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

THOMAS SCOTT,

Plaintiff,

No. CIV S-12-0055 DAD P

vs.

DR. GALLOWAY et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915. Plaintiff has consented to Magistrate Judge jurisdiction over this action pursuant to 28 U.S.C. § 636(c). (See Doc. No. 12.)

**PLAINTIFF’S COMPLAINT**

In the present case, plaintiff has identified Dr. Galloway, Dr. Smith, Dr. Heatley, Dr. Soltanian-Zadeh, and Dr. Hawkins as the defendants. In his complaint, plaintiff alleges that the defendants have denied him adequate medical care in connection with his treatment for Hepatitis C. Specifically, plaintiff alleges that the defendants have refused to provide him with a new medication regimen recently approved by the FDA. In terms of relief, plaintiff requests declaratory relief, injunctive relief and monetary damages. (Compl. at 3-3b & Exs.)



1 specially plead or demonstrate exhaustion in their complaints.”); Wyatt v. Terhune, 315 F.3d  
2 1108, 1117-19 (9th Cir. 2003). The defendants bear the burden of raising and proving the  
3 absence of exhaustion. Wyatt, 315 F.3d at 1119. When the district court concludes that the  
4 prisoner has not exhausted administrative remedies on a claim, “the proper remedy is dismissal  
5 of the claim without prejudice.” Id. at 1120. See also Lira v. Herrera, 427 F.3d 1164, 1170 (9th  
6 Cir. 2005). On the other hand, “if a complaint contains both good and bad claims, the court  
7 proceeds with the good and leaves the bad.” Jones, 549 U.S. at 221.

## 8 DISCUSSION

9 A prisoner’s concession to nonexhaustion is a valid ground for dismissal of an  
10 action. See Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003). On plaintiff’s original form  
11 complaint filed with this court, Section I.B. asks “Is there a grievance procedure [at Mule Creek  
12 State Prison]?” Plaintiff has checked the “Yes” box. Section I.C. asks “Did you present the facts  
13 in your complaint for review through the grievance procedure?” Again, plaintiff has checked the  
14 “Yes” box. However, Section I.D.1-4 instructs plaintiff to “list the appeal number and the date  
15 and result of the appeal at each level of review. If you did not pursue a certain level of appeal,  
16 explain why.” In the space provided for plaintiff to list the appeal number and date and result of  
17 his inmate appeal at the third level of review, plaintiff has typed “Pending.” Finally, Section I.F.  
18 asks “If you did not present your claim for review through the grievance procedure, explain  
19 why.” Plaintiff has typed “Claim is pending, but matter is life threatening and requires urgent  
20 attention by the Court.” (Compl. at 1-2.)

21 As noted above, the California Department of Corrections and Rehabilitation has  
22 an established administrative grievance system and a prescribed grievance process that plaintiff  
23 must complete prior to bringing a § 1983 action on his claims. See Vaden v. Summerhill, 449  
24 F.3d 1047, 1050-51 (9th Cir. 2006) (prisoner must exhaust administrative remedies prior to filing  
25 his complaint in federal court); McKinney v. Carey, 311 F.3d 1198, 1200-01 (9th Cir. 2002)  
26 (prisoner does not satisfy the exhaustion requirement with respect to the claims in his original

1 complaint by exhausting administrative remedies during the course of litigation). If a court  
2 concludes, as it does here, that a prisoner has not exhausted administrative remedies, “the proper  
3 remedy is dismissal of the claim without prejudice.” Wyatt, 315 F.3d at 1120. Given plaintiff’s  
4 acknowledgment of non-exhaustion, the undersigned will dismiss this action without prejudice.<sup>1</sup>

5 **CONCLUSION**

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. Plaintiff’s motion to proceed in forma pauperis (Doc. No. 16) is denied; and  
8 2. This action is dismissed without prejudice for failure to exhaust administrative  
9 remedies prior to bringing this action.

10 DATED: April 4, 2012.

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13 DALE A. DROZD  
14 UNITED STATES MAGISTRATE JUDGE

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25 <sup>1</sup> Plaintiff is informed that dismissal without prejudice will permit him to file a new  
26 action upon exhaustion of the prison grievance process through its completion. If plaintiff  
decides to file a new action, he should not include this case number on the new complaint. In  
addition, the new complaint should be accompanied by a properly completed, updated  
application to proceed in forma pauperis.