No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC C. BEAUCHAMP,
Petitioner

v.

F. De La TORRE Jr.,
D. J. DOGLIETTO,
C. ESPINOZA,
SGT. I. SOEKARDI
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit
Case No. 15-15616
Summary Judgment Affirmed on October 06, 2017
Petition for Rehearing Denied on February 1, 2018
Before: Silverman, Tallman, N.R. Smith, Circuit Judges

PETITION FOR WRIT OF CERTIORARI

Eric C. Beauchamp E87593
Folsom State Prison
PO Box 950
Folsom, CA 95763
Pro Se Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Ninth Circuit affirmation of the United States District Court grant of summary judgment to the Defendants for Plaintiff's failure to exhaust administrative remedies comports with this Court's ruling in *Ross v. Blake* 576 U.S. _____ (2016) in light of the very similar facts and issues present in this case raise which raise questions about whether, given these principles, Petitioner Beauchamp in fact had an "available" administrative remedy to exhaust?
2. Whether the appeals process in this case operated as a "dead end" and thus rendered the administrative remedy, although officially on the books, incapable of use towards obtaining relief and exhaustion?
3. Whether the Petitioner's good-faith efforts in obtaining proper exhaustion were thwarted by prison administrators through machination, misrepresentation and intimidation as clearly present in this case?
4. Whether the briefs and other submissions filed in this case suggest the possibility that the aggrieved inmate lacked an available administrative remedy?
5. Whether the District Court committed clear error in resolving disputed questions of material fact by either failing to consider *all evidence* properly put before it which created the disputed genuine issues of material fact, and or failed to view *all of the facts* in the record in the light most favorable to the non-

moving party and rule, as a matter of law, based on those facts? (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-250 (1986)).

LIST OF PARTIES

1. ERIC C. BEAUCHAMP, Plaintiff and Petitioner;
2. F. De La TORRE Jr., Defendant and Respondent;
3. D. J. DOGLIETTO, Defendant and Respondent;
4. C. ESPINOZA, Defendant and Respondent;
5. SERGEANT I. SOEKARDI, Defendant and Respondent.

TABLE OF CONTENTS

INDEX TO APPENDICES

[1] The abbreviation "CD" refers to the numerical sequence assigned by the district court's electronic docket; USDC N. Dist. of CA., Case No. CV-13-2098 CRB (PR).

TABLE OF AUTHORITIES CITED

Statutes and Rules:

Miscellaneous:

California Code of Regulations (CCR) Title 15 Division 3

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

The memorandum order of the United States Court of Appeals for the Ninth Circuit, filed October 6, 2017, affirming the United States District Court for the Northern District of California granting of summary judgment to the Defendant's and dismissal of the 42 U.S.C. § 1983 civil suit, filed December 16, 2014, for Plaintiff's failure to exhaust administrative remedies, appears at Appendix pp. 1-3 to the petition and is unpublished.

The order of the United States Court of Appeals for the Ninth Circuit, filed February 1, 2018, denying Petitioner's Fed. R. App. P. §40 petition for rehearing, appears at Appendix p. 4 to the petition and is unpublished.

The mandate order of the United States Court of Appeals for the Ninth Circuit, filed February 02, 2018, indicating the judgment of Ninth Circuit Court, originally entered on October 06, 2017, takes effect on February 02, 2018, appears at Appendix p. 5 to the petition and is unpublished.

The order of the United States District Court for the Northern District of California, filed December 16, 2014, granting Defendant's motion for summary

judgment and dismissal for Petitioner's failure to exhaust administrative remedies, appears at Appendix pp. 7-22 to the petition and is unpublished.

The order of the United States District Court for the Northern District of California, filed February 27, 2015, denying Petitioner's Federal Rule of Civil Procedure (FRCP) Rule § 59(e) motion for reconsideration of the District Court's December 16, 2014, order granting Defendant's motion for summary judgment and dismissal, appears at Appendix p. 6 to the petition and is unpublished.

JURISDICTION

Petitioner, a California state prisoner currently incarcerated at Folsom State Prison, filed a pro se civil rights action for damages in the United States District Court for the Northern District of California on May 8, 2013, under 42 U.S.C. §1983, alleging excessive use of force (as well as a state law claim for assault and battery) and deliberate indifference to serious medical needs. The District Court has subject matter jurisdiction under 42 U.S.C. §1331(a) because the complaint raises a question whether the Defendants violated Plaintiff's rights under the 8th and 14th Amendments of the United States Constitution.

Summary judgment in favor of the Defendants for Petitioner's failure to exhaust administrative remedies was entered by the District Court on 12/16/2014. (Appendix pp. 7-22.)

Petitioner filed a timely motion for reconsideration to the District Court pursuant to FRCP §59(e), on 1/02/2015, that was denied on 2/27/2015, with judgment entered by the District Court on 3/3/3015. (Appendix p. 6.)

The Ninth Circuit Court of Appeals has appellate jurisdiction under 28 U.S.C. §1291 because the grant of summary judgment to the Defendants is a final judgment.

Petitioner appealed the District Court's summary judgment and dismissal of his §1983 suit to the United States Circuit Court of Appeals for the 9th Circuit; Petitioner's timely notice of appeal was filed on 3/31/2015 and was later assigned case number 15-15616, and the matter was fully briefed on 11/6/2015.

On 10/6/2017, the Ninth Circuit Court of Appeals affirmed the District Court's grant of summary judgment to the Defendants for Petitioner's failure to exhaust administrative remedies that was received and signed for by Petitioner on 10/16/2017, via prison legal mail delivery. (Appendix pp.1-3.)

Petitioner filed a timely petition for rehearing to the Ninth Circuit Court of Appeals on 10/27/2017 pursuant to Fed. R. App. P. §40. On 2/1/2018, the Ninth Circuit Court of Appeals denied Petitioner's petition for rehearing. (Appendix p. 4.)

On 2/2/2018, the Ninth Circuit Court of Appeals issued its formal mandate which indicated that the prior judgment of the Appellate Court entered on 10/6/2017, takes effect this date [2/2/2018] and that costs are taxed against the Petitioner in the amount of $258.60. (Appendix p. 5.)

The Jurisdiction of this Court is invoked under 28 U.S.C. §1(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Eighth Amendment to the United States Constitution

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment to the United States Constitution

"1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. §1997e(a)

"No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

Federal Rules of Civil Procedure (Fed.R.Civ.P.) Rule § 56

(See Appendix pp. 23-24)

California Code of Regulations (CCR) Title 15 Division 3

CCR §3084-3084.9 (CDCR Article 8 Appeals Regulations)

CCR §3086 (CDCR Art. 8.5 Written Request Process Regulations)

CCR §3268-3268.2 (CDCR Article 1.5 Use of Force Regulations)

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STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

On 2/8/2011, Petitioner Eric C. Beauchamp, a California state prisoner, while at CTF Soledad, was subjected to the unnecessary and excessive use of force the left him with four broken ribs, a fractured tibia and a separated shoulder with lacerations at the hands of prison guard, Defendant De La Torre, while De La Torre's supervisor and two other defendants looked on and did not attempt to stop De La Torre as required per CCR §3268.1(c). The incident was not reported as required per CCR §§3268.1(a)(1) and 3268.1(b)(1), nor was medical attention provided. Instead, after the incident, Petitioner was pulled aside and threatened by De La Torre, who told by him, "if you go to medical [and report this] you're going to the hole." This was the third act of unprovoked and unreported violence Petitioner suffered at the hands of De La Torre and other prison guards, leaving Petitioner seriously injured, intimidated and in fear for his life.

Petitioner, in pro se, exhausted all available administrative remedies and brought suit against these prison guards under 42 U.S.C. §1983, alleging excessive force and continuing harms, deliberate indifference to his medical needs and state law claims. (Amended 42 U.S.C. §1983 Complaint; CD[1] 14).

B. The District Court Proceedings

The Defendants raised the exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA) as an affirmative defense initially under an

[1] The abbreviation "CD" refers to the numerical sequence assigned by the district court's electronic docket; USDC N. Dist. of CA., Case No. CV-13-2098 CRB (PR).

unenumerated Rule §12(b) Fed.R.Civ.P., motion and then under Rule §56, Fed.R.Civ.P., and argued that Beauchamp did not properly exhaust his claims prior to bringing suit.

Beauchamp argued that all administrative remedies in this particular case were effectively unavailable to him, citing *Albino v. Baca,* 747 F.3d 1162 (9th Cir. 2014) and *Sapp v. Kimbrell*, 623 F.3d 813 (9th Cir. 2010). Beauchamp provided material facts that remain in genuine dispute regarding the machination, misrepresentation, and intimidation that made the existing and generally available administrative remedies effectively unavailable to him, to include threats to him if he reported the use of force and his serious injuries; the cruel and unusual conditions of the "caged interview" regarding his use-of-force allegations, and the clear and still present controversy surrounding the cancellation of his grievance for his alleged "refusal to participate in the interview process"; the legitimacy of this use-of-force grievance cancellation—a cancellation that did not cite any related regulation to support the cancellation itself—or provide Petitioner with the required cancellation notice or interview; a cancellation that did not check, at any level of the process, the appropriate cancellation box indicating the grievance was in fact cancelled.

Petitioner also clearly evinced how his repeated and timely efforts to appeal the cancellation were subsequently thwarted by prison administrators through improper screening, being given conflicting instructions, the subsequent loss of the accepted appeal that challenged the cancellation when he was suddenly transferred,

and their failure to log or return his appeals or to forward his mail between 11/2011 and 3/2014, that created a procedural quagmire and led to a dead end. (CD 58; SER[2] pp. 31-43).

The District Court held that Beauchamp did not meet his burden an show that there was something in his particular case that made the existing and generally available administrative remedies unavailable to him; that he did not show that he properly exhausted his administrative remedies in connection with his excessive use of force claim by using CDCR's administrative process and complying with its "deadlines and other critical procedural rules"; nor did he show that "he attempted to exhaust his administrative remedies but was thwarted by improper screening," and that the defendants are entitled to summary judgment. (Appendix pp. 7-22; CD 69).

Beauchamp subsequently filed a Rule §59(e) Fed.R.Civ.P., Motion for Reconsideration of the Order granting Defendant's Motion for Summary Judgment and Dismissal of his §1983 action that was subsequently denied by the district court. (Appendix p. 6; CD 74; SER 1).

C. The Appellate Court Proceedings

Beauchamp appealed the district court's summary judgment and dismissal of his §1983 suit to the United States Circuit Court of Appeals for the 9th Circuit, was assigned case number 15-15616, and the matter was fully briefed on 11/6/2015.

[2] The abbreviation "SER" refers to the page numbers contained in the Defendants' Supplemental Excerpts of Record filed with their Appellate Answering Brief.

On 10/16/2017 via prison legal mail, Beauchamp was served with the Appellate Court's Memorandum affirming the District Court's granting of summary judgment to the Respondents/Defendants for Plaintiff's failure to exhaust administrative remedies, dated 10/06/2017. (Appendix pp. 1-3.)

Petitioner filed a timely petition for rehearing to the Ninth Circuit Court of Appeals on 10/27/2017. On 2/1/2018, the Ninth Circuit Court of Appeals denied Petitioner's petition for rehearing. (Appendix p. 4.)

On 2/2/2018, the Ninth Circuit Court of Appeals issued its formal mandate which indicated that the prior judgment of the Appellate Court entered on 10/6/2017, takes effect this date and that costs are taxed against the Petitioner in the amount of $258.60. (Appendix p. 5.)

SUMMARY OF ARGUMENT

The dispute here concerns whether the PLRA's exhaustion requirement, §1997e(a), bars Plaintiff's suit. Under §1997e(a), the exhaustion requirement hinges on the "availab[ility]" of administrative remedies: To be available, a remedy must be available "as a practical matter"; it must be "capable of use; at hand." (*Brown v. Croak*, 312 F.3d 109, 113 (3d Cir.2002)). An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones. Accordingly, an inmate is required to exhaust those, but only those, grievance procedures that are "capable of use" to obtain "some relief for the action complained of." *Booth v. Churner*, 532 U. S. 731 at 738 (2001).

The Defendant's exhaustion defense rests on Plaintiff's inability to obtain proper exhaustion as based upon the cancellation of his grievance for allegedly refusing to resume the caged interview after being "cleared" by medical to do so on 8/1/2011. The Defendants presented the interviewer's and the Defendant's supervisor, Lt. Villaseñor's undated, factually unsupported, and controverted declaration as the sole support of the events and circumstances related to the grievance cancellation. In his declaration, Villaseñor claims Petitioner was seen, evaluated and "cleared" by medical on 8/1/2011 and was fit to resume the grievance interview; however the Defendants were unable to provide any medical report(s) or declaration from *any medical staff* that allegedly evaluated or "cleared" Petitioner to resume the interview to support their claim as required per FRCP §56(c)(B). Villaseñor's declaration incorporates an unverified third-party statement (hearsay) that states that Sgt. Lew said Petitioner refused to resume the interview after being "cleared by medical" on 8/1/2011; however the Defendants failed to provide any declaration from Sgt. Lew, or anyone else who had "*personal knowledge*" or *actually heard Petitioner "refuse to resume" or participate in the interview on 8/1/2011*—and the Defendants failed to provide any declaration or documentation from any medical staff that allegedly evaluated and "cleared" Petitioner on 8/1/2011, to resume the interview, as they allege took place, as required per FRCP §56(c)(4), to be admissible as evidence. This is the crux of the Defendants affirmative defense which remains in clear controversy.

In *Woodford*, this Court recognized that officials might devise procedural systems (including similar blind alleys and quagmires present in this case) in order to "trip[] up all but the most skillful prisoners." *Woodford* v. *Ngo*, 548 U. S. 81 (2006) at 102. And appellate courts have addressed a variety of instances in which officials misled or threatened individual inmates so as to prevent their use of otherwise proper procedures which are similarly present. *Schultz* v. *Pugh*, 728 F. 3d 619, 620 (CA7 2013) ("A remedy is not available, therefore, to a prisoner prevented by threats or other intimidation by prison personnel from seeking an administrative remedy"); *Tuckel* v. *Grover*, 660 F. 3d 1249, 1252–1253 (CA10 2011) ("[W]hen a prison official inhibits an inmate from utilizing an administrative process through threats or intimidation, that process can no longer be said to be 'available' "); *Goebert* v. *Lee County*, 510 F. 3d 1312, 1323 (CA11 2007) (If a prison "play[s] hide-and-seek with administrative remedies," then they are not "available").

In his extensive filings, Plaintiff Eric C. Beauchamp demonstrated that his good-faith efforts to exhaust his administrative remedies were clearly thwarted by the prison administrators through machination, misrepresentation, or intimidation. *See Ross v. Blake,* 136 S. Ct. 1850, 1858-60 (2016). Plaintiff has met the burden of showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him. *See Albino v. Baca,* 747 F.3d 1162, 1171-1172 (9th Cir. 2014); *Sapp v. Kimbrell*, 623 F.3d 813, 823-24 (9th Cir. 2010). Plaintiff did exhaust *all available* administrative remedies as required by *Booth, supra,* at p. 738. *The* record clearly demonstrates

that the Plaintiff took "reasonable an appropriate steps" to exhaust but was precluded from doing so by outside interference. *Nunez v. Duncan,* 591 F.3d 1217, 1224-26 (9th Cir. 2010).

As all those courts have recognized, such interference with an inmate's pursuit of relief renders the administrative process unavailable. And then, once again, §1997e(a) poses no bar.

Plaintiff cannot force the local authorities to properly log, process, or provide a Third Level Response, especially if it is not in their best interest to do so. By subjecting Plaintiff to cruel and unusual conditions during the interview; by improperly cancelling Petitioner's appeal and then improperly screening and failing to process his appeals that challenged the cancellation; by failing to forward his appeals while out to court; by failing to process Petitioner's appeals that addressed the missing, unprocessed appeals upon his return from court; and by refusing to provide Petitioner with a Third Level Review and satisfactory exhaustion letter, the Defendants simply created their own affirmative defense, an exhaustion defense that, in light of the methods used and the clear controversy still present, renders such a defense illegitimate and without support for proper use in attaining summary judgment pursuant to FRCP §56.

Accordingly, Plaintiff Beauchamp's state claim for assault and battery was timely filed on 5/8/13, under *Wright v. California,* 122 Cal.App 4th 659 (2004), as the filing was completed during the time period when Plaintiff Beauchamp *reasonably*

and diligently pursued his administrative remedies from 6/6/11 until 10/14/2014[3] with his efforts being clearly thwarted by machinations, misrepresentations, intimidation and thus rendering the appeals process unavailable. Therefore, Plaintiff's filing of the §1983 lawsuit was timely under *Wright, supra,* as the six-month deadline to file the lawsuit in the instant case was tolled due to his reasonable and diligent efforts in pursuit of exhaustion and the 6-month deadline did not expire prior to his 5/8/13 §1983 filing in Federal Court and his claim is not time-barred.

In granting summary judgment without a preliminary proceeding, the Court committed clear error in resolving disputed questions of material fact by either failing to consider *all evidence* properly put before it which created the disputed genuine issues of material fact, and or failed to view *all of the facts* in the record in the light most favorable to the non-moving party and rule, as a matter of law, based on those facts. (*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-250 (1986)).

Petitioner now submits his petition for writ of certiorari and points to key facts that were erroneously decided and others that were apparently overlooked and clearly raise a genuine dispute of material fact and clearly show that that his repeated, good-faith efforts to exhaust his administrative remedies were clearly thwarted by the prison administrators through machination, misrepresentation, or intimidation, and that the Defendants are not entitled to summary judgment. *See Ross v. Blake,* 136 S. Ct. 1850, 1858-60 (2016).

[3] 10/14/14, is the last correspondence received from the Third Level in regards to Appellant's appeals that went missing while he went out to court which attempted to exhaust his administrative remedies regarding the cancellation of his use of force complaint. (CD 58, Ex."E").

REASONS WHY CERTIORARI SHOULD BE GRANTED

The lower Court's rulings do not comply with this Court's holding in *Ross v. Blake,* 136 S. Ct. 1850, (2016). The lower Court's did not thoroughly review or analyze Petitioner's extensive lodgings that provide persuasive evidence that California officials thwarted the effective invocation of the administrative process through threats, game-playing, and misrepresentations in this individual case. If rulings such as these are allowed to stand, it sends a strong message that the Courts condone such tactics and tacitly invites similar methods that welcome other Defendants to create analogous, illegitimate affirmative defenses to be deployed in their FRCP §56 motions for summary judgment and thus deny proper redress for the aggrieved party, in this case, the voiceless and disenfranchised prisoner.

Imagine being an inmate that, without any provocation, gets viciously and repeatedly beaten by members of a rogue unit that only answers to the prison warden, however there is no permanent warden at the facility (for over a decade), and the leader of the unit is also the powerful union president at the facility. After Petitioner experienced three rounds of unprovoked and excessive force at the hands of these rogue officers, now suffering 4 broken ribs (acute/displaced fractures), a fractured tibea and separated shoulder with lacerations on 2/8/2011—while also being threatened if he reported this attack—and two weeks later then told by another officer "you have to report this and take steps to protect yourself; next time they might kill you," Petitioner recognized his plight and mustered the courage to reported these violations. What happened afterwards speaks of the Defendant's

power, influence, and what they can and will do to make allegations such as these go away.

This case is right on point with this Court's decision in *Ross v. Blake, supra,* and evinces identical factors, to include machination, misrepresentation, game-playing, intimidation and a dead-end appeals process. However, this case is far worse; these violations are far more glaring—and they were deliberately orchestrated and deployed to make exhaustion impossible so that Petitioner's sought-after redress in the Courts would be unobtainable. The blind alley the Defendants created and what they did to the Petitioner in an a tiny, encapsulated holding cage on 8/1/2011 during the interview was in fact worse than the beatings themselves. Petitioner was tightly bound in chains and manacles and placed in a cage[4] that had no openings and he almost suffocated[5]; the pain from the tight restraints against his broken ribs and his inability to breathe caused a fight or flight response that spooked even the officers there. Petitioner was now cut at the wrists, bleeding, laboring to breathe and in clear distress and requesting immediate medical attention. However, the interviewer (Villaseñor) could not allow Petitioner to be seen by medical as it would create documentation of the event and sustained injuries. Petitioner's begging and repeated pleas to be released from the cage and tight chains so he could breathe went unanswered; he was in total fear for his life.

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[4] The holding cage had three (3) steel sides with plexi-glass covering the front of the cage; the tray slot was locked closed and a cardboard box covered the top of the cage which restricted the airflow into the cage on a hot, August day. The holding cage was in a small, windowless room, where Appellant was left locked inside, still in a waist-chain and manacles, behind a closed door, and unattended for 15+ minutes before ISU Lieutenant S. Villaseñor arrived.

[5] CCR §3268.2(c)(3) prohibits the application of restraints "in a way likely to cause undue physical discomfort or restrict blood flow or breathing..."

As a victim of a violent crime, Petitioner was now being punished and victimized for reporting the events and the Defendant's deployed these methods knowingly, willingly, and wantonly to create an exhaustion defense. Upon reporting the abuse to the prison authorities, Petitioner was held in isolation in punitive segregation without property; his mail was withheld; his appeals were improperly screened out or lost; and he was then transferred away from the prison for 30 months and his property and mail did not follow him. However, as Petitioner's extensive lodgings indicate, he remained vigilant and continued to seek proper exhaustion but was subjected to deliberate machination, deception and game-playing, and his efforts were thwarted. These facts are contained in Petitioner's numerous declarations and affidavits and clearly evince these methods and the Department's failure to follow their own use-of-force grievance regulations.

The facts of this case raise questions about whether, given these facts, Beauchamp had an "available" administrative remedy to exhaust. In light of Petitioner's many lodgings and the questions they raise about the cancellation of Plaintiff's grievance, to include whether the Department followed their own grievance regulations involved in use-of-force cases such as these; the unauthorized methods deployed in the interview that led to the cancellation—and the clear legal issues raised regarding the "availability" of the administrative remedy, as a practical matter, in this particular case, the writ should issue and this case should be remanded for a proper, in depth analysis and review of the record concerning the circumstances and conditions of the 8/1/2011 "caged interview"; whether anyone did

in fact personally hear or witness Petitioner refuse to resume the 8/1/2011 interview after he was allegedly cleared by medical to resume the interview; whether any medical staff did in fact evaluate and clear Petitioner on 8/1/2011 to resume the interview; whether Petitioner's subsequent requests to resume the interview went unanswered; whether Petitioner's attempts at appealing the cancellation were improperly screened and subsequently went missing; and whether these facts demonstrate the unavailability of an administrative remedy. "[I]f material facts are disputed [as they were in this case], summary judgment should be denied and the district judge rather than a jury should determine the facts in a preliminary proceeding." (*Albino v. Baca,* 747 F.3d 1162 (9th Cir. 2014), at 1166).

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMATION OF THE UNITED STATES DISTRICT COURT GRANT OF SUMMARY JUDGMENT TO THE DEFENDANTS FOR PLAINTIFF'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES FAILS TO COMPORT WITH THIS COURT'S RULING IN *ROSS V. BLAKE* 576 U.S. _____ (2016).

The PLRA contains its own, textual exception to mandatory exhaustion. Under §1997e(a), an inmate's obligation to exhaust hinges on the "availab[ility]" of administrative remedies. A prisoner is thus required to exhaust only those grievance procedures that are "capable of use" to obtain "some relief for the action complained of." *Booth,* 532 U. S., at 738.

"As relevant here, there are three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief. First, an administrative procedure is unavailable when it operates as

a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. Next, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use—*i.e.*, some mechanism exists to provide relief, but no ordinary prisoner can navigate it. And finally, a grievance process is rendered unavailable when prison administrators thwart inmates from taking advantage of it through machination, misrepresentation, or intimidation." *Ross v. Blake* 136 S. Ct. 1850, 1853-1854 (2016).

The facts of this case raise questions about whether, given these principles, Beauchamp had an "available" administrative remedy to exhaust.

In the present case, the District Court erroneously overlooked, omitted and resolved numerous material facts that remain in genuine dispute regarding the evidence that showed there is something [many things] in his particular case that made the existing and generally available administrative remedies unavailable to him. A "material" fact is one that "might affect the outcome of the suit under the governing law." (*Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986)). The genuine dispute of material facts surrounding the cancellation of Beauchamp's grievance are the crux of the Defendants affirmative defense and Beauchamp herein respectfully points this Court to the disputed material facts that were erroneously overlooked or decided and negatively affected the outcome of his suit.

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A. The Appeals Process Operated as a Dead End and Rendered The Administrative Remedy Incapable of Use Towards Obtaining Relief and Exhaustion.

Under the law of the circuit, improper screening of a prisoner's administrative grievance may render administrative remedies "effectively unavailable" such that exhaustion is not required under §1997e(a). *Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010). In meeting this exception, the record before the Court clearly shows "that he attempted to exhaust his administrative remedies but was thwarted by improper screening." *Id.* Plaintiff has also shown that (1) he actually filed a grievance or grievances that, if pursued through all levels of the administrative appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his grievance or grievances for reasons inconsistent with or unsupported by applicable regulations." *Id.*

In meeting this exception, Plaintiff provides this Court with 2 declarations that detail his extensive efforts in obtaining exhaustion (Appendix pp. 43-62 and pp. 77-81; CD 25 and CD 48) and 4 referenced exhibits—screening notices from both the 2nd and 3rd Level that provided specific directions (which Petitioner followed) on how to proceed with his grievance in pursuit of exhaustion dated 9/16/2011, 10/10/2011, 10/28/2011, 10/31/2011, 11/1/2011, that indicate that his use-of-force grievance was not in fact cancelled on 8/1/2011 (Appendix pp. 63-73; CD 25 Ex. "D", CD 26 Ex. "L", CD 26 Ex. "N", CD 27, Ex. "V"), as well as evidence that Petitioner's attempt at appealing the grievance cancellation was accepted for processing and submitted

according to the Appeals Coordinator's instructions, only to go missing/lost (Appendix 82-83; CD 48 Ex. "C"). Petitioner specifically points to the following:

1. He filed "use of force" grievance" log no. CTF-11-01266 on 6/29/11 (Appendix pp. 63-67); the use-of-force grievance was not processed in accordance with the Department's use-of-force requirements (CCR §3084.9(i)(5); the grievance does not reflect the designated "cancellation" box as being checked at any level; the checked "other" box references "canceled per CCR 3084.4(4)(d)[6]", however this cited regulation *does not deal with appeal cancellations;* the required, detailed cancellation notice was not provided per § CCR §3084.6(c)(A)[7]; Petitioner's subsequent attempts to resume the 8/1/2011 interview were not responded to as required per CCR §3086(f) (Appendix p. 47 ¶28); Petitioner's attempts to re-submit the grievance were improperly screened (Appendix pp. 49-51, ¶¶38-48); CD 25 pp. 7-9);
2. All attempts to submit appeal log CTF-11-01266 were improperly screened out, not processed, and then went missing while Plaintiff went out to court (and remain missing). (Appendix pp. 50-61; CD 25); Petitioner's attempts to appeal the cancellation were thwarted (Appendix pp. 77-81; CD 48);

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[6] The cited regulation §3084.4(4)(d) states: "If the abuse of process continues after the issuance of a warning letter, the appeals coordinator shall meet with the inmate or parolee in a timely manner before imposition of any restriction to provide instruction for the appropriate use of the appeals process and to rule out any unintended basis for non-compliance. If a face-to-face meeting is not possible, an agent acting on behalf of the appeals coordinator shall conduct the meeting."

[7] CCR §3084.6(c)(A) states that: "The appellant's refusal to be interviewed or to cooperate with the reviewer ***shall be clearly articulated in the cancellation notice."***

3. Upon return from Court, all attempts to locate and appeal the missing appeals which addressed the improper cancellation, findings, and improper screening, were improperly screened out and refused for processing at CTF and then the Third Level. (CD 58, declaration ¶18, Ex."E").
4. While out to Court, Plaintiff's appeal and mail was not being forwarded by CDCR, despite his repeated notice of address change, requests to have it forwarded; winning an appeal to have it forwarded; then having to request assistance from the CDCR Ombudsman. (Appendix pp. 53-56, 59 , ¶¶59,61,62,69,70,71,87-89; CD 25).

On 8/11/2011, the staff complaint appeal log CTF-11-01266, was returned to Plaintiff, stamped 8/5/2011, with the "Denied" box initially marked and then lined out, with the "other" box now marked, which had the following entry: "Cancelled per CCR 3084.4(4)(d)" (Appendix p. 65; CD 26, Ex. "D"). The appropriate cancellation box on the CDCR 602 Form indicating cancellation was not checked, nor was the required "clearly articulated" cancellation notice provided. Further, the cited CCR §3084.4(4)(d) section referenced in the "other" line, *does not deal with cancelation of appeals,* but address abuses of the appeal process, thus leaving Petitioner confused.

Plaintiff then resubmitted his appeal to the CTF Appeals Coordinator with a cover letter identifying the issues and the clear bias of the interviewer, requesting that a new interviewer be assigned[8] and once again requested to be interviewed and

[8] CCR §3084.6 subd.(c)(B) "If the appellant provides sufficient evidence to establish that the interviewer has a bias regarding the issue under appeal, the appeals coordinator shall assign another interviewer."

have his allegations investigated and findings made. The appeal was returned approximately ten (10) days later, the cover letter was not attached, and no other action was taken in result, (Appendix pp. 47, ¶¶27, 28; CD 25).

Plaintiff then attached supporting documents to his appeal and forwarded to Sacramento for Third Level Review. The appeal was returned with a rejection letter dated 9/16/2011, which stated "Remove the excessive attachments from appeal." (Appendix pp. 68-69; CD 26, Ex. "L"). The Appeals Chief had put the documents he wanted removed into a seperate envelope which stated "remove these documents". Plaintiff followed the Third Level Review (TLR) rejection notice and removed the envelope of documents TLR wanted removed and resubmitted to Sacramento for TLR. In response to this submission, the TLR sent a rejection notice dated 10/10/2011, indicating that the appeal is missing the "Second Level of Review Decision Letter." (CD 26, Ex. N, Appellate Appendix 12).

On 10/17/2011, Plaintiff submitted his appeal package and a cover letter requesting a Second Level decision letter to the CTF Appeals Coordinator with the 9/16/2011 and 10/10/2011 rejection notices provided by TLR. (Appendix p. 50, ¶44; CD 25).

On 10/20/11, the appeal was returned without the cover letter or screen out forms or any action taken. (Appendix p. 50 ¶ 45; CD 25). Plaintiff resubmitted the appeal to the CTF Appeals Coordinator attached to a Form 22 on 10/20/2011 (Appendix p. 51, ¶46; CD 25). This appeal went "missing/undelivered" until

July/2012.[9] (Appendix p. 54, ¶62; CD 25). Upon its return, the appeal now had three notices from the Second Level of Review stating that "your appeal is considered exhausted at the Second Level of Review" and to re-submit to 3rd Level. (Appendix pp. 71-73; CD 27, Ex. "V"). Plaintiff followed instructions and resubmitted to TLR on 7/16/12. (Appendix p. 54, ¶64; CD 25). *This appeal went missing and was not returned to him until 3/12/13,* after requesting assistance from the CDCR Ombudsman on 12/4/2012 (Appendix pp. 55-56, ¶¶69-71; CD 25; Also CD 27, Ex's. Z,DD). The appeal now had a TLR letter dated 8/3/12 that stated: "*The previous Appeal Rejection Letters sent from this office to you were sent in error.* It should be noted that this appeal was cancelled at the Second Level of Review."

Plaintiff also attempted to appeal the cancellation and submitted appeals related to the unsupported cancellation of his grievance, the circumstances and conditions surrounding the 8/1/2011 interview, and the fact that no cancellation notice was provided and that the cite referenced in the "other" box didn't deal with refusal to participate or cooperate or related cancellations. Each one of these appeals was either screened out, wasn't logged, or simply disappeared. (CD 58, Ex. "E"). Plaintiff was effectively "stonewalled" at every avenue of redress by the CTF appeals coordinator.

When one of these submitted appeals regarding the cancellation of appeal log CTF-11-01266 was finally indicated as being appropriate for processing as noted on

[9] Between 11/10/11 and 3/14/14, Appellant was "out to court" and his mail and appeals were not being forwarded by CDCR authorities. Appellant had to involve the Ombusdman to get his mail and appeal forwarded. (Appendix pp. 55-56, ¶¶69-71; CD 25).

the CDC Form 695 dated October 05, 2011[10], this appeal too went missing and remains unaccounted for since its 10/18/2011 submission. (Appendix pp. 77-80, ¶¶ 1-15; CD 48 ¶¶1-15, and Ex's "A-D").

Plaintiff went "out to court" from CTF Soledad between 10/31/2011 and 3/19/2014. While "out to court," all correspondence to the CTF Appeals Coordinator and CTF Administration went unresponded to; Plaintiff's appeals and weren't being properly forwarded to him despite repeated requests, notice of address change , or the "granting" of an appeal requesting the same. Plaintiff had to request assistance from the CDCR Ombudsman to have his appeals returned. (Appendix pp. 53-55, 59, ¶¶59,61,65,69,87; CD 25).

In *Marella v. Terhune,* 568 F.3d 1024 (9th Cir. 2009), this Court reversed a district court's dismissal of a PLRA case for failure to exhaust because the inmate did not have access to the necessary grievance forms within the prison's time limits for filing a grievance. (*Id.,* at 1027-28). Plaintiff argues that the Defendant's failure to forward his appeals, mail, or reply to his related correspondence made the existing and generally available administrative remedies effectively unavailable to him, and therefore he is excused. *See Albino, supra* at p.1172.

Upon his return from Court on 3/19/2014, Plaintiff immediately sent correspondence to the CTF Appeals Coordinator in regards to these missing appeals, without result. Plaintiff attached all of the documents he had in support of his position that his attempts to appeal the cancellation weren't processed and

[10] No log number was entered on this 695 screening form or any other related screening forms relating to Appellant's attempts to submit appeals relating to the cancellation of his Staff Complaint.

remain missing, and filed appeal log CTF-14-0811. This appeal was also screened out and refused processing at CTF. (CD 58, Ex. "E"). This appeal was rejected for processing at the Third Level as well, with the last notice being 10/14/14. Plaintiff has shown that "he attempted to exhaust his administrative remedies but was thwarted by improper screening" and thus rendered the administrative remedies "effectively unavailable" such that exhaustion is not required under §1997e(a). *See Sapp, supra* at p.823.

In addition to the apparent conflict of interest and violation of regulations[11] in having a direct supervisor investigate his subordinates alleged civil and criminal violations of law, the record is replete with evidence of questionable practices and the failure to follow established protocols in regards to the processing of use of force complaints per §3084.9(i); the failure to provide the required cancellation notice per §3084.6(c)(A); the failure to follow reporting and investigating use of force incidents as required per CCR §3268 through §3268.2, as well as the Plaintiff's inability to have his appeal(s) properly logged, processed or to receive a response despite his diligent, good-faith efforts and attempts to have his claims investigated and properly exhausted. (See Appendix pp. 43-63, 77-81; CD 25 and CD 48; See also CD 58 declaration ¶¶1-45, Ex's "A,E,I). In *Sapp,* the Court held "that where prison officials declined to reach the merits of a particular grievance 'for reasons

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[11] 3084.7(d)(1) states that: "Appeal responses **shall not** be reviewed and approved by a staff person who:(A) Participated in the event or decision being appealed. This does not preclude the involvement of staff who may have participated in the event or decision being appealed, so long as their involvement with the appeal response is necessary in order to determine the facts or to provide administrative remedy, *and the staff person is not the reviewing authority and/or their involvement in the process will not compromise the integrity or outcome of the process."* (Emphasis mine).

inconsistent with or unsupported by applicable regulations,' administrative remedies were 'effectively unavailable.'" *Id.*, at pp. 823-24.

Plaintiff's deliberate indifference claims and state tort assault and battery claims against the named Defendants are based on the same factual allegations as his excessive use-of-force claims as contained in his administrative grievance log no. CTF-11-01266 (Appendix pp. 63-67; CD 26, Ex. "D") and his §1983 complaint (CD 14). All filings and interviews referenced herein provided clear notice to Defendants as required by *Griffin v. Arpaio*, 557 F.3d 1117 (9th Cir. 2009).

The time which a litigant reasonably pursues his administrative remedies is excluded from the six-month time limit for filing a court action after the VCGCB rejects a tort claim. (*Wright v. California,* 122 Cal.App.4th 659, 671 (2004)). Plaintiff Beauchamp's state claim for assault and battery was timely filed on 5/8/13, under *Wright v. California*, 122 Cal.App 4th 659 (2004), as the filing was completed during the time period when Plaintiff Beauchamp reasonably and diligently pursued his administrative remedies from 6/6/11 until 10/14/2014[12].

Plaintiff filed the Government Tort Claim on 6/6/11. The Tort Claim was rejected on 8/18/11. On 2/16/12, Plaintiff's attorney filed a state lawsuit in Monterey County within the 6-month statutory time limit to file a lawsuit that was voluntarily dismissed on 8/20/12, without prejudice, due to Plaintiff's counsel's medical condition. (Appendix pp. 43, 44, 53, ¶¶5, 60; CD 25).

[12] 10/14/14, is the last correspondence received from the Third Level in regards to Appellant's appeals that went missing while he went out to court which attempted to exhaust his administrative remedies regarding the cancellation of his use of force complaint. (CD 58, Ex."E").

Between 8/20/12 and the 5/8/13 filing date of his §1983 action in the USDC Northern District of California, Plaintiff was reasonably and diligently pursuing the exhaustion of all available administrative remedies, until 10/14/14, and therefore, the six-month filing deadline did not commence until then. Plaintiff's filing of the §1983 lawsuit was timely under *Wright, supra,* as the six-month deadline to file the lawsuit in the instant case did not expire prior to his 5/8/13 §1983 filing in Federal Court. The District Court improperly dismissed Plaintiff's state claim of assault and battery despite his reasonable pursuit of his administrative remedies which were being frustrated by the improper screening and loss of his submitted appeals by CTF Soledad and CDCR officials. Plaintiff's inability to receive his mail and missing appeals while out to Court further impeded and frustrated his pursuit of exhaustion.

The record before the Court clearly indicates that Plaintiff's appeal log CTF-11-01266 use of force grievance was inappropriately cancelled and that the local remedies regarding the use of force appeal and its cancellation were ineffective, unobtainable, unduly prolonged, inadequate and unavailable. "The test for deciding whether the ordinary grievance procedures were available must be an objective one: that is, would 'a similarly situated individual of ordinary firmness' have deemed them available." *See Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004). "An inmate is required to exhaust only available remedies." *Booth v. Churner*, 532 U.S. 731, 740-41 (2001). To be available, a remedy must be available "as a practical

matter," it must be "capable of use; at hand." (*Brown v. Valoff,* 422 F.3d 926, 936-37 (9th Cir. 2005), quoting *Brown v. Croak*, 312 F.3d 109, 113 (3d Cir. 2002)).

The record clearly demonstrates that regardless of Plaintiff's unrelenting attempts to properly exhaust, that the administrative process in this case was ineffective, unobtainable, unduly prolonged, inadequate, and as a practical matter, not available for use, or at hand. Plaintiff has met the burden of showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him. *See Albino,* at p. 1172. Plaintiff has *clearly* demonstrated that "he attempted to exhaust his administrative remedies but was thwarted by improper screening." *See Sapp, supra,* at p.823.

The record clearly demonstrates that the Plaintiff took "reasonable an appropriate steps" to exhaust but was precluded from doing so by outside interference. *Nunez v. Duncan,* 591 F.3d 1217, 1224-26 (9th Cir. 2010). Accordingly, Plaintiff satisfied all §1997e(a) exhaustion requirements and the District Court's granting of summary judgment in favor of the Defendants was improper based upon its resolution of genuine issues of material facts that remain in dispute.

B. Machinations, Misrepresentations and Intimidation that Rendered the Grievance Process Unavailable.

After the 2/8/2011 use-of-force incident, Beauchamp was threatened by De La Torre and told by him, "if you go to medical [and report this] you're going to the hole." This was the third act of violence Beauchamp suffered at the hands of De La Torre and other prison guards, leaving Beauchamp seriously injured and in fear for his life. Beauchamp provided declarations, an affidavit, and letters to the prison

administrators detailing all 3 incidents and the extraordinary conditions of the caged interview and inhumane treatment he was subjected to therein, and how these extreme conditions aggravated his broken ribs and caused him extreme distress as he labored to breathe that he had a "fight-or-flight response" and the manacles cut into his wrists and left him bleeding and unable to continue at that time. (CD 58; SER 38-39; also CD 58-1; SER 76-80, 84-87).

During the interview Plaintiff informed Villaseñor of his pain, his labored breathing due to his rib injuries, that the waist-chain was tightly applied and biting into his ribs, the lack of air coming into the cage, and that the handcuffs were too tight and were cutting into his wrists. Villaseñor offered no relief. Plaintiff did his best to continue as long as he could but the conditions were intolerable and prohibitive to his continuing with the interview. (CD 26, Ex. G).

In *Woodford v. Ngo*, 548 U. S. 81, the Supreme Court recognized that officials might devise procedural systems (including the blind alleys and quagmires just discussed) in order to "trip[ ] up all but the most skillful prisoners." (Id., 548 U. S., at 102). Being brought to the caged interview under the guise of seeing a doctor was a "blind alley" that the Court spoke of and this tactic was used to trip up Beauchamp and left him in an "exhaustion quagmire." The prison administrators used this tactic to cancel his appeal and then thwarted his successive attempts at appealing the cancellation as detailed below.

Beauchamp repeatedly requested to have his claims investigated and that "[a]t no time did I refuse to interview, refuse to cooperate, or refuse to answer

questions on 8-1-11, or any other day." (CD 58; SER 39, ¶31). Beauchamp's numerous requests to resume the interview as sent to the interviewer, Lt. Villaseñor, Lt. Chamberlain, the Warden, Inmate Appeals Office in Sacramento, etc., all went unanswered. (CD 58; SER 39, ¶32; SER 81-87).

This "caged interview" experience was a "blind alley" that was intimidating and left Beauchamp traumatized and in fear for his life. Plaintiff argues that *the conditions of the caged interview alone* foreclose of the Defendants argument that the cancellation of his grievance was consistent with regulations, as the conditions of the 8/1/2011 interview were not in accord with Department protocols. The Defendants do not dispute Plaintiff's claims regarding the conditions he was subjected to during the 8/1/2011 "caged interview."

The Defendants have also failed to explain why Plaintiff's 30 minute recorded video interview with prison authorities on 6/14/2011, regarding his allegations, did not satisfy the interview requirement, or why the 2 hour interview on 6/17/2011, with CTF Associate Warden, J. Soares, did not satisfy this requirement, or why his participation in the 8/1/2011 "caged interview" prior to requiring medical attention (that never came) did not satisfy this requirement, or why his repeated written requests to resume the interview were not responded to or acted upon. Once the prison authorities were made aware of Plaintiff's allegations, the required CDCR CCR §3268 through §3268.2 "use of force" reporting and investigation protocols were not followed, nor were the required CCR §3084.9(i) staff complaint appeal processing protocols followed as well. (See *Schultz v. Pugh*, 728 F. 3d 619, 620 (CA7

2013) ("A remedy is not available, therefore, to a prisoner prevented by threats or other intimidation by prison personnel from seeking an administrative remedy") ; *Tuckel v. Grover,* 660 F. 3d 1249, 1252–1253 (CA10 2011) ("[W]hen a prison official inhibits an inmate from utilizing an administrative process through threats or intimidation, that process can no longer be said to be 'available' ").

In result of the circumstances and events that transpired on 8/1/2011, during the "caged interview" with Villaseñor, Plaintiff, on 8/2/2011, wrote out a 5 page affidavit and sent it to the CTF Warden, R. Grounds, CTF Associate Warden, J. Soares, as well as the CTF Appeals Coordinator, and received no response. (Appendix p. 47, ¶27; CD 25; See also CD 26, Ex. "D"). On 8/4/2011, Plaintiff sent a CDCR Form 22 Request to Lt. Villaseñor, requesting to be interviewed regarding his allegations of use of force; this request went unanswered in violation of CCR§3086(f). (Appendix p. 47 ¶29; CD 25).

The cancellation itself and the circumstances that led to the cancellation are genuine issues of material fact that remain in dispute. Plaintiff did not receive the detailed cancellation notice as required per CCR §3084.6(c)(8)(A) , nor was the "cancelled" box checked on the grievance CDCR form 602 (at any level)[13] . (Appendix p. 65; CD 26, Ex. "D"). All subsequent appeals related to the cancellation were improperly screened out and refused for processing once submitted, or went missing

[13] At the Second Level, Appeal Log 11-01266, shows the "denied" box being checked and also the "other" box being checked, with the following: "cancelled per CCR 3084.4(4)(d)". The cited section deals with the abuse of the appeal system, not cancellations, and failed to provide Appellant with the detailed notice of cancellation, as required.

when Plaintiff was taken out to court. (Appendix pp. 77-81 ¶¶1-15; CD 48, Ex's "A-D").

In a reply letter to Beauchamp related to the missing and disputed CTF 11-10266 grievance cancellation[14], dated 1/17/2012, the CDCR Chief of Inmate Appeals own findings contradict the Defendant's contention that was evaluated and cleared by medical to resume the interview. (CD 58-1; SER 106 ¶5). The Appeals Chief statement, in part, reads as follows:

> "A review of the CI [confidential inquiry] provided to the OOA confirms that Lt. Villaseñor began an interview with you at 1710 hours on August 1, 2011, and then postponed the interview on at 1745. It is documented by Correctional Sergeant (Sgt.) G. Lew that at 1739 hours on August 1, 2011, while being interviewed by Lt. Villaseñor you yelled out to him from the office, "Sarge, I can't breathe, I need air and water. I'm having an anxiety attack...Please I need to go back to my cell." Sgt. Lew further documented that he immediately contracted Registered Nurse Lena. As soon as he hung up the phone, you stated, "I'm fine; I don't want to see the medical people; just put me back into my cell and I'll be fine." Lt. Villaseñor then requested Sgt. Lew to ask you if you wanted to continue with the interview and you stated, "No." Your refusal to cooperate and continue with the interview was witnessed by Correctional Officers A. Castro and N. Cruz."

This Appeals Chief finding indicates that Beauchamp *was not* in fact seen or evaluated by medical; it also directly contradicts the interviewer, Lt. Villaseñor's own undated and unsupported declaration (Appendix pp. 75-76 ¶8; CD 34-3; SER 307) that states:

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[14] A subsequent letter dated 4/23/2013 from the Appeals Chief no longer indicated that appeal CTF-11-01266 is cancelled, but provided Beauchamp with instruction to follow. (CD 58-1; SER 115-116, see 116, ¶1). When this appeal was finally returned to Beauchamp on 7-13-2012 (9 months after submission), attached were three notices that his appeal was now processed through the Second Level and to re-submit it to the Third Level, with none of these notices indicating that the appeal was cancelled, and no cancellation box was checked on the 602 grievance form. Beauchamp followed these instructions in a timely manner and his efforts were again thwarted. (CD 58; SER 40-41, ¶¶34-41; CD 58-1; SER 129-134; See CD 48 and Exhibits A-D in Appellate Appendix 16).

"¶8. Based upon the report by medical staff and in conjunction with my observations, I requested that Beauchamp be escorted back to the holding cell so that I could interview him about his allegations that he was subjected to excessive force on February 8, 2011. I waited for approximately twenty-five minutes for Beauchamp to return, but he did not. Sgt. Lew advised me that Beauchamp refused to leave his cell and refused to let me interview him. Sergeant Lew advised Beauchamp that his allegations of staff misconduct would likely be rejected if he did not participate in the interview. Beauchamp continued to refuse to participate in an interview and refused to leave his cell. Furthermore, because he refused to participate in the interview, his claim was rejected for his failure to cooperate in the interview. The investigation was completed on August 5, 2011. I drafted a CDC 128-B General Chrono documenting the results. A true and correct copy of the forgoing document is attached as Exhibit C.
I declare under the penalty of perjury that the forgoing is true and correct to the best of my knowledge, Executed on January__, 2014, at Soledad California."

Beauchamp's own declaration and affidavit squarely rebuts Lt. Villaseñor's declaration and the statements made by the Appeals Chief in his 1/17/2012, and makes it clear that Beauchamp was not seen by medical staff. (CD 58, ¶¶25-32; SER 38-39; CD 58-1; SER 76-80).

Additionally, a subsequent letter dated 4/23/2013 from the Appeals Chief no longer indicated that appeal CTF-11-01266 is cancelled, but instead provided Beauchamp with specific instructions to follow to have his appeal processed at the Second level. (CD 58-1; SER 115-116, see 116, ¶1). Beauchamp took immediate action and resubmitted his appeal as specifically directed by the Appeals Chief and waited approximately 9 months for the appeal to be returned. When this appeal was finally returned to Beauchamp on 7-13-2012 (9 months after submission), attached were three notices from the CTF Appeals Coordinator informing Beauchamp that his appeal was now processed through the Second Level and directing him to re-

submit it to the Third Level, with *none* of these notices indicating that the appeal was cancelled; and at no time during this appeals process—at any level, was the specific and appropriate "cancellation" box ever checked on the 602 grievance form by the anyone. Beauchamp properly followed these instructions in a timely manner and his efforts were again thwarted. (Appendix pp. 77-81; CD 48; See also CD 58; SER 40-41, ¶¶34-41; CD 58-1; SER 129-134).

In support of the disputed cancellation of Plaintiff's grievance due to his alleged refusal to resume the 8/1/2011 interview after he was allegedly cleared by medical to do so, the Defendants point to an undated declaration from Lt. Villaseñor that relies on an unverified hearsay statement from Sgt. Lew that alleges Plaintiff was seen and cleared by medical staff to resume the 8/1/2011 interview on 8/1/2011, and upon being cleared, alleges that Plaintiff told Sgt. Lew that he refused to resume the interview. (Appendix pp. 75-76 ¶¶ 7, 8; CD 34-3; SER 307 line 23 through SER 308 line 2).

However, the Defendants have failed to produce any declaration or statement from Sgt. Lew, or anyone for that matter, *who actually heard Plaintiff's alleged statement that he refused to resume the 8/1/2011 caged interview.* The Defendants have also failed to produce any documentation that Plaintiff was ever seen or examined by medical staff on 8/1/2011 as they contend, nor have they produced any documents indicating that Plaintiff was "cleared by medical" on 8/1/2011, and able to resume the interview.

This is the crux of the controversy related to the grievance cancellation and the only evidence proffered by the Defendants in support of their cancellation action is hearsay and is insufficient to support a motion for summary judgment. FRCP §56(c)(4) specifically requires the information provided in an affidavit or declaration in support of such motion to be based upon personal and direct knowledge.

In granting summary judgment to the Defendants, the District Court committed clear error in accepting as unsupported and controverted hearsay statements as fact as incorporated within a declaration in sole support of the Defendants motion for summary judgment.

The District Court erred in finding that appeal "CTF 11-01266 was cancelled because Plaintiff refused to cooperate with the investigation of his appeal." (Appendix p.17 line 9 through p.18, line 5). However, it must be noted that Villaseñor's declaration does not say that Plaintiff's inmate appeal would be cancelled if he refused to participate in the interview process, only that it would be *"rejected."* (Appendix pp. 75-76, ¶¶6, 8; CD 34-3).

In granting summary judgment to the Defendants, The District Court committed clear error in finding that:

> "[t]he record makes clear that Villaseñor articulated the reason for the cancellation when he completed the second level response on the backside of the inmate appeal CTF-11-01266 and hand-wrote that the appeal was 'cancelled per CCR 3084.4(4)(d).'" (CD 69; SER 9, lines 23-26).

This is yet another problem with the legitimacy of this cancellation noting that in cancelling the grievance, Lt. Villaseñor cited CCR §3084.4(4)(d) section referenced in the "other" line, and did not check the appropriate "cancellation box"

(Appendix p. 64). Again, this CCR subdivision *does not deal with cancelation of appeals,* but addressed abuse of the appeal process.

In granting summary judgment to the Defendants, the District Court committed clear error in finding that:

> "Plaintiff claims that prison officials improperly cancelled his inmate appeal CTF 11-01266 because he suffered from a serious medical condition that prevented him from participating in the August 1, 2011 interview with Lieutenant Villasenor. But Plaintiff offers no medical evidence to support his claim." (Appendix p. 19, lines 12-15; SER 9).

However, the Plaintiff *did provide in fact provide numerous medical reports* and a health care appeal that indicate he was still suffering from acute rib fractures and related injuries on 8/1/2011 that caused him extreme pain that was aggravated by the tight application of a waist-chain and manacles and the conditions of the "caged interview" which left him bloodied, in pain and in need of medical attention that never came. Radiological reports dated 7/13/2011, show that there was only "interval healing of the left lateral sixth and seventh rib...There is no focal consolidation." The 2/25/2011, radiological report indicated "fractures of an *acute nature* of the left 6th through 8th ribs". The 6/5/11 CDC 7362 Health Care Service Request indicate "pain-problems breathing, need to see a thoracic specialist." The 6/14/2011, CDC 7219 medical report indicates chest deformity and crepitus (popping in the ribs when breathing). The 6/15/2011 CDC 7362 Health Care Service Request indicate "I remain in pain-left side ribs...requested pain meds remain unfilled...I labor to breathe." The 6/23/2011 doctor's notes requests X-rays to evaluate healing of the rib fractures, noting that "pt still notes unresolved pain & popping when

conducting overhead activities".[15] Radiological reports dated 11/30/11, indicate: "Trauma. Displaced fracture lateral left seventh rib." (CD 58, Ex. "I",#5; Appellate Appendix 17).

The Defendants have also failed to provide any statement or declaration from any doctor who *examined or treated* the Plaintiff for these serious injuries suffered on 2/8/2011. Rather, the Defendants rely upon a declaration from Dr. Adams in support of their contention that Plaintiff was not in any medical distress on 8/1/2011. It should be noted that Dr. Adams *did not examine* Plaintiff, nor did she reference Plaintiff's acute rib fracture injuries documented on 2/25/2011, or his subsequent complaints regarding pain and difficulty breathing due to a collapsed chest cavity and his requests for treatment as documented in his file, but only *narrowly reviewed* Plaintiff's "medical records for the time period of July 2011 through August 2011." (SER 319, lines 1-4).

In light of the proffered medical reports that indicate Plaintiff's serious and unhealed injuries, the District Court committed clear error in finding that there was nothing wrong with him, stating:

> "[t]he medical evidence in the record instead supports the medical staff's report to Villaseñor that there was nothing wrong with plaintiff to prevent him from participating in the interview." (CD 69; SER 9, lines 13-15).

The District Court also points to a declaration from Dr. Adams and that she reviewed Beauchamp's medical file and opined that "in her professional judgment,

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[15] On 6/23/2011, Appellant, while in Ad-Seg, was escorted to the committee room at CTF "X-wing" and seen by Physician Practitioner, Trent, who refused to touch or examine Appellant, leaving him standing, fully dressed in a jumpsuit and in waist-chain restraints. The process took approximately 2 minutes.

there was no medical impediment to plaintiff's ability to participate in the August 1, 2011 interview." (CD 69; SER 9 at lines 18-21").

It must be noted that this is an "opinion" statement from Dr. Adams and that she never saw or evaluated Beauchamp personally. Dr. Adams' "opinion" is wholly refuted by radiological reports that indicate one of the rib fractures *was still displaced and unhealed* as of 12/1/2011, 4 months after the interview. (CD 58-5; SER 158). Also, there is a 6/23/11 medical report indicating rib pain and crepitus (popping of the ribs with breathing movement) (CD 58-5; SER 155); and a 7/13/11 radiological report that depicts "interval healing" of the lateral 6th and 7th ribs with "no focal consolidation". (CD 58-5; SER 156). In other words, 19 days before the 8/1/2011 "caged interview", Beauchamp still had acute fractures to his ribs, broken ribs that were *very painful*, especially when a tight-waist chain is applied and you are placed in a very tight, encapsulated space.

Further, Dr. Adams, in her opinion, failed to opine on whether the extreme conditions of the cage and applied restraints that Beauchamp was subjected to would have impact on his broken ribs and ability to breathe, especially when no air was coming into the tight, encapsulated cage where Beauchamp was held in tight restraints and without his rescue inhaler. Also, in her declaration (CD 34-5; SER 318-320), Dr. Adams made no reference to Beauchamp's broken rib injuries or the conditions of the caged interview, or that she had personally evaluated Beauchamp before providing her medical opinion.

The Defendants did not carry the burden of demonstrating that they followed proper use-of-force grievance procedures; that the Plaintiff refused to resume the 8/1/2011 interview after he was allegedly cleared by medical as they claim; that the Plaintiff was in fact even seen or evaluated by medical staff on 8/1/2011 as they claim; or that the grievance cancellation was consistent with the regulations without having provided Plaintiff with a detailed cancellation notice, as required; and that the administrative remedy was available, as a practical matter, noting the improper screening of his appeals and the Defendants failure to properly log and process appeals that challenged the cancellation of his appeal or to forward his appeals to him in a timely manner while he remained out to court from 11/10/2011 to 3/14/2014.

These are material facts that remain in dispute and controversy and based upon this clear dispute—and a grant of summary judgment to the Defendants was not proper, and is unsupported by this Court's holdings *Ross v. Blake, supra.* These material facts are the crux of the matter and remain in genuine dispute regarding the legitimacy of the cancellation of Beauchamp's grievance and the crux of the matter as to whether administrative remedies were, in fact, effectively available or were "capable of use" for the petitioner. *(See Booth v. Churner,* 532 U. S. 731, 738 (2001); *Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010);).

In granting summary judgment without a preliminary proceeding, the Court committed clear error in resolving disputed questions of material fact by either failing to consider *all evidence* properly put before it which created the disputed

genuine issues of material fact, and or failed to view *all of the facts* in the record in the light most favorable to the non-moving party and rule, as a matter of law, based on those facts. (*Anderson v. Liberty Lobby, Inc., supra*, 247-250).

The propriety of the Court's judgment in granting the Defendant's summary judgment is not a debatable question; There is clear error and the resultant denial of redress is manifestly unjust. *See McDowell v. Calderon*, 197 F.3d 1253, 1256 (9th Cir. 1999).

Beauchamp has clearly shown that there showed there is something [many things] in his particular case that made the existing and generally available administrative remedies unavailable to him and therefore summary judgment for failure to exhaust was not appropriate. *Albino, supra,* at 1172.

CONCLUSION

The only limit to 42 U.S.C §1997e(a)'s mandate is the one baked into its text: An inmate need exhaust only such administrative remedies as are "available." *(Ross v. Blake,* 136 S. Ct. 1850, 1862 (2016)). The granting of this petition for writ of certiorari remand to the district court is proper for further consideration on how that modifying term affects Beauchamp's case—that is, whether the remedies he failed to exhaust were "available" under the principles set out in *Ross v. Blake, supra* at 1858-1860.

Respectfully submitted,

Date: May 01, 2018

Eric C. Beauchamp
Pro Se Petitioner