

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

TRACYE BENARD WASHINGTON,	)	Case No.: 1:18-cv-00564-LJO-SAB (PC)
Plaintiff,	)	
v.	)	FINDINGS AND RECOMMENDATION
	)	REGARDING DEFENDANTS' EXHAUSTION
E. STARK, et.al.,	)	MOTION FOR SUMMARY JUDGMENT
Defendants.	)	[ECF No. 37]
	)	
	)	

Plaintiff Tracye Benard Washington is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

Currently before the Court is Defendants' exhaustion-related motion for summary judgment, filed January 4, 2019.

**I.  
BACKGROUND**

This action proceeds on Plaintiff's first amended complaint against Defendant Rocha for excessive force and against Defendant Hicks for excessive force and failure to intervene in violation of the Eighth Amendment.

Defendants filed an answer to the complaint on October 5, 2018. On October 9, 2018, the Court issued the discovery and scheduling order.

1 As previously stated, on January 4, 2019, Defendants filed an exhaustion-related motion for  
2 summary judgment. Plaintiff filed an opposition on January 22, 2019, and Defendants filed a reply on  
3 January 24, 2019. Therefore, the motion is deemed submitted for review, without oral argument.  
4 Local Rule 230(l).

## 5 II.

### 6 LEGAL STANDARD

#### 7 A. Statutory Exhaustion Requirement

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

16 This statutory exhaustion requirement applies to all inmate suits about prison life, Porter v.  
17 Nussle, 534 U.S. 516, 532 (2002) (quotation marks omitted), regardless of the relief sought by the  
18 prisoner or the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and  
19 unexhausted claims may not be brought to court, Jones v. Bock, 549 U.S. 199, 211 (2007) (citing Porter,  
20 534 U.S. at 524).

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

27 ///

28 ///



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  
14 any other available information that would assist the appeals coordinator in making a  
15 reasonable attempt to identify the staff member(s) in question.

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

17 **B. Summary of Allegations Underlying Plaintiff’s Constitutional Claims**

18 On February 4, 2018, Plaintiff was transferred from the Richard J. Donovan Correctional  
19 Facility in San Diego, California, to Kern Valley State Prison in Delano, California to be housed in the  
20 mental health treatment and care division.

21 Plaintiff discovered that he was going to be housed in protective custody or “sensitive needs”  
22 instead of the general population. Over the next twenty-four hours, Plaintiff made numerous requests  
23 of custody staff to be taken off the protective custody list because his life was endangered, but staff  
24 refused to move him. After breaking several windows in his cell and overcoming staff’s attempt to  
25 have Plaintiff’s cellmate attack him, Plaintiff was taken to the administrative segregation unit on  
26 February 4, 2018.

27 However, Plaintiff was brought back to the facility on the evening of February 5, 2018. At  
28 approximately 10:00 p.m., Plaintiff was placed in restraints and removed from the cell. Plaintiff was  
escorted to the housing unit rotunda area where several correctional officers, including Defendants  
Hicks were standing. Sergeant Hicks ordered Plaintiff to the triage treatment area (“TTA”). Plaintiff

1 was secured in handcuffs with a chain that wraps around his waist due to Plaintiff's mobility  
2 impairment.

3 Hicks followed Plaintiff and the escorting officers out of unit C-8 to the TTA. Plaintiff was  
4 examined by a female nurse who cleaned the cut on his left wrist and took his vitals. The nurse then  
5 stated, "I'm going to place you on suicide watch tonight but in the morning a clinician is going to  
6 come and interview you and take you off suicide watch and return you to your housing unit." Plaintiff  
7 was then told he would be placed in an "out-patient" housing ("OHU) unit cell on the same facility.

8 As Plaintiff was preparing to exit the TTA, a black male in civilian clothing carrying a  
9 backpack and laptop computer and a certified nursing assistance ("CNA") followed him to monitor  
10 Plaintiff on suicide watch.

11 When Plaintiff reached his assigned cell, he was instructed to leave his walker outside the cell.  
12 Plaintiff stood at the cell door with his back to the door as a guard opened the food port to unlock the  
13 pad lock to the chains around Plaintiff's waist. When the lock was removed, Plaintiff walked over to  
14 the bed and sat down on the bottom bunk. Plaintiff refused to go back to the door stating he wanted to  
15 see a psychiatrist.

16 Hicks appeared at Plaintiff's cell door and attempt to talk to Plaintiff without results. The  
17 CAN positioned himself at the cell door with a chair. Plaintiff paced the cell for a while in handcuffs  
18 before he sack back on the bunk and fell asleep.

19 At approximately 5:00 a.m., three to four hours after Plaintiff fell asleep, he was awakened to  
20 the sound of the cell door opening, and Plaintiff saw several officers entering his cell. Plaintiff got out  
21 of the bed and stood at the rear of the cell, as Defendant Hicks entered followed by Defendant Rocha.  
22 Officers Frazier and Munoz stood at the cell door.

23 Hicks had an expandable baton fully extended in his right hand and an MK-9 pepper spray  
24 canister in his left hand, while he assumed a combative stance challenging Plaintiff to engaged in  
25 physical combat. Plaintiff remained standing at the rear of the cell without moving.

26 Rocha positioned himself in the cell behind the bunks in front of the toilet. Hicks then told  
27 Rocha, "spray his ass." Plaintiff was then sprayed with the pepper spray, while Hicks began striking  
28 Plaintiff with his baton. Hicks then grabbed Plaintiff's legs and dragged him off the bunk onto the

1 floor and out of the cell. Plaintiff was then kicked several times in the chest, abdomen and back, all  
2 while he was still in handcuffs.

3 Plaintiff was then ordered to lie on his stomach and someone stepped on his lower back as the  
4 waist chains and pad lock were placed around him. Plaintiff as then forced to stand and blindly walk  
5 with the walker. When Plaintiff felt the outside air, he overheard Hicks say “Code-1”, then a minute  
6 later, he said “Code-1 is now Code-4.”

7 Plaintiff was then taken to a holding cage after being decontaminated and required to stand for  
8 approximately two hours in pain and unable to breathe due to his glaucoma, asthma and arthritis.

9 Licensed Vocational Nurse (LVN) Teresiah Waiyaki went to the holding cage and asked  
10 Plaintiff if he had any injuries then turned and walked away.

11 After approximately two hours in the holding cage, Plaintiff was placed in a wheelchair, in  
12 restraints, and pushed by officers to the administrative segregation unit. After two hours of being in  
13 administrative segregation, a clinician informed Plaintiff she was removing him from suicide watch.  
14 Plaintiff was later informed he was being charged with battery on officer Hicks.

15 **C. Statement of Undisputed Facts**

16 1. At all relevant times, Plaintiff Tracey B. Washington (T-81075) was a state prisoner in  
17 the lawful custody of California Department of Corrections and Rehabilitation (CDCR), and housed at  
18 Kern Valley State Prison (KVSP), in Delano California. (First Am. Compl. (FAC) at pp. 5-6, ECF  
19 No. 29.)

20 2. At all relevant times, Defendants Rocha worked as a correctional officer and Hicks  
21 worked as a correctional sergeant at KVSP. (FAC at p. 2.)

22 3. Between February 4, 2018, when the events in this lawsuit occurred, and April 26,  
23 2018, when the complaint was filed, Washington submitted two grievances that were accepted for  
24 review at the first and second level: (1) KVSP-18-00387; and (2) KVSP-18-00478. (Lucas Decl. ¶¶ 5-  
25 6.)

26 4. During that same period, Washington also submitted four grievances that were accepted  
27 for review at the third level: (1) RJD-18-00630; (2) KVSP-18-00387; (3) RJD-17-05108; and (4) RJD-  
28 18-00368. (Voong Decl. ¶ 8.)

1           5.       Washington’s only grievance that concerned the incidents in this action was KVSP-18-  
2 00387. (Lucas Decl. ¶ 6; Voong Decl. ¶ 8, Ex. B.)

3           6.       Grievance log number KVSP-18-00387 was completed at the third level of review on  
4 July 13, 2018. (Voong Decl. ¶ 8.)

5           **D.       Defendants’ Motion for Summary Judgment**

6           Defendants argue that Plaintiff prematurely filed the complaint in this action before exhausting  
7 the administrative grievance review process.

8           It is undisputed that Plaintiff submitted administrative grievance log number KVSP-18-00387  
9 relating to the events and claims at issue in this action. The factual allegations in this grievance mirror  
10 those presented in the operative first amended complaint. There, as here, Plaintiff alleged that staff  
11 used excessive force on him on January 6, 2018, by entering his cell, pepper sprayed him, dragged him  
12 out of the cell, and then began kicking and hitting him with their batons. The grievance was classified  
13 as a staff complaint, bypassed the first level of review, and was “partially granted” at the second level  
14 of review on March 13, 2018. Plaintiff then submitted this grievance to the third level of review  
15 which was received on April 18, 2018.

16           On April 26, 2018, Plaintiff filed the original complaint, which was self-dated by Plaintiff on  
17 April 22, 2018. (Compl. at p. 3, ECF No. 1.) However, it is undisputed that the third level did not  
18 complete its review of Plaintiff’s grievance until more than two months later on July 11, 2018.  
19 (Voong Decl. ¶ 8.) An inmate must exhaust the available administrative remedies before he filed suit,  
20 even if the inmate fully exhausts while the suit is pending. See McKinney v. Carey, 311 F.3d 1198,  
21 1199 (9th Cir. 2002); Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006) (same).

22           Defendants have meet their burden of proof in demonstrating that Plaintiff failed to properly  
23 exhaust the administrative remedies prior to filing suit, and there is no evidence before the Court that  
24 something in this case made the existing administrative remedies effectively unavailable to Plaintiff or  
25 that Plaintiff is excused from the exhaustion requirement. Albino v. Baca, 757 F.3d at 1172; Sapp v.  
26 Kimbrell, 623 F.3d at 823; Nunez v. Duncan, 591 F.3d at 1224-1226; Brown v. Valoff, 422 F.3d at  
27 940. Accordingly, Defendants’ motion for summary judgment should be granted and the instant  
28 action should be dismissed, without prejudice.

1 In his opposition, Plaintiff argues that he should be excused from having to exhaust to the third  
2 level of review because his grievance was partially granted at the second level of review. Plaintiff  
3 further argues that Defendants’ motion is moot because he amended the complaint after his grievance  
4 was denied at the third level of review on July 13, 2018. Plaintiff’s arguments do not have merit.

5 An inmate exhausts the administrative process when the prison officials purport to grant relief  
6 that resolves the issue in the grievance to the inmate’s *satisfaction*. Harvey v. Jordan, 605 F.3d 681,  
7 684-85 (9th Cir. 2010) (finding prisoner had exhausted where his inmate appeal received a “partial  
8 grant” of his first request—“An inmate has no obligation to appeal from a grant of relief, or a partial  
9 grant that satisfies him, in order to exhaust his administrative remedies”). However, this Court must  
10 determine whether the entire relief was granted and whether the inmate has been “reliably informed by  
11 an administrator that no [further] remedies are available.” Id. at 683-84 (citations and quotations  
12 omitted).

13 In Harvey, the plaintiff received a partial grant of his grievance at the first level of review  
14 which resolved the issue entirely. There, Harvey received a disciplinary charge but failed to provide  
15 him with a hearing within thirty days. Harvey, 605 F.3d at 684. After several months passed without  
16 the necessary hearing, Harvey filed a grievance complaining of the failure to provide the hearing. Id.  
17 at 684-85. Harvey’s grievance was granted and “[t]he decision stated that he would be given a hearing  
18 and access to the videotape, and informed him that he could appeal within fifteen working days if he  
19 was ‘not satisfied’ with that resolution.” Id. After Harvey did not receive a hearing, he filed a  
20 “reminder” grievance several months later requesting the hearing. Under these circumstances, the  
21 Ninth Circuit held that Harvey was not required to appeal further because the ruling on the grievance  
22 satisfied Harvey’s request for the hearing with a videotape. Id. at 685.

23 Plaintiff’s exhibits belie his claim that he was confused as to whether he was required to  
24 further appeal his grievance. The bottom of the second level response specifically states that the  
25 appeal inquiry was complete, that documents were reviewed, and that staff did not violate policy. (Pl.  
26 Opp’n at 10, ECF No. 41.) On the next page, it was specifically stated:

27 ///

28 ///



1 If you wish to appeal the decision and/or exhaust administrative remedies, you must submit  
2 your staff complaint appeal through all levels of appeal review up to, and including, the  
3 Secretary's/Third Level of Review. Once a decision has been rendered at the Third Level,  
administrative remedies will be considered exhausted.

4 (Pl. Opp'n at 11.) This statement is consistent with the regulations governing the administrative  
5 grievance process. See Cal. Code Regs. tit. 15, § 3084.1(b) (unless otherwise stated, all appeals are  
6 subject to a third level of review before administrative remedies are deemed exhausted). This is not an  
7 instance where the administrative rules are so confusing that no prisoner could navigate them. Ross v.  
8 Blake, 136 S.Ct. at 1859 (one instance in which inmate may excused from exhaustion is if the  
9 "administrative scheme ... [is] so opaque that it becomes, practically speaking, incapable of use ..."  
10 and "no ordinary prisoner can discern or navigate it.") Here, both the grievance documents and the  
11 plain text of the regulations specifically required that Plaintiff resubmit his grievance to the third level  
12 of review before the administrative remedies were deemed exhausted.

13 To the extent Plaintiff contend that he was satisfied with the second level "partial grant," his  
14 own actions and words belie such claim. In appealing to the third level of review, Plaintiff specifically  
15 stated:

16 *Not satisfied.* For all the reasons stated and based on federal law U.S. Constitution 1st, 8th,  
17 14th and CDCR Title 15 and D.O.M. I wish to exhaust my administrative remedies and seek  
18 remedies in the U.S. Dist. Court. The 3 CAN's and custody staff that were present failed to  
protect me from being attacked by Hicks and Rocha.

19 (Pl. Opp'n 7.) (emphasis added). Plaintiff's appeal to the third level distinguishes this case from  
20 Harvey. Accordingly, given Plaintiff's failure to actually allege satisfaction with the second level  
21 response and the evidence demonstrating dissatisfaction, it cannot be determined that Plaintiff was  
22 excused from resubmitting his grievance to the third level review. Furthermore, while Plaintiff  
23 exhausted the administrative remedies through the third level of review, as explained herein, he did so  
24 after filing the instant action which is insufficient under the PLRA. McKinney v. Carey, 311 F.3d at  
25 1199.

26 Lastly, with regard to Plaintiff's argument that Defendants' instant motion is moot because he  
27 has since amended complaint, it is without merit. Although Plaintiff's first amended complaint was  
28 filed after his claims were exhausted, an inmate satisfies the exhaustion requirement for new claims

1 added in an amended complaint as long as he exhausted his administrative remedies with respect to  
2 such new claims prior to filing the amended complaint. See Rhodes v. Robinson, 621 F.3d 1002, 1003  
3 (9th Cir. 2010). In Cano v. Taylor, 739 F.3d 1214 (9th Cir. 2014), the Ninth Circuit added that new  
4 claims based on actions that took place before the original complaint was filed, were not barred under  
5 McKinney so long as plaintiff exhausted them prior to the filing of the amended complaint. Cano, 739  
6 F.3d at 1220. However, the exceptions outlined in Rhodes and Cano are not present here. The events  
7 giving rise to the “new” claims must not have occurred until after the filing of the original complaint,  
8 but the underlying events must be related to the events alleged in the original complaint. Id. Here, the  
9 factual allegations underlying Plaintiff’s excessive force and failure to intervene claims are based on  
10 precipitating events that took place before he filed this action. Such circumstances are not similar to  
11 the plaintiff in Cato who waited to raise his “new” claims until after the administrative remedies were  
12 exhausted. See also Vigil v. Valencia, No. 1:10-cv-01977-LJO-SAB, 2017 WL 3149636, at \*4 (E.D.  
13 Cal. July 25, 2017) (the date the original complaint was filed determines when an action is  
14 commenced for purposes of exhaustion of the administrative remedies). Accordingly, Plaintiff’s  
15 failure to exhaust until after the action was filed on April 26, 2018, warrants dismissal, without  
16 prejudice.<sup>1</sup>

#### 17 IV.

#### 18 RECOMMENDATIONS

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

- 20 1. Defendants’ motion for summary judgment be granted; and
- 21 2. The instant action be dismissed, without prejudice, for failure to exhaust the  
22 administrative remedies prior to filing suit.

23 ///

---

24  
25  
26 <sup>1</sup> This case is also distinguishable from the circumstances in Jackson v. Fong, 870 F.3d 928, 934 (9th Cir. 2017), where the  
27 plaintiff also filed suit prior to exhausting his grievance through the final level of review. However, there, while waiting  
28 for a third level response, the plaintiff was released from custody and the court granted him leave to amend the complaint.  
Id. at 932. The Ninth Circuit held that, “[a] plaintiff who was a prisoner at the time of filing his suit but was not a prisoner  
at the time of his operative complaint is not subject to a PLRA exhaustion defense.” Id. at 937. Here, Plaintiff remained in  
custody at the time he filed his amended complaint and currently remains in custody.

1           These Findings and Recommendations will be submitted to the United States District Judge  
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after  
3 being served with these Findings and Recommendations, the parties may file written objections with  
4 the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and  
5 Recommendations.” The parties are advised that failure to file objections within the specified time  
6 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.  
7 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

8  
9 IT IS SO ORDERED.

10 Dated: January 28, 2019



UNITED STATES MAGISTRATE JUDGE