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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN WILLIAMS,

Plaintiff,

No. CIV S-06-2381 FCD KJM P

vs.

D.L. RUNNELS, et al.,

Defendants.

ORDER AND

FINDINGS & RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se with an action under 42 U.S.C. § 1983. He alleges that defendants denied or delayed giving him adequate medical treatment in violation of his right to be free from cruel and unusual punishment under the Eighth Amendment. Defendants James, Roche and Cox have filed a motion to dismiss alleging that plaintiff failed to exhaust administrative remedies prior to filing this lawsuit.<sup>1</sup> Plaintiff has opposed the motion, and defendants have filed a reply.

<sup>1</sup> Contrary to the docket entry for the motion to dismiss, defendant Scovel is not a party to this motion. Defendant Scovel’s motion to dismiss for failure to state a claim was denied September 30, 2009. See Docket No. 57. Accordingly, all references to defendants in these Findings and Recommendations are to James, Roche and Cox. As for defendant Scovel, he was required to file an answer within fourteen days of the denial of his motion to dismiss. Fed. R. Civ. P 12(a)(4)(A). The Clerk of Court will be directed to enter a default against defendant Scovel. See Fed. R. Civ. P. 55(a); J2 Global Communications, Inc. v. Blue Jay, Inc., 2009 WL 4572726 \*4 (N.D.Cal.).

1 I. Plaintiff's Allegations And Defendants' Grounds For Dismissal

2 Plaintiff alleges that defendants were deliberately indifferent to and denied him  
3 adequate medical treatment for prostate cancer. See Second Am. Compl. (Docket No. 25) at 4-  
4 5.<sup>2</sup> He alleges that defendants failed to refer him to a urologist “until it was too late” and his  
5 “condition steadily worsened to the point of no treatment but removal only.” Id. at 3-4.  
6 Although his complaint does not explicitly state that his prostate gland was removed, plaintiff  
7 made that allegation clear in his opposition to defendants’ motions to dismiss under Federal Rule  
8 of Civil Procedure 12(b)(6), which the court denied as to all defendants except Warden Runnels.  
9 See Docket Nos. 54 and 57. Plaintiff seeks compensatory and punitive damages.

10 Defendants James, Roche and Cox again move to dismiss, arguing that the claims  
11 in the second amended complaint regarding pre-prostatectomy treatment have not been  
12 exhausted. See Defs.’ Mot. at 5-7 (Docket No. 56). Defendants concede that plaintiff has  
13 exhausted appeals complaining only about plaintiff’s post-prostatectomy treatment, but that  
14 treatment is not covered by plaintiff’s claims against James, Roche and Cox. Id.

15 II. Exhaustion

16 A. Standard Of Review

17 A motion to dismiss for failure to exhaust administrative remedies prior to filing  
18 suit arises under Rule 12(b) of the Federal Rules of Civil Procedure. See Wyatt v. Terhune, 315  
19 F.3d 1108, 1119 (9th Cir. 2003), cert. denied sub nom. Alameida v. Wyatt, 540 U. S. 810 (2003).  
20 In deciding a motion to dismiss for failure to exhaust non-judicial remedies, the court may look  
21 beyond the pleadings and decide disputed issues of fact. Id. at 1120. If the district court  
22 concludes that the prisoner has not exhausted non-judicial remedies, the proper remedy is  
23 dismissal of the claim without prejudice. Id.

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26 <sup>2</sup> Page references are to those assigned by the court’s CM/ECF system.

1           The exhaustion requirement is rooted in the Prison Litigation Reform Act  
2 (PLRA), which provides that “[n]o action shall be brought with respect to prison conditions  
3 under section 1983 of this title, . . . until such administrative remedies as are available are  
4 exhausted.” 42 U.S.C. § 1997e(a). The California Department of Corrections and  
5 Rehabilitation’s (CDCR) regulations provide administrative procedures at one informal and three  
6 formal levels of review to address an inmate’s claims. See Cal. Code Regs. tit. 15, §§ 3084.1-  
7 3084.7. Generally, a prisoner exhausts his administrative remedies when he receives a  
8 “Director’s Level Decision,” or third formal level of review, with respect to his issues or claims.  
9 Cal. Code Regs. tit. 15, § 3084.5. Defendants bear the burden of proving plaintiff’s failure to  
10 exhaust. Wyatt, 315 F.3d at 1119.

11           B. Factual Background

12           Defendants submit two declarations stating that plaintiff did not exhaust appeals  
13 regarding any pre-prostatectomy treatment involving these defendants. See Decl. of T.  
14 Robertson (Docket Nos. 56-3 and 56-4); Decl. of N. Grannis (Docket Nos. 56-1 and 56-2).  
15 Robertson, the Appeals Coordinator at HDSP, states that plaintiff filed three appeals concerning  
16 medical issues containing allegations against defendants while he was housed at High Desert  
17 State Prison (HDSP). In the first appeal, plaintiff complained of his state issued boots and  
18 medication for pain. See Robertson Decl. ¶ 6 (discussing Log No. HDSP-02-01055), Exs. 1, 2,  
19 3. In the second, plaintiff complained of the denial of medication and unsanitary conditions at  
20 the prison medical facility following his prostatectomy. Id. ¶ 7 (discussing Log No. HDSP-05-  
21 02947), Exs. 4, 5, 6. In the third, plaintiff alleged he was still suffering from post-surgery  
22 complications when he was shot with a “block gun” and received no medical attention  
23 afterwards, further complicating his condition. Id. ¶ 8 (discussing Log No. HDSP-06-00713),  
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1 Exs. 7, 8, 9.<sup>3</sup> Robertson states that plaintiff “has not filed any other administrative appeals, at the  
2 first level of review or beyond, regarding Defendants James, Roche, Cox and Scovel” concerning  
3 defendants’ treatment before the prostatectomy.<sup>4</sup> Id. ¶ 9. Defendants also present the affidavit of  
4 N. Grannis, Chief of the Inmate Appeals Branch of CDCR. Grannis states that plaintiff  
5 submitted no third-level appeals concerning defendants’ pre-surgery denial of referral to a  
6 specialist. See Grannis Decl. (Docket No. 56-1) ¶ 8.

7 In his opposition, plaintiff does not contend that his request for medically required  
8 footwear, Log No. HDSP-02-01055, exhausted the claims in the second amended complaint.  
9 Plaintiff also does not argue that the appeal concerning injuries from the “block gun” incident,  
10 Log No. HDSP-06-00713, satisfies the exhaustion requirement for this case.

11 Plaintiff contends the second appeal discussed in Robertson’s and Grannis’s  
12 declarations, Appeal Log No. 05-02947, concerns “past and present” medical issues broadly  
13 enough to exhaust the claims against James, Roche and Cox for their medical treatment before  
14 the prostatectomy. See Opp’n (Docket No. 58) at 6-8. The 602 form initiating that appeal states  
15 plaintiff’s position, in pertinent part, that it was “bad enough that 4-years went by without the  
16 medical attention I needed,” and “this recent surgery is a perfect example of the neglect by the  
17 medical department.” See Mot. to Dismiss, Ex. 4 (Docket No. 56-4) at 14-15. However, these  
18 are only general, passing references to plaintiff’s earlier treatment in a lengthy complaint about  
19 his post-prostatectomy medical care. Plaintiff identifies his recovery from surgery as “the  
20 problem” on the 602 form and asks for “the proper medicines to help in my recovery.” Id. at 10.  
21 Plaintiff exhausted this appeal, and apparently it led to some responsive measures by prison staff  
22 regarding his recovery. It does not, however, alert prison staff to a specific problem regarding

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24 <sup>3</sup> Defendants have submitted the Director’s Level decision for each of the administrative  
appeals at issue, with the Grannis declaration discussed below. See Docket No. 56-2.

25 <sup>4</sup> Robertson refers to a summary of plaintiff’s allegations he says are in paragraph four of  
26 his declaration. See Decl. of T. Robertson ¶ 9. The court presumes that Robertson meant to refer  
to paragraph five, which contains the summary of plaintiff’s complaint.

1 treatment before the prostatectomy. Log No. HDSP-05-2947 cannot stand as proof that plaintiff  
2 exhausted any claims about pre-surgery treatment.

3 Plaintiff also claims in his opposition that he filed additional appeals that were  
4 lost or destroyed. See Opp'n at 5-7. Failure to exhaust the administrative appeals process may  
5 be excused if prison staff renders the process effectively unavailable. See Nunez v. Duncan, 591  
6 F.3d 1217 (9th Cir. 2010). Plaintiff presents a fourth 602 form as evidence that he says "in  
7 essence nullifies" the declarations submitted by defendants because it involves pre-prostatectomy  
8 medical care and is not discussed in Robertson's or Grannis's declarations. See Opp'n at 7.  
9 Plaintiff apparently documents the history of that appeal, recorded as Log No. HDSP-03-0030,  
10 only to support his contention that defendants interfered with the appeals process. See Opp'n  
11 (Docket No. 58), Ex. A. He concedes the appeal was not exhausted. See Opp'n at 7.

12 This fourth appeal does notify prison staff of complaints about plaintiff's pre-  
13 prostatectomy care. However, there is no evidence that prison officials interfered with this  
14 appeal or any other. The attachments to plaintiff's opposition show that his third-level filing of  
15 this appeal was returned because it was untimely. See Opp'n at 34, Ex. I (N. Grannis declining  
16 the appeal at Director's Level for failure to meet submission deadlines).

### 17 C. Analysis

18 The primary purpose of an administrative appeal is to notify prison officials of a  
19 problem with prison conditions. Defendants correctly make the distinction between claims  
20 regarding pre-prostatectomy and post-prostatectomy treatment in their motion to dismiss for  
21 failure to exhaust. There is no evidence that plaintiff exhausted his claim for inadequate pre-  
22 surgery treatment against defendants James, Roche or Cox.

23 The one grievance form that is both exhausted and potentially relevant to this  
24 case, Appeal Log No. HDSP-05-2947, complains only of deficiencies in post-surgery treatment,  
25 and accuses defendants Cox and James of deliberate indifference to the conditions of his  
26 recovery. As noted, however, plaintiff's second amended complaint alleges deliberate

1 indifference against James, Roche and Cox for their failure to refer him to a specialist before a  
2 prostatectomy became necessary. See Second Am. Compl. at 4-5. Even with the liberal reading  
3 afforded pleadings by pro se litigants, the court can draw no reasonable inference from those  
4 allegations that would include James, Roche and Cox in a claim for post-surgery mistreatment.<sup>5</sup>  
5 Therefore the instant motion to dismiss for failure to exhaust should be granted.

6 III. Plaintiff's Motions

7 A. Sanctions

8 Plaintiff has moved for sanctions against defendants, pursuant to Federal Rule of  
9 Civil Procedure 11(c). See Docket No. 62. Plaintiff argues that defendants filed their second  
10 motion to dismiss, in which they argue that plaintiff has failed to exhaust his claims against  
11 James, Roche and Cox, for the purpose of harassing plaintiff and causing unnecessary delay. The  
12 motion is without merit and will be denied.

13 B. "Summary Judgment"

14 On January 13, 2010, plaintiff submitted a paper styled "Notice of Motion for  
15 Summary Judgment." See Docket No. 71. It was docketed as a motion for summary judgment,  
16 but on review it contains only a statement of alleged damages, without any argument of fact or  
17 law in support of summary judgment. It asks for no relief at all. The court will direct the Clerk  
18 of Court to re-characterize the filing as a statement of damages.

19 C. "Imminent Danger"

20 Plaintiff has submitted a motion "to present further evidence of Imminent  
21 Danger," see Docket No. 73, which the court construes as a request for the court to reconsider its  
22 denial of plaintiff's earlier motion for a protective order, wherein the plaintiff alleged he was in  
23 imminent danger of not receiving medication for back pain. See Docket Nos. 67, 74. Plaintiff

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25 <sup>5</sup> In contrast to the claims against James, Roche or Cox, the claim against defendant  
26 Scovel refers to that defendant's actions "upon [plaintiff's] return" from surgery and alleges  
those actions caused "phenomenal pain in the weeks of recovery ahead." Second Am. Compl. at  
5-6.

1 submits no evidence to support reconsideration of the court’s denial. Therefore plaintiff’s  
2 request should be denied.<sup>6</sup>

3 D. Summary Judgment

4 Plaintiff has filed two identical motions for summary judgment. See Docket Nos.  
5 77, 81. Because plaintiff has not exhausted his claims against defendants James, Roche and Cox,  
6 the motions for summary judgment against them are moot. As to defendant Scovel, they should  
7 be denied even though Scovel has not answered them. Summary judgment is appropriate when  
8 the movant demonstrates that there exists “no genuine issue as to any material fact and that the  
9 moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c ). In both of his  
10 motions, plaintiff submits no discussion of the facts of his claim against Scovel such that the  
11 court could decide there are no genuine issues of material fact and enter judgment in plaintiff’s  
12 favor under Federal Rule of Civil Procedure 56. The motions should be denied without  
13 prejudice, subject to renewal of a motion against any remaining defendants, if a schedule for  
14 dispositive motions is set in the future.

15 E. Motions For Judicial Intervention

16 Plaintiff’s multitudinous filings have become a burden for the court and have  
17 contributed to delay in the resolution of pending matters in this case. Plaintiff shall not file any  
18 new motions for summary judgment until discovery has concluded. Failure to honor this  
19 restriction may subject plaintiff to sanctions, including dismissal of this case.

20 Plaintiff has submitted two other filings that are identical to each other, at docket  
21 numbers 78 and 83. Although they are docketed, respectively, as a motion for summary  
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23 <sup>6</sup> Plaintiff begins his motion to present further evidence of imminent danger by stating he  
24 wishes to add three more defendants to this cause of action. At this stage in the proceedings,  
25 without an agreement from defendants, plaintiff can add new defendants only with permission of  
26 the court, after a showing consistent with the requirements of Federal Rule of Civil Procedure  
15(a)(2) and Local Rule 220. Although the court construes the motion solely as one seeking the  
court’s reconsideration of its denial of injunctive relief, the court notes that plaintiff’s submission  
also does not meet the requirements for requests to add defendants.

1 judgment and a “motion regarding discovery,” the court construes them as motions for judicial  
2 intervention in obtaining information to serve defendant Dial, a physician who, plaintiff alleges,  
3 rendered inadequate medical treatment.<sup>7</sup> The court earlier instructed plaintiff to seek Dr. Dial’s  
4 information through discovery or the California Public Records Act, § 6250 et seq. See Order at  
5 2 (docket no. 75). The court left open the possibility of judicial intervention if plaintiff’s efforts  
6 to obtain the information were denied. Id.

7 Plaintiff supports his motions for judicial intervention with a letter from the  
8 litigation coordinator at HDSP, stating that CDCR had denied his request for information to  
9 serve Dr. Dial. See Docket No. 82, Ex. A. The letter also states Dr. Dial is no longer employed  
10 by CDCR. Id.

11 In light of plaintiff’s apparent good faith effort to obtain the information necessary  
12 to serve Dr. Dial, the court finds plaintiff’s first motion for judicial intervention well taken.<sup>8</sup>  
13 Defendants’ counsel shall query CDCR to ascertain the whereabouts of Dr. Dial. If defendant  
14 Dial is employed with another California state agency, or if counsel is otherwise informed of the  
15 business address of defendant Dial, counsel shall provide the business address to plaintiff. If  
16 counsel is able to ascertain only the residence address for Dr. Dial, counsel shall promptly  
17 provide that information to the U.S. Marshals Service to facilitate service. Defendants’ counsel  
18 shall file and serve a report, informing the court of its efforts to comply with this order and the  
19 results of its inquiry, within thirty days of the entry of this order.

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22 <sup>7</sup> Plaintiff styles his first motion for judicial intervention as one for relief pursuant to the  
23 California Public Records Act “in contrast to... summary judgment.” See Docket No. 78.  
24 Plaintiff in passing suggests summary judgment as an alternative form of relief at the end of his  
25 motion, although erroneously. The “motion regarding discovery” contains the same passing,  
26 alternative request for summary judgment, also unsupported. The court will direct the Clerk of  
Court to re-characterize both submissions as motions for judicial intervention.

<sup>8</sup> Because the second motion for judicial intervention is duplicative of the first, it is moot.

1 V. Conclusion

2 In accordance with the above, IT IS HEREBY ORDERED that:

3 1. Plaintiff's motion for sanctions against defendants (Docket No. 62) is denied.

4 2. The Clerk of Court is directed to re-characterize Docket No. 71 as "plaintiff's  
5 statement of damages."

6 3. The Clerk of Court is directed to re-characterize Docket Number 78 and  
7 Number 83 each as "motion for judicial intervention in obtaining information for service of  
8 defendant Dial."

9 4. Plaintiff's motion for judicial intervention (Docket No. 78), as re-  
10 characterized, is granted to the extent described in the discussion above.

11 5. Defendants' counsel shall query CDCR to ascertain the whereabouts of  
12 defendant Dial. Defendants' counsel shall file and serve the report directed above, informing the  
13 court of efforts to comply with this order, within thirty days of the entry of this order.

14 6. Plaintiff's motion for judicial intervention (Docket No. 83), as re-  
15 characterized, is denied as moot.

16 7. The Clerk of Court is directed to enter default against defendant Scovel.

17 IT IS HEREBY RECOMMENDED that:

18 1. Plaintiff's motion to present further evidence of imminent danger, construed  
19 by the court as a motion to reconsider (Docket No. 73), be denied.

20 2. The motion to dismiss by defendants James, Roche and Cox (Docket No. 56)  
21 be granted for failure to exhaust administrative remedies.

22 3. Plaintiff's motions for summary judgment (Docket Nos. 77 and 81) be denied  
23 as to defendants James, Roche and Cox, and denied without prejudice as to defendant Scovel.

24 These findings and recommendations are submitted to the United States District  
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
26 one days after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
3 shall be served and filed within seven days after service of the objections. The parties are  
4 advised that failure to file objections within the specified time may waive the right to appeal the  
5 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). **If a party does not**  
6 **plan to file objections or a reply, that party is encouraged to file a prompt notice informing**  
7 **the court of as much.**

8 DATED: August 31, 2010.

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U.S. MAGISTRATE JUDGE