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11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

14 **KEVIN COOPER,**

Plaintiff,

16 v.

17 **RICHARD A. RIMMER and JEANNE**
 18 **WOODFORD,**

19 Defendants.

CASE NO. C 04-0436 JF (PR)

**DEFENDANTS' NOTICE OF
 MOTION AND MOTION TO
 DISMISS PLAINTIFF'S
 COMPLAINT**

Hearing: June 21, 2004
 Time: 9:00 a.m.
 Courtroom: 3
 Judge: The Honorable
 Jeremy Fogel

21 TO PLAINTIFF KEVIN COOPER AND HIS COUNSEL:

22 PLEASE TAKE NOTICE that on Monday June 21, 2004 at 9:00 a.m. in the above-
 23 captioned Court, defendants Rimmer and Woodford (Defendants) will move the Court to dismiss
 24 with prejudice Counts II and III of Plaintiff Cooper's Complaint for failure to state a claim for
 25 which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and
 26 move to dismiss Plaintiff's entire Complaint for failure to exhaust administrative remedies
 27 pursuant to the non-enumerated portion of Rule 12 of the Federal Rules of Civil Procedure as
 28

1 mandated by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). The motion is
2 based on this Notice, the Memorandum of Points and Authorities filed in support, the attached
3 declarations and exhibits, the pleadings and records on file in this case, and the proposed order
4 filed in this action.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **Introduction**

7 Plaintiff Kevin Cooper (Plaintiff), a condemned prisoner incarcerated at California State
8 Prison, San Quentin, filed a Complaint For Equitable And Injunctive Relief (Complaint) under
9 42 U.S.C. § 1983 on February 2, 2004. Plaintiff's Complaint alleges that the California
10 Department of Corrections' (CDC) lethal injection policy violates Plaintiff's rights under the
11 cruel and unusual clause of the Eighth Amendment (Count I); violates Plaintiff's rights under the
12 due process clause of the Fourteenth Amendment because it was improperly formulated (Count
13 II); and violates Plaintiff's right to access to the courts under the First, Eighth and Fourteenth
14 Amendments (Count III). (Compl. at 6-10.) Plaintiff seeks injunctive relief, enjoining
15 Defendants from executing Plaintiff by lethal injection. (*Id.* at 10.)

16 Counts II and III of Plaintiff's Complaint fail to state a claim upon which relief can be
17 granted and should be dismissed with prejudice. Plaintiff's entire Complaint should be
18 dismissed because Plaintiff failed to exhaust his administrative remedies prior to filing this suit.

19 **Argument**

20 **I.**

21 **COUNTS II AND III OF PLAINTIFF'S COMPLAINT FAIL TO**
22 **STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.**

23 Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the
24 claims alleged in the pleadings. In a § 1983 action, a plaintiff's allegations must show (1) that
25 the conduct complained of was committed by a person acting under color of state law; and (2)
26 that the conduct deprived the plaintiff of a constitutional right. *See Balistreri v. Pacifica Police*
27 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A dismissal pursuant to Rule 12(b)(6) is proper where
28 there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under

1 a cognizable legal theory." *Id.* at 699. Where there is no allegation of facts which show the
2 violation of a federally protected right, defendants are entitled to prevail as a matter of law. *See*
3 *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

4 **A. Count II of Plaintiff's Complaint Fails to State a Claim Under the Fourteenth**
5 **Amendment For Which Relief Can Be Granted.**

6 In Count II of his Complaint, Plaintiff alleges that the CDC's lethal injection protocol "is
7 illegal under applicable mandatory administrative provisions contained in California statutes and
8 regulations, and thereby violates plaintiff's fundamental constitutional rights and rights to due
9 process of law under the Fourteenth Amendment." (Compl. at 6-7.) In support of this assertion,
10 Plaintiff alleges that CDC's lethal injection protocol was somehow improperly promulgated. (*Id.*
11 at 7.) Plaintiff also alleges that certain provisions of the protocol are inconsistent with various
12 state statutory provisions, including provisions concerning the euthanization of non-livestock
13 animals and laws regulating controlled substances. (*Id.*) Plaintiff claims these laws have vested
14 him with a liberty interest which is protected by the due process clause of the Fourteenth
15 Amendment. (*Id.* at 8.)

16 It is unclear from his allegations if Plaintiff is attempting to assert a substantive due process
17 claim or a procedural due process claim, or both. In any event, Plaintiff has failed to allege facts
18 sufficient to maintain any due process claim. Any substantive due process claim is simply a
19 reformulation of Plaintiff's Eighth Amendment claim, and must be analyzed under Eighth
20 Amendment principles. *United States v. Lanier*, 520 U.S. 259, 272 (1997). Further, Plaintiff's
21 allegation that the lethal injection protocol was "improperly formulated outside the public's eye
22 pursuant to arbitrary procedures," fails to amount to a procedural due process claim. *See, e.g.,*
23 *Pickus v. United States Bd. of Parole*, 543 F. 2d 240, 241 (1976) (due process did not require an
24 opportunity for federal prison inmates to comment orally on United States Board of Parole's
25 proposed rules); *Ex Parte Grannel*, 561 S.W. 2d 503, 515 (Tx. 1978) (finding no authority in
26 support of assertion that promulgation of lethal injection procedure violates due process). Thus,
27 Count II of Plaintiff's Complaint should be dismissed.

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1 **B. Count III of Plaintiff's Complaint Fails to State a Claim For Which Relief Can Be**
2 **Granted.**

3 Count III of Plaintiff's Complaint essentially alleges that the use of pancuronium bromide
4 (Pavulon) compromises Plaintiff's First Amendment right to access to the courts and the public's
5 First Amendment right to view an execution because it allegedly places a chemical veil over the
6 execution chamber. (Compl. at 8.)

7 The First Amendment guarantees prisoners access to the courts. *See Lewis v. Casey*, 518
8 U.S. 343, 350-51 (1996). The right protects a prisoner's ability to assert non-frivolous claims
9 concerning his conviction or conditions of confinement. *Id.* at 355. A prisoner's right to access
10 to the courts is not implicated merely because the state must impose a sentence of death pursuant
11 to a criminal conviction. As Plaintiff's current action belies, his access to the courts has not been
12 impeded. Much like his due process claims, Plaintiff's access to the courts claim is simply an
13 attempt at reformulating his Eighth Amendment claim, and the claim should be dismissed.

14 The First Amendment provides the public a right "of access to view executions from the
15 moment the condemned is escorted into the execution chamber." *California First Amendment*
16 *Coalition v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002). It is not clear from Plaintiff's
17 allegations how this public right of access to view an execution is implicated by the manner in
18 which the CDC implements its lethal injection protocol. The state's means of carrying out an
19 execution, including the use of certain drugs, is not related to the right of the public to be
20 provided access to view executions. Here again, Plaintiff appears to be attempting to rehash his
21 Eighth Amendment claim under irrelevant constitutional provisions. Thus, Count III of
22 Plaintiff's Complaint should be dismissed.

23 **II.**

24 **PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES**
25 **PRIOR TO FILING THIS ACTION.**

26 This action must be dismissed without prejudice because Plaintiff has failed to exhaust his
27 administrative remedies for the claims in his Complaint as required by 42 U.S.C. § 1997e(a).

28 The Ninth Circuit recognizes a defendant's right to address the issue of exhaustion of

1 administrative remedies in a motion to dismiss under the “non-enumerated” portion of Rule
2 12(b) of the Federal Rules of Civil Procedure. *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th
3 Cir. 2003); *Ritz v. Int’l Longshoremen & Warehousemen’s Union*, 837 F.2d 365, 368-69 (9th Cir.
4 1988). A defendant may support the motion with evidence and affidavits extrinsic to the
5 complaint. *Wyatt*, 315 F.3d at 1119-20. The proper remedy for failure to exhaust administrative
6 remedies is dismissal without prejudice. *Id.* at 1120.

7 **A. Complete Exhaustion is Required Before Filing Suit in Federal Court.**

8 In the Prison Litigation Reform Act, Congress amended 42 U.S.C. § 1997e(a) and imposed
9 a mandatory exhaustion requirement on suits brought by prisoners. *See Booth v. Churner*, 532
10 U.S. 731, 741 (2001). The amended 42 U.S.C. § 1997e(a) provides that “[n]o action shall be
11 brought with respect to prison conditions under section 1983 of this title, or any other Federal
12 law, by a prisoner confined in any jail, prison or other correctional facility until such
13 administrative remedies as are available are exhausted.” *See* 42 U.S.C. § 1997e(a). The
14 exhaustion requirement is a prerequisite to all federal suits “[e]ven when the prisoner seeks relief
15 not available in grievance proceedings, notably money damages” *Porter v. Nussle*, 534
16 U.S. 516, 524 (2002); *see also Booth*, 532 U.S. at 738. It applies to “all suits about prison life,
17 whether they involve general circumstances or particular episodes, and whether they allege
18 excessive force or some other wrong.” *Porter*, 534 U.S. at 532. The purposes of the exhaustion
19 requirement are to “afford corrections officials time and opportunity to address complaints
20 internally before allowing the initiation of a federal case,” to “filter out some frivolous claims,”
21 and to possibly “satisfy the inmate, thereby obviating the need for litigation.” *Porter*, 534 U.S.
22 at 525; *see also Booth*, 532 U.S. at 737 (“requiring [administrative] exhaustion . . . would satisfy
23 some inmates who start out asking for nothing but money, since the very fact of being heard and
24 prompting administrative change can mollify passions”).

25 The CDC affords its inmates a four-level administrative appeals process which permits the
26 prisoner to grieve “any departmental decision, action condition, or policy which they can
27 demonstrate as having an adverse affect upon their welfare.” Cal. Code of Regs. tit. 15, §
28 3084.1(a). The four levels of appeal include the following: (1) an informal level, (2) a first

1 formal level of review, (3) a second level review to the institution head or designated
2 representative, and (4) a final third level of appeal to the Director of the CDC or designated
3 representative. Cal. Code Regs. tit. 15, § 3084.5. A decision at the Director’s level constitutes
4 exhaustion of an inmate’s administrative remedies. Cal. Code Regs. tit. 15, §§ 3084.1(a),
5 3084.5(e)(2). This exhaustion requirement is mandatory (*Booth*, 532 U.S. at 741), and must be
6 done before filing suit. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2003).

7 **B. Plaintiff’s Inmate Appeals.**

8 Here, Plaintiff has submitted one appeal which completed the Director’s level review:
9 Inmate Appeal No. 93-4723.^{1/} (*See* Decl. N. Grannis ¶ 6, Ex. A, MTD-001.) Inmate Appeal No.
10 93-4723 concerns Plaintiff’s request that he be allowed to wear a religious symbol in the prison’s
11 visiting room. (Decl. A. Cattermole ¶ 2, Ex. B, MTD-015 through MTD-035.) The record
12 before the court shows that Plaintiff has submitted no administrative appeals regarding the
13 Department of Corrections’ lethal injection protocol. (*See* Decl. N. Grannis ¶ 6, Ex. A, MTD-
14 001; Decl. A. Cattermole, ¶ 2, Ex. B, MTD-002 though MTD-035.)

15 In accordance with the policies behind the mandatory exhaustion requirement, the CDC
16 should have the opportunity to address Plaintiff’s complaint internally before Plaintiff initiates a
17 federal case. *See Porter* 534 U.S. at 525. Thus, Plaintiff’s Complaint should be dismissed
18 without prejudice.

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26 1. Plaintiff also submitted Inmate Appeal No. 94-6914 at San Quentin on or about
27 September 1994. (Decl. A. Cattermole ¶ 2, Ex. B, MTD-003 through MTD-0014.) Appeal No. 94-
28 6914 concerns Plaintiff’s receipt of a rules violation report. (*Id.*) This Appeal was not decided at
the Director’s level (Decl. N. Grannis ¶ 6, Ex A, MTD-001), and is not relevant to Plaintiff’s
challenge to CDC’s lethal injection protocol.

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Conclusion

Counts II and III of Plaintiff’s Complaint are simply restatements of his Eighth Amendment found in Count I. Plaintiff’s allegations in fail to state a claim for which relief can be granted under the Fourteenth or First Amendment, and these claims should be dismissed with prejudice. Furthermore, because Plaintiff failed to exhaust his administrative remedies prior to filing this action, his Complaint must be dismissed under 42 U.S.C. § 1997e(a).

Dated: April 19, 2004

Respectfully submitted,

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