United States District Court for the Northern District of California on March 29, 2018.

On April 3, 2018, the Court issued an order requiring Plaintiff to show cause, within twenty-one days, why this action should not be dismissed for failure to exhaust administrative remedies. (ECF No. 13.) On April 11, 2018, Plaintiff filed a response to the order to show cause, including copies of his filed appeals and the responses he received. (ECF No. 15.)

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1           **I.       Legal Standard**

2           The Court is required to screen complaints brought by prisoners seeking relief against a  
3 governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C.  
4 § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous  
5 or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary  
6 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 28 U.S.C.  
7 § 1915(e)(2)(B)(ii).

8           Pursuant to the Prison Litigation Reform Act of 1996, “[n]o action shall be brought with  
9 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
10 confined in any jail, prison, or other correctional facility until such administrative remedies as are  
11 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available  
12 administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney  
13 v. Carey, 311 F.3d 1198, 1199–1201 (9th Cir. 2002). Exhaustion is required regardless of the  
14 relief sought by the prisoner and regardless of the relief offered by the process, Booth v. Churner,  
15 532 U.S. 731, 741 (2001), and the exhaustion requirement applies to all suits relating to prison  
16 life, Porter v. Nussle, 435 U.S. 516, 532 (2002).

17           In rare cases where a failure to exhaust is clear from the face of the complaint, it may be  
18 dismissed for failure to state a claim. See, e.g., Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir.  
19 2014); Medina v. Sacramento Cty. Sheriff’s Dep’t, No. 2:16-cv-0765 AC P, 2016 WL 6038181,  
20 at \*3 (E.D. Cal. Oct. 14, 2016) (“When it is clear from the face of the complaint and any attached  
21 exhibits that a plaintiff did not exhaust his available administrative remedies before commencing  
22 an action, the action may be dismissed on screening for failure to state a claim.”); Lucas v. Dir. of  
23 Dep’t. of Corrs., 2015 WL 1014037, at \*4 (E.D. Cal. Mar. 6, 2015) (relying on Albino and  
24 dismissing complaint without prejudice on screening due to plaintiff’s failure to exhaust  
25 administrative remedies prior to filing suit).

26           **II.       Discussion**

27           In the complaint, Plaintiff alleges that he never received a copy of his court transcript  
28 which his attorney sent to Plaintiff in November of 2015. Plaintiff checked the boxes on the form

1 complaint indicating that administrative remedies are available. (ECF No. 1, p. 1.) However,  
2 Plaintiff indicated that the Form 22 he filed at the informal level went unanswered and that  
3 grievance log SVSP-L-17-07272 was rejected at the First, Second, and Third formal levels. (Id.  
4 at 2.)

5 Upon review of the documents attached to Plaintiff's response to the order to show cause,  
6 it appears that Plaintiff's appeal was never accepted at the first level, but rather was rejected on  
7 November 30 and December 7, 2017 for procedural errors. The appeal was ultimately cancelled  
8 on December 12, 2017. The reason provided is that, pursuant to California Code of Regulations,  
9 Title 15, Section (CCR) 3084.6(c)(4), Plaintiff exceeded the time limits for submitting the appeal  
10 even though he had the opportunity to submit within the prescribed time constraints. (Id. at 4–6.)

11 Plaintiff does not provide any information regarding any appeals filed regarding the  
12 cancellation of his appeal, nor does he identify any reasons for his failure to challenge the  
13 cancellation.

14 Plaintiff further states that “after Mr. Risenhoover sought court action in Dec 2017 Mr.  
15 Risenhoover believes the officers retaliated by placing an inmate of a different classification in  
16 his protective custody cell in the hopes Mr. Risenhoover would be assaulted.” (ECF No. 15, p.  
17 1.) Plaintiff states that he believes that if he continues to seek administrative remedies on this  
18 issue, he will be retaliated against and he fears that great bodily injury or death could occur.

19 Although Plaintiff appears to argue that his administrative remedies were effectively  
20 unavailable due to his fears of retaliation, Plaintiff has only identified potential retaliation that  
21 began **after** the filing of the complaint in this action. Plaintiff's complaint and response to the  
22 Court's order to show cause make clear that he did not exhaust his administrative remedies prior  
23 to filing this action, and Plaintiff has not provided any justification for his failure to do so.

### 24 **III. Order and Recommendation**

25 Accordingly, the order to show cause issued on April 3, 2018, (ECF No. 13), is HEREBY  
26 DISCHARGED and the Clerk of the Court is DIRECTED to randomly assign a District Judge to  
27 this action.

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1           Furthermore, it is HEREBY RECOMMENDED that this action be dismissed, without  
2 prejudice, based on Plaintiff's failure to exhaust administrative remedies prior to filing suit.

3           These findings and recommendations will be submitted to the United States District Judge  
4 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**  
5 **(14) days** after being served with 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 the "right to challenge the magistrate's factual  
9 findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.  
10 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

11  
12 IT IS SO ORDERED.

13 Dated: May 8, 2018

14 /s/ Barbara A. McAuliffe  
15 UNITED STATES MAGISTRATE JUDGE  
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