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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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| _____ |) |
| GARY J. WINKLER, |) |
| |) |
| Plaintiff, |) |
| |) |
| vs. |) |
| |) |
| GODECKI et al., |) |
| |) |
| Defendants. |) |
| _____ |) |

3:13-cv-00711-RCJ-VPC

ORDER

This is a prisoner civil rights case under 42 U.S.C. § 1983. After screening and summary judgment, a single claim of excessive force remains for trial. The Court denied summary judgment on the affirmative defense of non-exhaustion as to that claim, and the remaining Defendant requested an evidentiary hearing on the issue. *See Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014). The Court held the hearing on April 10, 2017 and ruled at the end of the hearing that Defendant had not proved the defense by a preponderance of the evidence. Defendant has asked the Court to reconsider. The motion is untimely, and the Court declines to enlarge time. The only basis given is the desire to review transcripts of the hearing before filing the motion. But counsel was of course present at the hearing, and a Rule 59 motion was not due until May 8, 2017, 11 days after the transcript was filed into the docket.

1 Anyway, the Court finds no basis to reconsider. *Morton v. Hall* does not appear to
2 institute any burden-shifting scheme for non-exhaustion of prisoner complaints. 599 F.3d 942
3 (9th Cir. 2010). There, the Court of Appeals used no burden-shifting scheme but simply found
4 that the district court had not abused its discretion in finding non-exhaustion where the
5 defendants testified that there were no records of a grievance and the plaintiff “presented no
6 evidence” of one. *Id.* at 945. Morton only testified as to having grieved other issues; he argued
7 that for the purposes of exhaustion a grievance should inure to a plaintiff’s benefit as to all issues
8 that “ar[i]se out of the same facts and circumstances.” *Id.* at 945–46. The Court of Appeals
9 declined to adopt such a rule, noting that even absent grievance regulations requiring a particular
10 degree of specificity, a grievance must “alert[] the prison to the nature of the wrong for which
11 redress is sought.” *Id.* at 946 (quoting *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009)).
12 Here, by contrast, Plaintiff presented evidence that he exhausted the precise claim at issue. He
13 testified that he submitted a modified informal grievance form (identified thereupon as a second-
14 level grievance) relating to the informal and first-level grievances he had already submitted
15 concerning the incident at issue in this lawsuit. Unlike Morton, Plaintiff provided evidence of
16 exhaustion of the relevant claim sufficient to prevent Defendants from proving non-exhaustion,
17 or even that the remedy was “available” to Plaintiff, by a preponderance of the evidence. *See* 28
18 U.S.C. § 1997e(a).

19 Even if *Morton* had instituted a burden-shifting scheme, Plaintiff here would prevail.
20 Defendant would have satisfied his initial burden by showing a lack of any institutional record of
21 a second-level grievance, but Plaintiff would have satisfied his shifted burden by testifying that
22 he in fact put the second-level grievance in the drop-box designated for that purpose. Plaintiff’s
23 testimony that he had submitted the second-level grievance on the modified informal grievance
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1 form (because the guards had no second-level grievance forms when he requested one) was
2 corroborated by the fact that he had retained two copies of the completed, modified form. The
3 grievance coordinator's own testimony that the multiple-copy-and-receipt procedures were
4 confusing and difficult makes even more plausible Plaintiff's claim that he submitted the second-
5 level grievance without receiving any signed or stamped receipt. The fact that no second-level
6 grievance appeared in the prison's records would be insufficient without more to rebut Plaintiff's
7 evidence as to his shifted burden. The lack of records would be a defendant's initial burden to
8 show. As a general matter of procedural logic, a defendant cannot rebut a plaintiff's evidence of
9 having satisfied a shifted burden by simply reiterating that the defendant has satisfied his initial
10 burden, lest the putative burden-shifting scheme collapse into a conclusive presumption upon a
11 defendant's initial showing.

12 *Ross v. Blake* does not require a different result. 136 S. Ct. 1850 (2016). In that case, the
13 Supreme Court ruled that the exhaustion requirement under § 1997e(a) contains a single
14 exception for “[un]availabil[ity]” of the administrative remedy, not any “special circumstances”
15 exception. *Id.* at 1856. Plaintiff needn't invoke any “special circumstances.” Defendants have
16 simply failed to prove non-exhaustion by a preponderance of the evidence. Only if they had
17 done so and Plaintiff had then escaped dismissal by arguing some sort of exception to the statute
18 apart from nonavailability would *Ross* matter.

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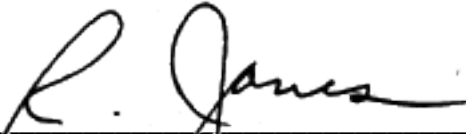
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1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motion to Extend Time (ECF No. 45) and the
3 Motion to Reconsider (ECF No. 48) are DENIED.

4 IT IS SO ORDERED.

5 Dated June 14, 2017

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8 ROBERT C. JONES
9 United States District Judge
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