

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 31 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TRAVIS RAY THOMPSON,

No. 21-15812

Plaintiff - Appellant,

D.C. No. 1:21-cv-00001-AWI-JLT
U.S. District Court for Eastern
California, Fresno

v.
KATHLEEN ALLISON, Secretary of
CDCR; et al.,

MANDATE

Defendants - Appellees.

The judgment of this Court, entered May 26, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: David J. Vignol
Deputy Clerk
Ninth Circuit Rule 27-7

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 23 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TRAVIS RAY THOMPSON,

Plaintiff-Appellant,

v.

KATHLEEN ALLISON, Secretary of
CDCR; et al.,

Defendants-Appellees.

No. 21-15812

D.C. No. 1:21-cv-00001-AWI-JLT
Eastern District of California,
Fresno

ORDER

Before: CANBY, TASHIMA, and NGUYEN, Circuit Judges.

Thompson's petition for panel rehearing (Docket Entry No. 21) is denied.

No further filings will be entertained in this closed case.

Appendix C

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY 26 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TRAVIS RAY THOMPSON,

No. 21-15812

Plaintiff-Appellant,

D.C. No. 1:21-cv-00001-AWI-JLT

v.

KATHLEEN ALLISON, Secretary of
CDCR; CONNIE GIPSON, Warden,
Director of the Div. of Adult Inst.;
IGBINOZA, Chief Medical Officer;
CHRISTIAN PFEIFFER, Warden, Warden,
Kern Valley State Prison,

MEMORANDUM*

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Submitted May 17, 2022**

Before: CANBY, TASHIMA, and NGUYEN, Circuit Judges.

California state prisoner Travis Ray Thompson appeals pro se from the
district court's judgment dismissing for failure to exhaust administrative remedies

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision
without oral argument. *See* Fed. R. App. P. 34(a)(2).

his 42 U.S.C. § 1983 action alleging violations of his Eighth Amendment rights. We have jurisdiction under 28 U.S.C. § 1291. We review de novo legal rulings on exhaustion. *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc). We affirm.

The district court properly dismissed Thompson's action because Thompson was required to exhaust administrative remedies, but alleged in the complaint that he did not. *See Albino*, 747 F.3d at 1169 (where a failure to exhaust is clear from the face of the complaint, a district court may dismiss for failure to state a claim); *see also Ross v. Blake*, 578 U.S. 632, 643-44 (2016) (articulating the limited circumstances in which administrative remedies are not "available" and therefore need not be exhausted).

AFFIRMED.

Appendix D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TRAVIS RAY THOMPSON,
Plaintiff,
v.
KATHLEEN ALLISON, et al.,
Defendants.

Case No. 1:21-cv-00001-AWI-JLT (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND DISMISSING
ACTION WITHOUT PREJUDICE FOR
FAILURE TO EXHAUST

(Doc. No. 11)

Plaintiff Travis Ray Thompson is a state prisoner proceeding *pro se* in this civil rights action brought under 42 U.S.C. § 1983. This matter was referred to a United States magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

20 On February 12, 2021, the assigned magistrate judge filed findings and recommendations,
21 recommending that this action be dismissed for failure to exhaust administrative remedies. Doc.
22 No. 11. The magistrate judge found that it is clear on the face of his complaint that Plaintiff failed
23 to exhaust administrative remedies prior to initiating this action, as required by the Prison
24 Litigation Reform Act (“PLRA”). Id. at 2. The magistrate judge provided plaintiff 14 days to file
25 objections to the findings and recommendations. Id. at 5. After receiving an extension of time
26 (Doc. No. 13), Plaintiff filed objections on April 9, 2021. Doc. No. 15.

27 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a
28 *de novo* review of this case. Having carefully reviewed the file, including Plaintiff's objections,

1 the Court finds the findings and recommendations to be supported by the record and proper
2 analysis. Plaintiff admits that he failed to exhaust administrative remedies. See Doc. No. 1 at 18-
3 19. Nevertheless, in his objections, he contends that he qualifies for an “imminent-danger”
4 exception to the PLRA’s exhaustion requirement. Doc. No. 15 at 2-. However, as explained by
5 the magistrate judge, it is unclear whether such an exception exists within the Ninth Circuit, and
6 even if one did, Plaintiff would not qualify for it because he does not allege facts in his complaint
7 showing that he is in danger of imminent, future harm. Doc. No. 11 at 3-4. The Court agrees with
8 the magistrate judge’s findings and analysis.

9 Accordingly, the Court ORDERS:

10 1. The findings and recommendations issued on February 12, 2021 (Doc. No. 11) are
11 ADOPTED in full;

12 2. This action is DISMISSED without prejudice for failure to exhaust administrative
13 remedies prior to filings suit; and,

14 3. The Clerk of the Court is directed to terminate all pending motions and to close this
15 case.

16 IT IS SO ORDERED.

17 Dated: April 21, 2021



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SENIOR DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

TRAVIS RAY THOMPSON,

CASE NO: 1:21-CV-00001-AWI-JLT

v.

KATHLEEN ALLISON, ET AL.,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 04/21/2021**

Keith Holland
Clerk of Court

ENTERED: April 21, 2021

by: /s/ C. Maldonado

Deputy Clerk

Appendix E

1 **I. LEGAL STANDARD**

2 The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought with
3 respect to prison conditions under ... any ... Federal law ... by a prisoner confined in any jail,
4 prison, or other correctional facility until such administrative remedies as are available are
5 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion of administrative remedies is mandatory and
6 “unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (citation
7 omitted). Inmates are required to “complete the administrative review process in accordance with
8 the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal
9 court.” *Woodford v. Ngo*, 548 U.S. 81, 88, 93 (2006). The exhaustion requirement applies to all
10 inmate suits relating to prison life, *Porter v. Nussle*, 534 U.S. 516, 532 (2002), regardless of the
11 relief sought by the prisoner or offered by the administrative process, *Booth v. Churner*, 532 U.S.
12 731, 741 (2001).

13 In general, failure to exhaust is an affirmative defense that the defendant must plead and
14 prove. *Jones*, 549 U.S. at 204, 216. However, courts may dismiss a claim if failure to exhaust is
15 clear on the face of the complaint. *See Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014).

16 **II. DISCUSSION**

17 It is clear on the face of his complaint that Plaintiff failed to exhaust administrative
18 remedies prior to filing suit. Plaintiff contends that he meets an exception to the exhaustion
19 requirement because, given the length of time it would take to exhaust administrative remedies,
20 the “denial of immediate judicial relief would result in irreparable damage to Plaintiff’s life or
21 health.” (Doc. 10 at 3-4.)

22 In support of his argument, Plaintiff cites *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171,
23 1173 (7th Cir. 2010). (Doc. 10 at 4.) In *Fletcher*, the Seventh Circuit concluded that, “[i]f a
24 prisoner has been placed in imminent danger of serious physical injury by an act that violates his
25 constitutional rights, administrative remedies that offer no possible relief in time to prevent the
26 imminent danger from becoming an actual harm can’t be thought available.” 623 F.3d at 1173. In
27 such a situation, therefore, the prisoner would not be required to exhaust the “unavailable”
28 remedy. *See id.* at 1173-74. For example, “[i]f it takes two weeks to exhaust a complaint that the

1 complainant is in danger of being killed tomorrow, there is no ‘possibility of some relief’ and so
2 nothing for the prisoner to exhaust.” *Id.* at 1174.

3 Plaintiff’s reliance on *Fletcher* is misplaced. First, the case was decided before the
4 Supreme Court case of *Ross v. Blake*, 136 S. Ct. 1850 (2016), and it is unclear whether an
5 “imminent-danger exception” to the exhaustion requirement exists in the Ninth Circuit, *see, e.g.*,
6 *Wilson v. California Dep’t of Corr. & Rehab.*, No. 1:18-cv-01508-LJO-JLT, 2019 WL 2464946,
7 at *4 (E.D. Cal. 2019) (“‘imminent danger exception’ applicable only to determinations made
8 in response to motions to proceed in forma pauperis”); *Williams v. Bal*, No. 2:12-cv-01005-EFB,
9 2012 WL 2065051, at *2 (E.D. Cal. 2012) (“no authority supporting ... ‘imminent danger’
10 exception to the mandatory exhaustion requirement”); *Severson v. Igbinosa*, No. 1:10-cv-02217,
11 2011 WL 870895, at *3 (E.D. Cal. 2011) (“no exception to the exhaustion requirement for
12 imminent harm”).

13 Second, assuming *arguendo* that an imminent-danger exception does exist, the exception
14 would not apply here. Plaintiff does not seek “relief to prevent [an] imminent danger from
15 becoming an actual harm.” That is, in his complaint, Plaintiff does not allege that prison officials
16 or medical personnel are providing him inadequate treatment for COVID-19. Rather, he alleges
17 that the “conditions of [his] confinement illegally expose[d] him to contracting COVID-19,”
18 which he now has, and that the “failure to properly mitigate the risk of ... contraction” violated
19 the Eighth Amendment. (Doc. 1 at 19.) Plaintiff also does not seem to fully believe that he has
20 COVID-19, since he alleges that medical personnel may have “present[ed] a false positive in
21 retaliation for litigation.” (*Id.* at 18.) Thus, Plaintiff does not seek a remedy to prevent an
22 imminent, future harm; he seeks redress for past harm.

23 Third, the *Fletcher* court ultimately held that “the imminent-danger exception does not
24 excuse a prisoner from exhausting remedies tailored to imminent dangers.” 623 F.3d at 1175.
25 California, like Illinois, “has created an emergency grievance procedure” *Id.* at 1174 (emphasis
26 removed); Cal. Code Regs. tit. 15, § 3483(a). Under California regulations, an official “assess[es]
27 each written grievance within one business day of receipt to determine if it contains any
28 information concerning personal safety, institutional security, or sexual misconduct.” Cal. Code

1 Regs. tit. 15, § 3483(a). In cases where it does, the regulations require the official to “immediately
2 commence an appropriate response” and to notify the claimant “of the … course of action within
3 five business days.” *Id.* Thereafter, CDCR must provide a written response within 60 days. *Id.*, §
4 3483(i).

5 Plaintiff complains that it may take up to two months to exhaust an emergency appeal.
6 (Doc. 10 at 3.) However, he has not filed a motion for a temporary restraining order or a
7 preliminary injunction in this case seeking immediately relief. This makes sense given that, as
8 explained above, Plaintiff is not seeking relief to prevent imminent harm, but rather redress for
9 past harms. Consequently, as the court in *Fletcher* noted, there is “no reason to think that the
10 prison’s grievance procedure would take longer than judicial procedure.” 623 F.3d at 1175. In
11 other words, it is highly unlikely that this case will reach a decision on the merits prior to the 60
12 days it would take to exhaust an administrative remedy.

13 The Supreme Court in *Ross v. Blake* did outline an exception to the exhaustion
14 requirement where administrative remedies are “unavailable.” 136 S. Ct. at 1858-60. To be
15 “unavailable,” the administrative process must (1) operate as a “simple dead end,” (2) be so
16 “opaque” as to be “incapable of use,” or (3) be thwarted by “prison administrators … through
17 machination, misrepresentation, or intimidations.” *Id.* at 1859-60. Plaintiff does not show that
18 either of these situations apply. Rather, he complains that it may take two months to exhaust
19 administrative remedies, and he speculates that his appeal will ultimately be denied. (Doc. 10 at
20 2-4.) However, the Supreme Court has not recognized a “length-of-time” or “futility” exception
21 to the exhaustion requirement. *See Booth*, 532 U.S. at 741 n.6.

22 Plaintiff was required to exhaust his administrative remedies prior to initiating this action,
23 and he may not pursue this action because he failed to do so. “In reaching this conclusion, the
24 Court does not overlook the risks of COVID-19.... But the Court may not alter the mandatory
25 requirements of the PLRA for COVID-19 or any other special circumstance.” *Nellson v.*
26 *Barnhart*, 454 F. Supp. 3d 1087, 1094 (D. Colo. 2020) (citing *Ross*, 136 S. Ct. at 1856-57).

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III. CONCLUSION AND RECOMMENDATION

For the reasons set forth above, the Court RECOMMENDS that this action be DISMISSED for failure to exhaust administrative remedies. The Court DIRECTS the Clerk of the Court to assign a district judge to this action.

These Findings and Recommendations will be submitted to the United States District Judge assigned to this case, pursuant to 28 U.S.C. § 636(b)(1). Within 14 days of the date of service of these Findings and Recommendations, Plaintiff may file written objections with the Court. The document should be captioned, “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff’s failure to file objections within the specified time may result in waiver of his rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **February 11, 2021**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TRAVIS RAY THOMPSON,
Plaintiff,
v.
K. ALLISON, et al.,
Defendants.

Case No. 1:21-cv-00001-JLT (PC)

**FINDINGS AND RECOMMENDATIONS TO
DISMISS ACTION FOR FAILURE TO
EXHAUST ADMINISTRATIVE REMEDIES**

14-DAY DEADLINE

Clerk of the Court to Assign a District Judge

Travis Ray Thompson, a state prisoner proceeding *pro se*, initiated this action on December 28, 2020. (Doc. 1.) He alleges that prison guards “deliberately contaminated his food,” causing him to contract COVID-19, or “solicited medical personnel to present a false positive in retaliation for litigation.” (*Id.* at 17-18.) In his complaint, Plaintiff admits that he failed to exhaust administrative remedies prior to filing suit. (*See id.* at 18-19.)

Accordingly, on January 5, 2021, the Court issued an order to show cause why this action should not be dismissed for failure to exhaust. (Doc. 7.) Plaintiff filed a response on January 29, 2021. (Doc. 10.) Therein, Plaintiff argues that, given the length of time that it would take to pursue an administrative remedy, “the exhaustion of remedies rule does not apply because denial of immediate judicial relief would result in irreparable damage to Plaintiff’s life or health.” (*Id.* at 3-4.) This argument is unavailing. For the reasons set forth below, the Court recommends that this action be dismissed for failure to exhaust.

1 **I. LEGAL STANDARD**

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3 respect to prison conditions under … any … Federal law … by a prisoner confined in any jail,
4 prison, or other correctional facility until such administrative remedies as are available are
5 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion of administrative remedies is mandatory and
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25 requirements of the PLRA for COVID-19 or any other special circumstance.” *Nellson v.*
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IT IS SO ORDERED.

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/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE