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

DEVONTE B. HARRIS,

Plaintiff,

No. CIV S-09-1523 GGH P

vs.

L. ZAMUDIO, et al.,

Defendants.

ORDER &

FINDINGS AND RECOMMENDATIONS

Introduction

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ motion to dismiss, filed on September 7, 2010, to which plaintiff filed an opposition after which defendants filed a reply.

Plaintiff’s Allegations

In his second amended complaint, plaintiff alleges that there were several incidents of physical altercations between Bloods and Crips in the fall and winter of 2004 at California State Prison - Sacramento (CSP-Sac) and that there was a prison riot on April 10, 2005 in C-Facility involving Bloods and Crips, in which plaintiff was not involved but in which defendant Zamudio took an active part in quelling the riot, such that he had direct knowledge of the potential for future violence. Second Amended Complaint (SAC), pp. 4-5. Plaintiff alleges that on June 14, 2005, when Bloods and Crips were released to the yard for the first time

1 following the riot, defendant Zamudio, heading toward the door exiting to the yard, observed an
2 inmate palming what appeared to be an inmate-manufactured weapon, but did not press an alarm
3 or otherwise alert staff. *Id.*, at 5-6, 19. By not acting appropriately, plaintiff alleges that
4 defendant Zamudio failed to protect him in violation of plaintiff's Eighth Amendment rights
5 from being the victim of a stabbing assault, when Zamudio only activated his alarm after the riot
6 started. *Id.*, at 7, 12. Plaintiff suffered puncture wounds to his stomach and right shoulder, blunt
7 trauma to his face, abrasions on his left leg and his knees; following his ambulance transport to
8 the hospital it was discovered that plaintiff's left lung had collapsed and he had sustained a minor
9 liver injury. *Id.* Plaintiff had several surgeries during nine days of hospitalization. *Id.*

10 Plaintiff alleges that defendants Walker, Forester and Hill deprived him of
11 outdoor exercise from June 23, 2005 (following his return from the hospital) until August 4,
12 2005, a period of six weeks; plaintiff indicates he was to have normal activity as of June 27,
13 2005. SAC, pp. 7-13. These defendants were members of a classification committee who had
14 the responsibility to classify him while he was in administrative segregation (Ad Seg) and to
15 assign him to a yard group so that he could receive outdoor exercise, but failed to do so. *Id.*, at
16 10. This deprivation was a violation of plaintiff's Eighth Amendment rights. *Id.*, at 12-13.
17 Plaintiff seeks declaratory relief and money, including punitive, damages. *Id.*, at 3.

18 Motion to Dismiss

19 Defendants move for dismissal, under non-enumerated Fed. R. Civ. P. 12(b) and
20 under Fed. R. Civ. P. 12(b)(6), on the following grounds: 1) plaintiff failed to exhaust his
21 administrative remedies before filing suit against defendant Zamudio; 2) plaintiff fails to state a
22 claim as to defendants Walker, Hill and Forester; and 3) defendants are entitled to qualified
23 immunity. Notice of Motion; Motion to Dismiss (MTD), p. 2.

24 Legal Standard under Non-Enumerated Fed.R.Civ.P. 12(b)

25 In a motion to dismiss for failure to exhaust administrative remedies under non-
26 enumerated Rule 12(b) of the Federal Rules of Civil Procedure, defendants "have the burden of

1 raising and proving the absence of exhaustion.” Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.
2 2003). The parties may go outside the pleadings, submitting affidavits or declarations under
3 penalty of perjury, but plaintiff must be provided with notice of his opportunity to develop a
4 record. Wyatt v. Terhune, 315 F.3d at 1120 n.14. The court provided plaintiff with such fair
5 notice by Order, filed on June 3, 2010 (docket # 25).

6 Should defendants submit declarations and/or other documentation demonstrating
7 an absence of exhaustion, making a prima facie showing, plaintiff must refute that showing.
8 Plaintiff may rely upon statements made under the penalty of perjury in the complaint if the
9 complaint shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to
10 the court’s attention those parts of the complaint upon which plaintiff relies. If the court
11 determines that plaintiff has failed to exhaust, dismissal without prejudice is the appropriate
12 remedy for non-exhaustion of administrative remedies. Wyatt v. Terhune, 315 F.3d at 1120.

13 PLRA Requirements

14 The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) provides that,
15 “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any
16 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
17 such administrative remedies as are available are exhausted.” Inmates seeking injunctive relief
18 must exhaust administrative remedies. Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999). In Booth
19 v. Churner, 532 U.S. 731,741, 121 S. Ct. 1819, 1825 (2001), the Supreme Court held that
20 inmates must exhaust administrative remedies, regardless of the relief offered through
21 administrative procedures. Therefore, inmates seeking money damages must also completely
22 exhaust their administrative remedies. Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819 (inmates
23 seeking money damages are required to exhaust administrative remedies even where the
24 grievance process does not permit awards of money damages). The United States Supreme Court
25 has held that exhaustion of administrative remedies under the PLRA requires that the prisoner
26 complete the administrative review process in accordance with the applicable procedural rules.

1 Woodford v. Ngo, 548 U.S. 81, 126 S. Ct. 2378 (2006). Thus, in the context of the applicable
2 PLRA § 1997e(a) exhaustion requirement, any question as to whether a procedural default may
3 be found should a prisoner plaintiff fail to comply with the procedural rules of a prison's
4 grievance system has been resolved: the PLRA exhaustion requirement can only be satisfied by
5 "proper exhaustion of administrative remedies....," which means that a prisoner cannot satisfy the
6 requirement "by filing an untimely or otherwise procedurally defective administrative grievance
7 or appeal." Woodford v. Ngo, *supra*, at 84, 126 S. Ct. at 2382. Moreover, 42 U.S.C. § 1997e(a)
8 provides that no action shall be brought with respect to prison conditions *until* such
9 administrative remedies as are available are exhausted. McKinney v. Carey, 311 F.3d 1198 (9th
10 Cir. 2002), *but see Rhodes v. Robinson*, 621 F.3d 1002 (9th Cir. 2010)(PLRA exhaustion
11 requirement satisfied with respect to new claims within an amended or supplemental complaint
12 so long as administrative remedies are exhausted prior to the filing of the amended or
13 supplemental complaint).

14 Administrative Exhaustion Procedure

15 In order for California prisoners to exhaust administrative remedies, they must
16 proceed through several levels of appeal: 1) informal resolution, 2) formal written appeal on a
17 CDC 602 inmate appeal form, 3) second level appeal to the institution head or designee, and 4)
18 third level appeal to the Director of the California Department of Corrections. Barry v. Ratelle,
19 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. xv, § 3084.5). A final
20 decision from the Director's level of review satisfies the exhaustion requirement. *Id.* at 1237-38.

21 Defendant Zamudio

22 Plaintiff's first appeal claiming defendant Zamudio failed to take reasonable steps
23 to protect him when he failed to activate an alarm upon observing a weapon in another inmate's
24 hand, ultimately resulting in the injuries plaintiff suffered during the June 14, 2005,¹ riot was

25
26 ¹ Defendant Zamudio incorrectly dated the riot causing the injuries as having occurred on
June 24, 2005. Motion to Dismiss, p. 3.

1 filed on August 16, 2005.² MTD, p. 3, Declaration of A. Pereira, an appeals coordinator at CSP-
2 Sac, Exhibit A, docket # 30-4, p. 6.³ The informal level of review was bypassed and on
3 September 23, 2005, the appeal was denied at the first level for plaintiff's failure to have
4 provided sufficient evidence of defendant Zamudio's negligence with regard to his duties. *Id.*, at
5 5. Plaintiff appealed the decision to the second level of review on October 11, 2005, and the
6 appeal to the second level was denied on November 7, 2005, once again for insufficient
7 evidence. MTD, p. 3, Pereira Dec., Exh. B, dkt. # 30-4, pp. 37-39.⁴

8 Defendant, citing the declaration of D. Foston, chief of the inmate appeals branch
9 in Sacramento, points out that plaintiff then had fifteen (15) working days to appeal to the final
10 third level of review. MTD, p. 3, Foston Dec., dkt. # 30-2, ¶8. Foston avers that the IAB will
11 allow late appeals if the appeal is filed within a reasonable time period but that if it is screened
12 out as untimely, it is not fully exhausted because it never reaches the final level of review.
13 Foston Dec. at ¶¶ 8-9.

14 Defendant Zamudio maintains that plaintiff was in general population at CSP-Sac,
15 from October 23, 2005, until December 4, 2005, the only exception being that he was
16 temporarily released to the California Medical Facility on November 4, 2005, but was returned to
17 CSP-Sac the same day. MTD, pp. 3-4, Declaration of Deputy Attorney General Jarhett Blonien,
18 counsel for defendants, Exh. B, dkt. # 30-3, p. 10.⁵ Plaintiff submitted his first appeal to third
19 level on May 1, 2006, which was screened out and never reviewed due to untimeliness. MTD, p.
20

21 ² While the form is file-stamped August 16, 2005, plaintiff dated the 602 as filed on
22 August 15, 2005, which is no doubt why plaintiff refers to Aug. 15, 2005 as the date the appeal
was filed.

23 ³ The court's electronic pagination system is referenced.

24 ⁴ The entire second level appeal appears to have been comprised of pages 39-52 in dkt. #
25 30-4.

26 ⁵ These movement history records were certified/authenticated by affidavit of the
custodian of records at CSP-Corcoran. Blonien Dec., Exh. A, dkt. # 30-3.

1 4, Foston Dec., Exh. A, dkt. # 30-2, p. 7. Defendant Zamudio notes that plaintiff concedes that
2 his failure to protect claim was not administratively exhausted in his second amended complaint.
3 MTD, p. 4, see SAC, p. 2.

4 In his opposition, plaintiff states that he did not have a reasonable opportunity to
5 comply with time constraints and provided a written explanation to the third level of review, but
6 his appeal was summarily denied without any investigation to determine whether plaintiff was
7 deprived of a reasonable opportunity to appeal timely. Opposition (Opp.), p. 2. Plaintiff notes
8 that he did not file his initial appeal until two months after the riot in which he was injured after
9 he was exonerated from having participated in the June 14, 2005, riot and the appeal, as noted
10 above, was processed through the first and second levels. *Id.*, at 3. Plaintiff states that he did not
11 receive his second level appeal response until November 21, 2005, not as dated on the appeal,
12 November 9, 2005, a discrepancy he claims is common. *Id.*, at 3, 6. (Actually, defendant dates it
13 as November 7, 2005). However, this point is not particularly germane in light of plaintiff's
14 having failed to file the third level appeal until May of 2006. In any event, plaintiff indicates that
15 his calculation for the response time was from November 21, 2005, and he states that while he
16 wrote his response to the second level denial on November 23, 2005, he did not file the third
17 level appeal at that time due to a lack of postage. *Id.*, at 4, Exh. A, plaintiff's Declaration, dkt #
18 37, ¶ 8. He avers that on December 4, 2005, when he was sent to Ad Seg, his appeal was among
19 the personal property that was inventoried and stored. *Id.* at ¶ 9. On February 22, 2006, he was
20 transferred to Pelican Bay State Prison (PBSP) Ad Seg; his appeal was not among the personal
21 property issued to him and he only obtained it after putting in several requests. *Id.* at ¶¶10-11.
22 Plaintiff explained why his appeal was late to the third level appeal reviewer, but it was
23 nevertheless screened out as untimely on May 1, 2006. *Id.* at ¶ 12. Thereafter, he re-submitted it,
24 explaining again why it had not been filed timely, but it was again screened out as untimely on
25 May 31, 2006. Opp., at 4-5, plaintiff's Dec., dkt # 37 at ¶ 12-13. This is substantiated by the
26 records submitted by defendant. See MTD, Foston Dec., Exh. A, dkt. # 30-2, p. 7.

1 Plaintiff cites CAL. CODE REGS. tit.XV, § 3084.3(c)(6), which he avers states appeals
2 can be screened out if times limits are exceeded and the appellant had the opportunity to file
3 within prescribed time constraints;⁶ and the DOM⁷ § 54100.8.1, that provides that the appeal
4 coordinator is to “ensure that an inmate ... had, in fact, the opportunity to file in a timely
5 manner”⁸ before screening it out as untimely. Opp., p. 6. Plaintiff also maintains that he was
6 subjected to many moves during the pendency of his appeal, arguing that the movement history
7 attached to defendant’s exhibit, Blonien Dec., Exh. B, does not take account of moves from cell
8 to cell and building to building. Id., at 6-7.

9 In reply, defendant counters that plaintiff’s excuses for late filing lack merit and
10 that he had more than adequate time to file his third level appeal. Reply, pp. 2-5. Defendant
11 points to CAL. CODE REGS. tit.XV, § 3138 (2010),⁹ which upon the request of an indigent inmate,
12 directs that writing supplies and postage for up to five first-class letters a week be provided. Id.,
13 at 4. Defendant also cites CAL. CODE REGS. tit.XV, § 3084.7(c) (2010), which defendant contends
14 allows for the appeals coordinator to fax an inmate’s third level review appeal.¹⁰ Id. Defendant
15 points out that there were 11 days between the time that plaintiff indicates he wrote his response
16

17 ⁶ From the court’s research, there currently is no such subsection, although § 3084.3(c)
18 permits an inmate whose appeal has been rejected for failing to attach all supporting documents
19 necessary an additional 30 days to obtain the necessary documents and resubmit the appeal and §
20 3084.3(d) permits the appeals coordinator to grant further time extensions beyond the initial 30-
21 day extension should the inmate provide a reasonable explanation as to why supporting
22 documents are still not available.

21 ⁷ Department Operations Manual.

22 ⁸ Quoting DOM § 54100.8.1 in relevant part.

23 ⁹ Defendant does not make clear that this provision existed at the time relevant for
24 plaintiff in 2005-2006.

25 ¹⁰ The court is unable to locate the 2010 version of CAL. CODE REGS. tit.XV, § 3084.7(c)
26 as described by defendant in the Westlaw/Lexis electronic databases even though both indicate
the regulation is current through 2011. Local Rule 133(i)(3) requires that, inter alia, regulatory
authority relied on that is not available through Westlaw/Lexis “shall be appended to the brief or
other document in which the authority is cited.” The court cannot locate any such document.

1 to the second level review on Nov. 23, 2005, and the time he was placed in Ad Seg, on Dec. 4,
2 2005. *Id.* In addition, defendant contends that inmates in Ad Seg can make timely appeals, and
3 point to plaintiff's own appeal that he exhausted while in Ad Seg, attached to his opposition. *Id.*,
4 citing *Opp.*, at 48.

5 Analysis

6 It is not at all clear that plaintiff would have had the opportunity either to receive
7 the postage to mail out his third level inmate appeal in November of 2005, or to have it faxed
8 when defendant points to regulations that would permit postage and faxing that apparently date
9 from 2010. Nevertheless, while plaintiff may well have encountered difficulty in his effort to
10 process his appeal to the third level, the court must agree with defendant that plaintiff had an
11 adequate opportunity to file a timely appeal to the third level when he had it written by
12 November 23, 2005, and was not placed in Ad Seg until December 4, 2005. The court notes that
13 among the reasons for which an appeal may be cancelled includes the situation where the time
14 limit is exceeded even though the inmate "had the opportunity to submit within the prescribed
15 time constraints." CAL. CODE REGS. tit.XV, § 3084(c)(4). Moreover, while he was placed in Ad Seg
16 at CSP-Sac, presumably before his transfer to PBSP on February 22, 2006, he was evidently able
17 to process another inmate appeal. The appeal defendant cited as evidence provided by plaintiff
18 himself that demonstrates he could file an inmate appeal and administratively exhaust a claim
19 while in Ad Seg, shows that plaintiff filed a 602 appeal (log no. SAC-C- 05-01721) on July 20,
20 2005, seeking the return of his tennis shoes and sweatshirt that had been confiscated following
21 the June 14, 2005, incident. *Opp.*, p. 32. Following the August 9, 2005, informal level denial,
22 plaintiff filed his first formal level appeal on September 12, 2005. *Id.* Following the first level
23 response, plaintiff appealed to the second level on October 20, 2005. *Id.* at 33. The second level
24 denial is dated December 5, 2005 (apparently a day after he had been placed in Ad Seg at CSP-
25 Sac). *Id.* at 44. The third level appeal denial of log no. SAC-C- 05-01721 is dated April 7, 2006.
26 *Id.* at 48. It is evident that plaintiff's appeal to the third level had to have been made subsequent

1 to his placement in Ad Seg. Plaintiff's ability to process this appeal timely significantly
2 undermines plaintiff's representation that circumstances precluded his ability to file the
3 administrative appeal at issue within a more reasonable time. Pursuant to Woodford v. Ngo,
4 supra, at 84, 126 S. Ct. at 2382, plaintiff's third level appeal with regard to defendant Zamudio,
5 screened out as untimely some five months beyond the deadline, simply does not satisfy the
6 administrative exhaustion requirement and this defendant and claim must be dismissed.

7 Legal Standard for Fed. R. Civ. 12(b)(6) Motion

8 In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6),
9 a complaint must contain more than a "formulaic recitation of the elements of a cause of action;"
10 it must contain factual allegations sufficient to "raise a right to relief above the speculative
11 level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007). "The
12 pleading must contain something more...than...a statement of facts that merely creates a suspicion
13 [of] a legally cognizable right of action." Id., quoting 5 C. Wright & A. Miller, Federal Practice
14 and Procedure § 1216, pp. 235-236 (3d ed. 2004). "[A] complaint must contain sufficient factual
15 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal,
16 ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955).
17 "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
18 draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

19 In considering a motion to dismiss, the court must accept as true the allegations of
20 the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740, 96 S.
21 Ct. 1848, 1850 (1976), construe the pleading in the light most favorable to the party opposing the
22 motion and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421,
23 89 S. Ct. 1843, 1849, reh'g denied, 396 U.S. 869, 90 S. Ct. 35 (1969). The court will "'presume
24 that general allegations embrace those specific facts that are necessary to support the claim.'" National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 256, 114 S.Ct. 798, 803
25 (1994), quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992).
26

1 Moreover, pro se pleadings are held to a less stringent standard than those drafted by lawyers.
2 Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 596 (1972).

3 The court may consider facts established by exhibits attached to the complaint.
4 Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also
5 consider facts which may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d
6 1385, 1388 (9th Cir. 1987); and matters of public record, including pleadings, orders, and other
7 papers filed with the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir.
8 1986). The court need not accept legal conclusions “cast in the form of factual allegations.”
9 Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

10 A pro se litigant is entitled to notice of the deficiencies in the complaint and an
11 opportunity to amend, unless the complaint’s deficiencies could not be cured by amendment. See
12 Noll v. Carlson, 809 F. 2d 1446, 1448 (9th Cir. 1987).

13 Defendants Forsterer, Hill and Walker

14 Defendants argue that they are entitled to qualified immunity for plaintiff’s claims
15 of a deprivation of outdoor exercise for six weeks in violation of the Eighth Amendment. MTD,
16 pp. 12-14. Defendants also quote from a prior screening order of this court in this case wherein
17 the undersigned had stated that plaintiff’s claim that he did not receive yard for “perhaps a period
18 of six weeks...does not state a constitutional deprivation, particularly where there is a clear
19 inference to be drawn that plaintiff appears to have been recuperating from one or more stab
20 wounds during this period.” MTD, p. 7, quoting Order, filed on September 25, 2009, p. 5.

21 Plaintiff counters that the defendants’ failure, as the classification committee
22 responsible for his yard group assignment, to classify him and assign him to a yard group led to
23 his not receiving yard time while he was in Ad Seg, linking them directly to his alleged exercise
24 deprivation. Opp., pp. 11-12. Plaintiff claims that the classification chrono he has attached as
25 Ex. G (p. 37) to his second amended complaint is “forged.” Id. at 12. The chrono, dated June
26 29, 2005, appears to have been signed by defendants Walker and Forsterer and includes, inter

1 alia, defendant Hill as a member of the Ad Seg Unit (ASU) Institutional Classification
2 Committee (ICC), and states that plaintiff declined to appear before the ICC for his initial ASU,
3 but that he received the appropriate notice and the hearing was held in absentia. SAC, Ex. G, p.
4 37. It recounts that following his transport to the hospital on June 14, 2005, he was placed in Ad
5 Seg on June 23, 2005 for “participation in a riot.” Id. It states that he would be retained in Ad
6 Seg in a single cell and walk-alone yard, pending adjudication of a rules violation report for
7 participation in a riot. Id. However, the chrono then goes on contradictorily to state the June 14,
8 2005 RVR had been adjudicated and plaintiff had been found guilty. Id. However, this is not
9 substantiated by another exhibit plaintiff attached to his second amended complaint, wherein
10 plaintiff was found not guilty of participation in the June 14, 2005 riot at the RVR hearing and
11 the charge was dismissed. SAC, Ex. A, p. 17. Moreover, the date of the disposition appears to
12 have been July 18, 2005, which is some weeks after the June 29, 2005 ICC chrono wherein it is
13 indicated that plaintiff had already been found guilty. Plaintiff, however, is focused on the
14 representation that he received walk-alone yard, which he insists simply did not occur. Opp., p.
15 13. Plaintiff also asserts that the ICC chrono shows that defendants in no way evidenced any
16 concern for his health and did assign him to walk-alone yard, which he continues to insist never
17 occurred, such that his failure to have been provided any yard cannot be attributed to any effort
18 by defendants to make sure he was recuperated. Id. at 12. He also makes the point that medical
19 staff had discharged him on June 27, 2005, from the treatment center and returned him to
20 “normal activity” and it would not have been within the non-medical defendants’ purview to
21 restrict his yard access for a medical reason. Id. at 14, citing SAC, Ex. F, p. 35.

22 In reply, defendants contend that plaintiff fails to allege adverse effects from the
23 deprivation of outdoor exercise or to demonstrate defendants’ deliberate indifference. Reply, pp.
24 5- 8.

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1 Qualified Immunity

2 In resolving a claim for qualified immunity the court addresses two questions: (1)
3 whether the facts, when taken in the light most favorable to plaintiff, demonstrate that the
4 officers' actions violated a constitutional right and (2) whether a reasonable officer could have
5 believed that his conduct was lawful, in light of clearly established law and the information the
6 officer possessed. Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987). Although the
7 Supreme Court at one time mandated that lower courts consider these two questions in the order
8 just presented, more recently the Supreme Court announced that it is within the lower courts'
9 discretion to address these questions in the order that makes the most sense given the
10 circumstances of the case. Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808 (2009).

11 Eighth Amendment - Outdoor Exercise

12 Although a temporary denial of exercise does not per se constitute an Eighth
13 Amendment violation, denial of all outdoor exercise for an extended period may. May v.
14 Baldwin, 109 F.3d 557, 565 (9th Cir. 1997) (temporary deprivation of 21 days without outdoor
15 exercise with no medical effects not a substantial deprivation); Hayward v. Procnier, 629 F.2d
16 599, 603 (9th Cir. 1980) (30-day emergency lockdown period was an unusual circumstance
17 justifying denial of outdoor exercise); see also LeMaire v. Maass, 12 F.3d 1444, 1457-1458 (9th
18 Cir. 1993) (while exercise is "one of the basic human necessities protected by the Eighth
19 Amendment," where restriction from outdoor exercise arose from inmate's abuse of the privilege
20 and posing a security risk, plaintiff's Eighth Amendment claim for deprivation thereof failed);
21 but see, Spain v. Procnier, 600 F.2d 189, 199-200 (9th Cir. 1979) (upholding district court
22 decision that inmates confined with almost total lack of outdoor exercise for period of years was
23 cruel and unusual punishment, and requiring they be allowed one hour of outdoor exercise, five
24 days a week, absent poor weather, unusual circumstances); see also, Keenan v. Hall, 83 F.3d
25 1083, 1090 (9th Cir. 1996) (defendants not entitled to summary judgment where plaintiff
26 produced evidence showing deprivation of outdoor exercise for six-month period in

1 administrative segregation). The Ninth Circuit has clarified the elements necessary to state a
2 deprivation that would rise to the level of an Eighth Amendment violation:

3 An Eighth Amendment claim that a prison official has deprived
4 inmates of humane conditions must meet two requirements, one
5 objective and one subjective. Allen v. Sakai, 48 F.3d 1082, 1087
6 (9th Cir.1995). “Under the objective requirement, the prison
7 official’s acts or omissions must deprive an inmate of the minimal
8 civilized measure of life’s necessities. The subjective requirement,
9 relating to the defendant’s state of mind, requires deliberate
10 indifference.” Id. (citations omitted).

11 Lopez v. Smith, 203 F.3d 1122, 1132-1133 (9th Cir. 2000).

12 In Lopez, the Ninth Circuit found that plaintiff’s claim that he was denied all
13 outdoor exercise for six and a half weeks met the objective requirement for an Eighth
14 Amendment claim. 1132-1133. The Lopez court noted that:

15 The clear implication of May is that temporary denials of outdoor
16 exercise must have adverse medical effects to meet the Eighth
17 Amendment test, while long-term deprivations are substantial
18 regardless of effects.

19 Lopez v. Smith, 203 F.3d at 1133 n. 15 (see May v. Baldwin, supra).

20 The Ninth Circuit reversed a district court finding that denial of out-of-cell
21 exercise for nearly fourteen months did not demonstrate a genuine issue of material fact as to
22 deliberate indifference. On the other hand, the Ninth Circuit has also found prison officials to be
23 entitled to qualified immunity for extended deprivation of outdoor exercise after a prison riot or
24 in the face of prison attacks. Noble v. Adams , 636 F.3d 525, 529 (9th Cir. 2011) (it is not clearly
25 established “precisely how, according to the Constitution, or when a prison facility housing
26 problem inmates must return to normal operations, including outside exercise, during and after a
state of emergency called in response to a major riot...”); id., citing Norwood v. Vance, 591 F.3d
1062 (9th Cir. 2010), for the proposition that courts defer to the judgment of prison officials “so
long as the judgment does not manifest either deliberate indifference or an intent to inflict harm.”

1 Plaintiff is insistent that he never received any form of outdoor exercise for a six-
2 week period. He also maintains that defendants' representation in the ICC chrono he produced
3 that he was to have walk-alone yard is simply unsupported by what occurred. While plaintiff
4 during part of this period was being held in Ad Seg for his allegedly having participated in a riot
5 (an allegation later discharged as he had apparently been a victim of an unprovoked attack), even
6 during that time in Ad Seg, there appears to have been no reason why he should not have
7 received the walk-alone yard to which defendants purportedly assigned him and if he was so
8 assigned by defendants and yet did not receive access to any form of yard, such an omission
9 makes out a claim for deliberate indifference. Under these circumstances, plaintiff's allegations
10 rise to the level of a clearly established Eighth Amendment violation to which defendants do not
11 show entitlement to qualified immunity.

12 Accordingly, IT IS ORDERED that a district judge be randomly assigned to this
13 case.

14 IT IS HEREBY RECOMMENDED that defendants' September 7, 2010 (docket #
15 30), motion to dismiss be granted for plaintiff's failure to exhaust administrative remedies as to
16 defendant Zamudio and this defendant be dismissed, and denied as to defendants Forrester, Hill
17 and Walker.

18 These findings and recommendations are submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
20 days after being served with these findings and recommendations, any party may file written
21 objections with the court and serve a copy on all parties. Such a document should be captioned
22 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
23 shall be served and filed within fourteen days after service of the objections. The parties are

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1 advised that failure to file objections within the specified time may waive the right to appeal the
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: 05/23/2011

/s/ Gregory G. Hollows

4
5 GREGORY G. HOLLOWES
6 UNITED STATES MAGISTRATE JUDGE

6 GGH:009
7 harr1523.mtd

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