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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JOSE G. AMEZQUITA

12 Plaintiffs,

13 v.

14 CORRECTIONAL OFFICER D.  
15 HOUGH, et al.,

16 Defendants.  
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Case No.: 3:19-cv-01461-AJB-KSC

**ORDER:**

**(1) ADOPTING MAGISTRATE  
JUDGE'S REPORT AND  
RECOMMENDATION; and**

**(2) GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT**

**(Doc. No. 48, 56)**

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22 Before the Court is Correctional Officers Armenta, Hough, and Downs'  
23 ("Defendants") motion for summary judgment on *pro se* prisoner Jose G. Amezquita's  
24 ("Plaintiff") claims against them, pursuant to Title 42, United States Code, Section 1983,  
25 for deliberate indifference to a serious risk of harm in violation of the Eight Amendment.  
26 (Doc. No. 47). The Court referred the matter to United States Magistrate Judge Karen S.  
27 Crawford for a Report and Recommendation ("R&R"). The R&R advises the Court to grant  
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1 Defendants' motion for summary judgment, as well as deny Plaintiff's request for  
2 additional discovery and appointment of counsel. (Doc. Nos. 47, 49, 56.)

### 3 I. BACKGROUND

4 The R&R provides a thorough recitation of the procedural and factual background  
5 of this case, to which Plaintiff raised no objections. (Doc. No. 56 at 2–5.)<sup>1</sup> The Court  
6 reiterates the pertinent facts below.

7 In October 2018, Plaintiff was incarcerated at Richard J. Donovan ("RJD")  
8 correctional facility and assigned to an administrative segregation unit ("ASU"). The  
9 events giving rise to Plaintiff's claims occurred on October 18, 2018, when Plaintiff  
10 appeared before an Institutional Classification Committee ("ICC") for an assessment on  
11 whether he should remain in administrative segregation and where to place him after he  
12 completed his term in that unit. Plaintiff objected to the ICC's decision to place him into a  
13 "special needs yard" ("C-Yard"), rather than a general population unit. Plaintiff alleges that  
14 his placement in C-Yard would endanger his life.

15 According to Plaintiff, at the time of the October 18, 2018 ICC hearing, he was  
16 suicidal and suffering from paranoid delusions and severe claustrophobia. Plaintiff further  
17 alleges that during the ICC hearing, he informed Armenta several times that by transferring  
18 him to C-Yard, Armenta would be putting his life in danger. Plaintiff claims that Armenta  
19 responded, "I don't care, do what you gotta do. I run this prison. I tell you where you are  
20 going." (Doc. No. 25 at 3, 6.)

21 Plaintiff also asserts that when the ICC hearing concluded, Hough and Downs  
22 escorted him back to his cell in the ASU, and Plaintiff told them that he was feeling  
23 suicidal. According to Plaintiff, Hough and Downs laughed at him and told him to "go  
24 ahead and kill [him]self." (*Id.* at 6.) Plaintiff alleges he returned to his cell in the ASU, and  
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27 <sup>1</sup> The page citations refer to the ECF-generated page numbers at the top of each filing.  
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1 while in an “agitated state,” “discovered a large blade secreted in the mattress,” which he  
2 used to cut his right wrist. (*Id.*) Unidentified correctional officers discovered Plaintiff and  
3 transported him via ambulance to the medical clinic where he received medical and  
4 psychological care. Plaintiff was also seen by psychologist Dr. Loebenstein when he  
5 returned to RJD on October 18, 2018. Dr. Loebenstein interviewed Plaintiff that day and  
6 determined that he had not attempted suicide.

7 Plaintiff asserts that Defendants violated his Eighth Amendment rights because they  
8 were “deliberately indifferent” to the “unreasonable risk of serious harm” to Plaintiff. (*Id.*  
9 at 7.) Specifically, Plaintiff alleges that Armenta failed to “exercise his supervisory  
10 responsibility to make sure appropriate actions were taken related to plaintiff’s verbalized  
11 intention to commit suicide” and did not “prevent Hough and Downs from making  
12 incentivizing remarks for the plaintiff to go ahead and kill himself.” (*Id.*) Plaintiff contends  
13 Hough and Downs “never checked back on plaintiff and never notified the mental health  
14 staff about his state of emotional distress nor his suicidal intentions.” (*Id.* at 6.) According  
15 to Plaintiff, Defendants’ conduct “created an unreasonable risk of serious harm to  
16 plaintiff,” which violated his Eighth Amendment right to be free of cruel and unusual  
17 punishment and caused him lasting harm. (*Id.* at 7–8.)

18 On November 3, 2020, Plaintiff was transferred to Salinas Valley State Prison  
19 (“Salinas Valley”), where he remains incarcerated.

## 20 II. LEGAL STANDARDS

### 21 A. Review of Report and Recommendation

22 Federal Rule of Civil Procedure (“Rule”) 72(b) and 28 U.S.C. § 636(b)(1) set forth  
23 a district judge’s duties in connection with a magistrate judge’s R&R. The district judge  
24 must “make a *de novo* determination of those portions of the report . . . to which objection  
25 is made[,]” and “may accept, reject, or modify, in whole or in part, the findings or  
26 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C); *see also*  
27 *United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989). “The statute makes it clear  
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1 that the district judge must review the magistrate judge’s findings and recommendations  
2 de novo *if objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d  
3 1114, 1121 (9th Cir. 2003) (emphasis in original). Thus, in the absence of timely  
4 objection(s), the court “need only satisfy itself that there is no clear error on the face of the  
5 record in order to accept the recommendation.” Fed. R. Civ. P. 72(b) advisory committee’s  
6 note to 1983 amendment; *Reyna-Tapia*, 328 F.3d at 1123. Additionally, a court may, but  
7 is not required to, consider evidence presented for the first time in a party’s objection to a  
8 magistrate judge’s recommendation. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir.  
9 2000).

### 10 **B. Summary Judgment**

11 Summary judgment is proper where the pleadings and materials demonstrate “there  
12 is no genuine dispute as to any material fact and the movant is entitled to judgment as a  
13 matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).  
14 A genuine dispute as to a material fact is a question a trier of fact must answer to determine  
15 the rights of the parties under the applicable substantive law. *See Matsushita Elec. Indus.*  
16 *Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (stating that a material fact is  
17 one that is relevant to an element of a claim or defense and whose existence might affect  
18 the outcome of the suit); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A  
19 dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for  
20 the nonmoving party.” *Id.* The court must review the record as a whole and draw all  
21 reasonable inferences in favor of the non-moving party. *Hernandez v. Spacelabs Med. Inc.*,  
22 343 F.3d 1107, 1112 (9th Cir. 2003). However, unsupported conjecture or conclusory  
23 statements are insufficient to defeat summary judgment. *Id.*; *Surrell v. Cal. Water Serv.*  
24 *Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008).

25 The moving party has the initial burden of demonstrating that summary judgment is  
26 proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). The burden then shifts  
27 to the opposing party to provide admissible evidence beyond the pleadings to show that  
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1 summary judgment is not appropriate. *See Celotex*, 477 U.S. at 322, 324. To avoid  
2 summary judgment, the opposing party cannot rest solely on conclusory allegations of fact  
3 or law. *See Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, the non-movant  
4 must designate which specific facts show that there is a genuine issue for trial. *See*  
5 *Anderson*, 477 U.S. at 256. The opposing party's evidence is to be believed, and all  
6 justifiable inferences are to be drawn in their favor. *See id.*

### 7 III. DISCUSSION

8 Plaintiff objects to the R&R on the grounds that the Magistrate Judge erroneously  
9 (1) recommended a denial of Plaintiff's request for a deferred ruling on the summary  
10 judgment motion so he can conduct additional discovery; (2) found no triable issue of fact  
11 as to Plaintiff's failure to exhaust administrative remedies; (3) found no triable issue of fact  
12 as to Plaintiff's Eighth Amendment claims; and (4) found that appointment of counsel is  
13 not appropriate in this case. (Doc. No. 62 at 2.)

14 As an initial matter, the Court notes that incorporated within Plaintiff's objections is  
15 a section titled "DECLARATION," which is a new, amended version of the declaration he  
16 presented before the Magistrate Judge. (*Id.*) "[A] district court has discretion, but is not  
17 required, to consider evidence presented for the first time in a party's objection to a  
18 magistrate judge's recommendation." *Howell*, 231 F.3d at 621. Because this amended  
19 declaration was not in evidence for the Magistrate Judge's consideration, and Plaintiff  
20 offers no explanation as to why he failed to submit it earlier, the Court exercises its  
21 discretion to not consider Plaintiff's new declaration. *See id.* The amended declaration is  
22 generally similar to the prior declaration, but contains new facts that appear to have been  
23 formulated after the Magistrate Judge's R&R. The Court deems it imprudent to provide  
24 Plaintiff a second bite at the apple as it would be "fundamentally unfair to permit a litigant  
25 to set its case in motion before the magistrate, wait to see which way the wind was blowing,  
26 and-having received an unfavorable recommendation-shift gears before the district judge."  
27 *Id.* at 622 (quoting *Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co.*, 840  
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1 F.2d 985, 991 (1st Cir. 1988)). Moreover, “[s]ystemic efficiencies would be frustrated and  
2 the magistrate judge’s role reduced to that of a mere dress rehearsal if a party were allowed  
3 to feint and weave at the initial hearing, and save its knockout punch for the second round.”  
4 *Id.* at 622 (internal quotation marks and citation omitted). Accordingly, the Court will not  
5 consider Plaintiff’s new, post-hoc declaration.

#### 6 **A. Request to Defer Ruling Under Rule 56(d) for Additional Discovery**

7 The Court turns to Plaintiff’s objection to the Magistrate Judge’s recommendation  
8 to deny his request for a deferred ruling under Rule 56(d). Pursuant to Rule 56(d), the Court  
9 has discretion, to defer ruling on a summary judgment motion upon a proper showing that  
10 the facts necessary to oppose summary judgment are “unavailable” to the nonmoving party.  
11 Fed. R. Civ. P. 56(d). “A party seeking to delay summary judgment for further discovery  
12 must state ‘what other specific evidence it hopes to discovery [and] the relevance of that  
13 evidence to its claims.’” *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 678 (9th Cir. 2018)  
14 (citation omitted).

15 In recommending a denial of Plaintiff’s request, the Magistrate Judge found that  
16 Plaintiff’s declaration lacked specificity as to what additional discovery is necessary as he  
17 referred only to unspecified logs, reports, video, and statements of unidentified witnesses  
18 that are missing. (Doc. No. 56 at 8.) The Magistrate Judge further found that even assuming  
19 Plaintiff had identified the “missing evidence,” he failed to explain how that discovery  
20 relates to his claims or would establish a material issue of fact for trial. (*Id.*) In his objection,  
21 Plaintiff claims that there are missing videos and logs that Defendants are keeping from  
22 him and that such evidence will show a triable issue of fact as to whether Hough and Downs  
23 escorted him back to his cell on October 18, 2018, and told Plaintiff to kill himself. (Doc.  
24 No. 62 at 13.) The Court is unpersuaded. Defendants have represented that all  
25 documentation concerning the incident giving rise to his claims have been produced. (Doc.  
26 No 56 at 8.) There is no evidence that Defendants made this representation in bad faith.  
27 Accordingly, the Court **OVERRULES** Plaintiff’s objection, and **ADOPTS** the Magistrate  
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1 Judge’s recommendation to **DENY** his request for a deferred ruling and additional  
2 discovery. *Stevens*, 899 F.3d at 678 (“[F]or purposes of a Rule 56(d) request, the evidence  
3 sought must be more than ‘the object of pure speculation.’”) (citation omitted).

#### 4 **B. Plaintiff’s Failure to Exhaust Administrative Remedies**

5 As to Defendants’ summary judgment motion, the Magistrate Judge recommended  
6 that the Court grant the motion, finding that Defendants met their burden of proving the  
7 affirmative defense of non-exhaustion. (Doc. No. 56 at 9–12.)

8 The Prison Litigation Reform Act requires inmates challenging the conditions of  
9 their confinement to exhaust “such administrative remedies as are available” before filing  
10 suit in federal court. 42 U.S.C. §1997e(a). In evaluating whether there has been “proper  
11 exhaustion,” the court looks to the “California prison system’s requirements” for prisoners  
12 to pursue a grievance. *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009); *see also*  
13 *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (“exhaustion demands compliance with an  
14 agency’s deadlines and other . . . procedural rules”). At all times relevant to Plaintiff’s  
15 claims, the administrative process for inmate grievances was set forth in the since-repealed  
16 Sections 3084 through 3085 of Title 15 of the California Code of Regulations. *See* Cal.  
17 Code Regs. tit. 15 §§ 3084-3085 (2019) (repealed June 1, 2020). Pursuant to those  
18 regulations, an aggrieved inmate was required to complete a CDCR<sup>2</sup> Form 602 within 30  
19 calendar days of the decision or action being appealed. *Id.*, § 3084.8(b)(1). The Form 602,  
20 including a description of “the specific issue under appeal and the relief requested,” was to  
21 be submitted to the institution’s appeals coordinator. *Id.*, § 3804.2(a) and (c).

22 A prisoner’s failure to exhaust administrative remedies is an affirmative defense for  
23 which defendants bear the burden of proof. *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir.  
24 2014) (en banc). At summary judgment, defendants’ burden is “to prove that there was an  
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27 <sup>2</sup> CDCR is the abbreviation for the California Department of Corrections and Rehabilitation.  
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1 available administrative remedy, and that the prisoner did not exhaust that available  
2 remedy.” *Id.*

3 Here, the Magistrate Judge found, based on the declaration of a grievance  
4 coordinator at RJD (where Plaintiff was housed at the time of the alleged incident) and the  
5 declaration of a grievance coordinator at Salinas Valley (where Plaintiff was transferred  
6 within 30 days of the alleged incident), that Defendants met their burden of “demonstrating  
7 a system of available administrative remedies’ which were not exhausted by [P]laintiff.”  
8 (Doc. No. 56 at 10 – 11 (quoting *Williams v. Paramo*, 775 F.3d 1182, 1192 (9th Cir.  
9 2015)).) The grievance coordinators described that the process required Plaintiff to submit  
10 a Form 602 within 30 days of the incident giving rise to the grievance—here, October 18,  
11 2018. (*Id.* at 10.) They explained that inmates can file grievances for incidents that took  
12 place at another facility. (*Id.*) They also stated that they searched the records at their  
13 respective facilities for any appeal submitted by Plaintiff between October 18, 2018 and  
14 the time of their declarations, and found none. (*Id.*) Turning to whether Plaintiff rebutted  
15 Defendants’ evidence of non-exhaustion, the Magistrate Judge found that Plaintiff failed  
16 to show “that there is something particular in his case that made the existing and generally  
17 available administrative remedies effectively unavailable to him.” (*Id.* at 11.)

18 Plaintiff’s objections to the Magistrate Judge’s findings are unavailing. He merely  
19 rehashes arguments that he raised in response to the summary judgment motion—namely,  
20 that he filed a Form 602 but that it was “lost or ignored” and that he was “under direct  
21 threat of retaliation.” (Doc. No. 62 at 14.) The Court agrees with the Magistrate Judge that  
22 Plaintiff’s general and unsubstantiated fears about possible retaliation do not suffice to  
23 excuse his failure to exhaust. (Doc. No. 56 at 11.) *See also Rodriguez v. Cty. of Los Angeles*,  
24 891 F.3d 776, 794 (9th Cir. 2018) (finding that inmates’ “factual statements” supported an  
25 “actual and objectively reasonable fear of retaliation,” whereas generalized statements  
26 would not). Plaintiff made no specific argument that the Magistrate Judge misapplied the  
27 law in this regard. Moreover, the fact that Plaintiff proclaims that he repeatedly filed “602s”  
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1 belies his assertion that the process was made unavailable to him because he feared  
2 retaliation. Accordingly, the Court **OVERRULES** Plaintiff's objection, and **ADOPTS** the  
3 Magistrate Judge's recommendation to grant Defendants' summary judgment motion  
4 based on the affirmative defense of non-exhaustion.

### 5 **C. Plaintiff's Eighth Amendment Claim**

6 The Magistrate Judge also found that even if Plaintiff had exhausted his  
7 administrative remedies, Defendants are entitled to summary judgment on Plaintiff's  
8 Eighth Amendment claims. (Doc. No. 56 at 15.) With respect to Plaintiff's claim against  
9 Armenta, the Magistrate Judge found that "no reasonable juror could infer that defendant  
10 Armenta was aware of, and consciously disregarded, a risk that plaintiff would attempt  
11 suicide when he returned to his cell." (*Id.*) Plaintiff raised no objection to this portion of  
12 the R&R, and the Court finds it well-reasoned and contains no clear error. Accordingly,  
13 the Court **ADOPTS** the Magistrate Judge's recommendation to enter summary judgment  
14 in favor of Armenta.

15 With respect to Plaintiff's claims against Hough and Downs, the Magistrate Judge  
16 acknowledged that Plaintiff alleges that after the ICC hearing, Hough and Downs escorted  
17 him back to his cell in the ASU and made "incentivizing remarks" when Plaintiff told them  
18 that he was feeling "depressed and suicidal." (*Id.* at 16.) However, because the evidence  
19 showed that neither Hough nor Downs were on duty at that time, the Magistrate Judge  
20 found that "no reasonable juror could infer that Hough and Downs were aware of, but  
21 indifferent to, a risk that [P]laintiff would harm himself." (*Id.* at 17.) Plaintiff's objection  
22 to this conclusion simply repeats his unsupported contention that videos and logs will show  
23 that Hough and Downs escorted him to his cell as he alleged. (Doc. No. 62 at 13.) As the  
24 Magistrate Judge noted, Defendants produced evidence that the ICC hearing began at 9:56  
25 a.m. and did not last for more than one hour, and that Hough and Down did not report for  
26 work that day until 2:00 p.m. Plaintiff failed to present competent evidence to the contrary.  
27 Instead, he continues to insist that videos and logs will show that Hough and Downs  
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1 escorted him to his cell as he alleged. But as previously discussed, Defendants represented  
2 to the Court that they have produced all documentation concerning the incident giving rise  
3 to Plaintiff's claims, and there is no evidence that Defendants made this representation in  
4 bad faith. Accordingly, the Court **OVERRULES** Plaintiff's objection and **ADOPTS** the  
5 Magistrate Judge's recommendation to enter summary judgment in favor of Hough and  
6 Downs.

#### 7 **D. Request for Appointment of Counsel**

8 Lastly, the Magistrate Judge found that "there are no 'exceptional circumstances'  
9 warranting appointment of counsel in this matter." (Doc. No. 56 at 18.) As an objection,  
10 Plaintiff reiterates that he has limited ability to read and write in English and has had to  
11 rely on "inmate assistance" for his case. (Doc. No. 62 at 14.) In the Ninth Circuit, "[t]here  
12 is no absolute right to counsel in civil proceedings." *Hedges v. Resolution Trust Corp.*, 32  
13 F.3d 1360, 1363 (9th Cir. 1994). However, the court may in its discretion request that an  
14 attorney represent indigent civil litigants upon a showing of "exceptional circumstances."  
15 *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Burns v. County of King*, 883 F.2d  
16 819, 823 (9th Cir. 1989). The court "must determine whether a) there is a likelihood of  
17 success on the merits; and b) the prisoner is unable to articulate his claims in light of the  
18 complexity of the legal issues involved." *Cano v. Taylor*, 739 F.3d 1214, 1219 (9th Cir.  
19 2014). These two factors "must be considered cumulatively." *Id.*

20 As to the first factor, the Court finds that based on the lack of evidence supporting  
21 Plaintiff's claims (as discussed here and extensively in the R&R), Plaintiff is not likely to  
22 succeed on the merits of his claims. As to the second factor, Plaintiff has demonstrated,  
23 through his prior filings, that he is able to articulate his claims, notwithstanding his limited  
24 proficiency in the English language. Accordingly, the Court **OVERRULES** Plaintiff's  
25 objection and **ADOPTS** the Magistrate Judge's recommendation to **DENY** the request for  
26 appointment of counsel for want of "exceptional circumstances."  
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1 **IV. CONCLUSION**

2 Having carefully reviewed the R&R and Plaintiff’s objections thereto, the Court  
3 **OVERRULES** Plaintiff’s Objections (Doc. No. 62), **ADOPTS** the R&R in its entirety  
4 (Doc. No. 56), **DENIES** Plaintiff’s request for a deferred ruling and additional discovery,  
5 **GRANTS** Defendants’ motion for summary judgment (Doc. No. 48), and **DENIES**  
6 Plaintiff’s request for appointment of counsel. The Clerk of Court is **DIRECTED** to close  
7 this case.

8 **IT IS SO ORDERED.**

9 Dated: September 7, 2021

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11 Hon. Anthony J. Battaglia  
12 United States District Judge  
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