

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

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| MICHAEL EUGENE MONTGOMERY, |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. 7:05cv00131 |
| |) | |
| SIA JOHNSON, et al., |) | |
| Defendants. |) | By: Hon. Michael F. Urbanski |
| |) | United States Magistrate Judge |

REPORT AND RECOMMENDATION

Plaintiff Michael Eugene Montgomery, a federal inmate proceeding pro se, has filed this civil rights action against federal prison officials pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), with jurisdiction vested under 28 U.S.C. § 1331. Plaintiff alleges that on August 6, 2004, while incarcerated at the United States Penitentiary, Lee County (“USP Lee”), defendants utilized excessive force to subdue him after what he claims was a peaceful protest in the recreation yard.

Defendants filed a motion to dismiss or, in the alternative, motion for summary judgment, asserting that Montgomery’s claims are barred under 42 U.S.C. § 1997e(a) because he failed to properly exhaust all available administrative remedies.¹ Montgomery readily admits that he did not fully exhaust his administrative remedies, but claims that his attempts to utilize the institutional grievance system were thwarted by the defendants, thereby excusing compliance with this requirement.

By Order entered August 4, 2005, this matter was referred to the undersigned for an evidentiary hearing on the issue of administrative exhaustion. An evidentiary hearing was held

¹As defendants have provided evidence outside of the pleadings in support of their motion, this matter will be treated as a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6).

on March 23-24, 2006.² Following the hearing, defendants were directed to submit certain documents and evidence referenced at the hearing. In addition to this information, defendants filed additional documentation in support of their motion for summary judgment. See Docket No. 104. Montgomery did not object to the court's consideration of this new evidence, but rather explained how defendants' evidence actually supports his position that he was not provided an opportunity to file a timely grievance regarding the August 6, 2004 incident. As this information is relevant to the issue of exhaustion, defendants' motion to submit additional evidence is granted, and this information will be considered in conjunction with the evidence offered at the evidentiary hearing.

The issue now before the court is whether Montgomery properly exhausted all available administrative remedies before filing his complaint.³ Montgomery concedes that he did not file any formal grievances within the requisite twenty day period following the incident, but insists that he was unable to do so because he did not have access to the appropriate forms or his unit team in the days following the incident. Montgomery contends, therefore, that defendants thwarted his efforts to grieve his complaint in a timely manner. The undersigned finds Montgomery's claim that administrative remedies were not available to him in the days immediately following the August 6, 2004 incident to be corroborated by the absence of required institutional reports on his status in the special housing unit. While defense witnesses testified

²A hearing by video conference was initially set for October 18, 2005. Due to repeated technical difficulties, the hearing could not be completed. Accordingly, the court rescheduled the hearing, and issued an Order directing that Montgomery be transferred from his place of incarceration, United States Penitentiary, Lewisburg, Pennsylvania, to appear before the court in Roanoke, Virginia, at the rescheduled hearing. The transcript of the evidentiary hearing was filed on August 14, 2006.

³ As plaintiff has not requested a jury trial, the court is the ultimate trier of fact on this issue.

generally that Montgomery did not complain or request grievance forms and was not the kind of inmate who would do so, the undersigned does not find such evidence, in the context of this case, to be sufficient to meet defendants' burden of proving the affirmative defense of failure to exhaust. As such, the undersigned recommends that defendants' motion for summary judgment be denied.

I.

On August 6, 2004, Montgomery and three other inmates staged a protest in the outdoor recreation cage of the special housing unit ("SHU") at USP Lee. Montgomery explained that he and the other inmates were frustrated by the lack of unit team visits to the SHU, problems with the processing of incoming mail in the SHU, and the failure to provide personal hygiene and cell cleaning items to SHU inmates. As part of this protest, Montgomery refused to submit to hand restraints until he was permitted to speak to someone in a position of authority regarding these concerns. Montgomery alleges that in response to the protest and his refusal to submit, correctional officers shot numerous rubber bullets and gas into the recreation cell. Montgomery claims that he was hit more than twenty times with rubber bullets and was shot several times with chemical munitions, some of which hit him in the face. Once the inmates were prone, officers in riot gear entered the recreation cage, restrained the inmates, and the inmates were escorted out without further incident. Montgomery complains that he was not given an adequate opportunity to wash the burning chemicals from his eyes or body, that his body was covered with welts from the bullets, and that he was placed in four point restraints for approximately eighteen hours and ambulatory restraints for an additional twelve hours.

II.

The Prison Litigation Reform Act (“PLRA”) requires a prisoner to exhaust all available administrative remedies prior to filing a civil action pursuant to 42 U.S.C. § 1983. 42 U.S.C. § 1997e(a) (2000); see also Porter v. Nussle, 534 U.S. 516 (2002).⁴ Exhaustion under the PLRA must be done properly, including compliance with all internal procedures and deadlines. Woodford v. Ngo, 126 S.Ct. 2378, 2387 (2006) (finding “proper exhaustion” under the PLRA requires a prisoner to complete the administrative review process in accordance with institutional procedural rules, including deadlines, as a precondition to bringing suit in federal court). However, defendants have the burden to plead and prove failure to exhaust administrative remedies as an affirmative defense. Anderson v. XYZ Correctional Health Services, 407 F.3d 674, 681 (4th Cir. 2005) (noting that in some instances sua sponte dismissal for failure to exhaust may be appropriate). Where an inmate’s ability to exhaust his administrative remedies is thwarted, the inmate is not required to exhaust. See, e.g., Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004) (“Defendants may also be estopped from raising non-exhaustion as an affirmative defense when prison officials inhibit an inmate's ability to utilize grievance procedures. Additionally, exhaustion may be achieved in situations where prison officials fail to timely advance the inmate's grievance or otherwise prevent him from seeking his administrative remedies.” (internal citations omitted)); Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (finding that a prisoner’s failure to exhaust administrative remedies is excused if prison officials refused to provide him with the necessary forms); Miller v. Norris, 247 F.3d 736, 740 (8th Cir.

⁴ By the plain language of the statute, exhaustion of administrative remedies is a precondition to the filing of a prisoner’s civil rights action; thus, a plaintiff who filed his lawsuit before exhausting administrative remedies cannot satisfy the §1997e(a) requirement, even if he later demonstrates that he filed a grievance and appealed it to the highest extent of the prison’s grievance procedure after commencing the lawsuit. See Dixon v. Page, 291 F.3d 485 (7th Cir. 2002) (citing Perez v. Wisconsin Dep’t of Corrections, 182 F.3d 532, 535 (7th Cir. 1999)).

2001) (holding that allegations of prison officials' failure to respond to written requests for grievance forms were sufficient to raise an inference that the prisoner had exhausted his "available" administrative remedies); Newell v. Angelone, No. 7:01cv241, 2002 WL 378438, at *6 (W.D. Va. Mar. 7, 2002) (treating exhaustion and inability to exhaust as the same thing), aff'd, 75 Fed. Appx. 129 (4th Cir. 2003).

III.

To prove that the administrative remedy process was available to Montgomery, several defense witnesses testified at the evidentiary hearing that Montgomery had access to unit staff yet never requested any administrative remedy forms during August, 2004.⁵

William Story, Executive Assistant to the Warden, provided an overview of the administrative remedies process. Story testified that inmates with grievances could seek administrative remedy forms from their inmate counselor and that other members of the unit team likewise had the responsibility of providing forms. Story testified that inmates also could file administrative forms with the Warden and the Bureau of Prisons' Regional Office and Central Office. Story recounted that the inmate orientation handbook provides information on the operation of the administrative remedy procedure. Story testified that the Warden and executive staff make rounds in the SHU, stopping by each cell door to see whether there are any problems or issues. Story testified that if inmates need something, they will seek staff members out on rounds to resolve those issues. Story said that he saw Montgomery during his rounds in the SHU, and that while Montgomery typically would acknowledge his presence with a nod of the head, he never asked Story for administrative remedy forms or complained that he did not

⁵ Pursuant to 28 C.F.R. § 542.14(a), the deadline for the submission of a formal administrative remedy form is 20 calendar days following the date on which the basis for request occurred. Thus, Montgomery was required to properly initiate the grievance process within twenty days of August 6, 2004. See Woodford, 126 S.Ct. at 2387.

have access to such forms. Story testified that the SHU visitor logs confirmed that he made rounds in the SHU on several occasions between August 6, 2004 and August 26, 2004. Other staff members, including the Captain, Warden, Assistant Warden and Institutional Duty Officer, all made regular rounds in the SHU. According to institutional records, Montgomery filed only one administrative remedy form, on June 6, 2005. Story testified that during 2004, a new procedure was instituted whereby staff members initialed sign-in sheets on cell doors in the SHU to document the frequency of inmate contact with staff members. Story could not say if those sheets were in place in August, 2004.

Wardell Chambers was Montgomery's Unit Manager in the housing unit to which Montgomery was assigned during his tenure at USP Lee. Chambers stated that he made rounds once or twice per week and spoke with inmates to address their concerns. Chambers testified that he spoke with Montgomery while he was in the SHU, but recalled no occasion in which Montgomery asked him for an administrative remedy form. Chambers stated that Montgomery was polite, respectful, and never complained about anything. Chambers recalled that the only thing that Montgomery wanted to know was "when he was leaving USP Lee." Chambers testified that when he did not make rounds in the SHU, another member of his unit team would do so. Chambers confirmed that someone from his unit team made rounds in the SHU every day. Chambers was not at USP Lee during the first two weeks of August, 2004, but the SHU visitor log book reflects that he made rounds there on August 17, 2004 and twice the next week. Chambers could not recall whether he saw Montgomery during August, 2004, nor could he recall when the sign-up sheets were placed outside of the cell doors.

Lisa Eller, Case Manager at USP Lee, testified that Montgomery was in the SHU for most of the time that he was assigned to her unit team. Eller testified that during her rounds, she

saw Montgomery, but he rarely had anything to say. Instead, he would usually wave her away. According to Eller, Montgomery never voiced any complaints nor indicated that he did not know who his counselor was. Eller stated that the only time that Montgomery ever asked her for an administrative remedy form was in May or June of 2005, regarding an appeal of the findings of a disciplinary hearing officer. Eller stated that the SHU log book indicated that she made rounds in the SHU six times between August 8 and August 28, 2004. Eller conceded, however, that during August, 2004, Montgomery was not part of her case load and did not become so until October 12, 2004. Regardless, Eller testified that she never even had a conversation with Montgomery about the August 6, 2004 assault at any time during 2004. Eller indicated that Montgomery was an inmate leader at USP Lee and, as such, did not communicate or associate with staff.

Kevin Bowling was Montgomery's Case Manager at the time of the August 6, 2004 recreation cage incident. Bowling testified that he spoke with Montgomery about being transferred to another institution, but never about pursuing any complaints through the administrative remedy process or administrative remedy forms. Bowling testified that had Montgomery asked for a form, he would have made a note to the counselor as to that request, but he would not have actually given him a form.⁶ Bowling testified that Montgomery was a leader of a prison gang, the Dirty White Boys ("DWB"), and as such, did not complain to staff. Indeed, Bowling could not recall any DWB gang member ever asking for an administrative remedy form. Bowling stated that it was totally out of character for a gang member to ask for forms or complain about not having access to administrative remedies. Instead, gang members took care

⁶ Lawrence Collins was Montgomery's counselor during this period. As Collins had retired from BOP service, he did not testify nor were any records of his interactions with Montgomery introduced.

of their own problems and did not complain to staff. Bowling saw Montgomery on August 7, 2004 and recalled Montgomery stating that he just wanted his mail and would not cause any more problems. Neither at that time nor at any time in the future did Montgomery tell Bowling that he wanted to file a grievance or seek any administrative remedy concerning the August 6, 2004 incident. As Bowling recalled, Montgomery told him that he was sore and in discomfort, that he had learned a lesson and just wanted to be transferred from USP Lee. Bowling was not aware of any notes or forms given to any counselor by Montgomery regarding the August 6, 2004 incident.

Michael Carruba was assigned as Montgomery's counselor beginning in October, 2004. While Carruba was not Montgomery's counselor in August, 2004, he testified that complaining was out of character for Montgomery, and that he did not complain to him about the August 6, 2004 incident, being placed in restraints, or his eyes burning. Carruba testified that he made rounds twice a week in the SHU, he saw Montgomery during his rounds, and Montgomery would usually acknowledge him with a nod or wave. Carruba said that Montgomery rarely talked with staff, and he could recall only one conversation dealing with whether his transfer to another institution had come through. Carruba stated that he issued many administrative remedy forms, but could not recall Montgomery ever asking for one. Carruba stated that he had much respect for Montgomery as he was an "old style convict," who preferred "to do his time and get on with it," without complaining to staff.

Dennis Peltier served as Lead Administrative Counselor at USP Lee during 2004, and, as such, had various inmate responsibilities throughout the prison. Peltier testified that he made rounds in the SHU and often saw Montgomery. Peltier stated that while it was not his primary responsibility to hand out administrative remedy forms, he always did so if an inmate asked for

one. Peltier testified that he spoke with Montgomery if “he was of a mind to,” and that Montgomery was not one to complain, as he had status as a gang leader. Peltier kept a log of administrative remedy forms he gave to inmates, and his records show only two forms were given to Montgomery in June, 2005. Peltier testified that he gave Montgomery “anything he wanted,” but it was out of character for Montgomery to ask for administrative remedies. Rather, Peltier stated that seeking administrative remedies “is what snitches do,” and that Montgomery would have lost respect had he complained. According to Peltier, that was not the way a “convict,” such as Montgomery, did business. “Convicts” do not need any help from institutional staff as they seek their own remedies. In contrast to Montgomery, Peltier testified that he issued 400 such forms to other inmates between May and December, 2005. Peltier was present at the August 6, 2004 incident at the recreation cage and spoke with Montgomery to try to diffuse the situation, to no avail.

In short, the evidence from the USP Lee staff established (1) Montgomery did not complain to them or seek to file any administrative remedies or grievances concerning the August 6, 2004 recreation cage incident until 2005; (2) Montgomery rarely complained about anything; and (3) it would have been completely out of character for a gang leader such as Montgomery to complain to staff or file a grievance. While these witnesses testified that Montgomery did not speak to them about filing a grievance when they saw him, this evidence begs the question of whether Montgomery saw his unit team in the days following August 6, 2004, such that he could have obtained a remedy form and filed a grievance.

To further their position that Montgomery had access to administrative remedies but failed to utilize them, defendants provided the court with SHU visitor logs, the personal logs of the Warden and Associate Wardens, and certain documents regarding an unrelated request by

Montgomery for dental treatment. Defendants insist these documents establish that Montgomery's unit team members made regular rounds in the SHU, and that Montgomery had access to any forms necessary to grieve the August 6, 2004 incident. The undersigned disagrees that these documents satisfy defendants' burden.

1. SHU Visitor Logs

SHU visitor logs reflect the dates and length of rounds made by unit team members. All staff entering and leaving the SHU must sign the visitor log book, which, at the time in question, was located at the main entrance to the SHU.⁷ Defendants argue these records establish that Montgomery's assigned unit team made regular rounds in the SHU, giving him access to grievance forms. During the time period in question, Kevin Bowling was Montgomery's assigned case manager and Laurence Collins was his assigned counselor. See Defs.' Ex. 3, 4, Evidentiary Hearing. Defendants' evidence established that an inmate's assigned counselor has the "primary duty" to provide an inmate with administrative remedy forms. See Docket No. 103, Defs.' Resp. to Mar. 29, 2006 Order to Produce, Fn. 1. Visitor logs generated during this period reveal that Collins typically made rounds two to three times per week, but his rounds often lasted less than an hour. On one occasion, his visit was only fifteen minutes. See Defs.' Ex. 1, Evidentiary Hearing; see also Docket No. 103, Defs.' Resp. to Mar. 29, 2006 Order to Produce, Ex. A, Attach. 2. Bowling made nine visits to the SHU during the period in question.⁸

Montgomery argued that the visitor logs alone do not demonstrate that he had the opportunity to obtain grievance forms from his unit team. Montgomery testified that while his

⁷ Defense witness Kevin Bowling testified that the SHU visitor log books were maintained near the SHU entrance. See also Docket No. 103, Defs.' Resp. to March 29, 2006 Order to Produce, Ex. A, Attach. 2.

⁸ See Defs.' Ex. 1, Evidentiary Hearing; see also Docket No. 103, Defs.' Resp. to Mar. 29, 2006 Order to Produce, Ex. A, Attach. 2.

assigned team members did make some rounds in the SHU, frequently they spent a significant amount of time visiting with correctional officers before beginning rounds, and that they began rounds on the lower tier of the SHU and often failed to get all the way up to the second tier where Montgomery was housed. Further, Montgomery stated that each team member was assigned to numerous inmates, and, as inmates frequently wanted to talk with team members, it was not unusual for a team member to visit only a few inmates on each round.

While defendants' log books confirm Collins and Bowling's occasional physical presence in the SHU, they do not establish that either one actually saw Montgomery or were available to provide him with any remedy forms during the period in question. Defendants present no evidence to contradict Montgomery's claims that assigned team members frequently visited with correctional officers before beginning their rounds, had numerous inmates to visit, and often spent the entire round talking with a few inmates housed on the lower tier of the pod.

To further support their argument that administrative remedy forms were available, defense witnesses testified that Montgomery could have requested administrative remedy forms from other correctional employees present in the SHU. Specifically, witnesses Lisa Eller and Michael Carruba testified that Montgomery could have requested forms from them, and if he had, they would have immediately provided the forms requested. However, Eller and Carruba were not assigned as part of Montgomery's unit team until October 12, 2004. Similarly, although Dennis Peltier was the Lead Correctional Counselor at the time in question, he did not begin to assist in the SHU until some time in September, 2004; even then, he did not make regular rounds in the SHU and was not actually assigned to Montgomery's building until January, 2005. Defense witnesses testified that any attempts by Montgomery to file grievances related to the August 6, 2004 incident after August 27, 2004 would not have been recorded, but

would have been rejected and returned as untimely. Therefore, testimony which suggests Montgomery had access to forms several months later does not establish that he had available means to timely grieve the August 6, 2004 incident.

Further, the mere fact that Montgomery could have asked an unassigned correctional employee for forms does not establish that he had access to the forms he needed to exhaust his administrative remedies. Montgomery testified that when he did ask other employees for forms, he was referred back to his assigned counselor. Defense records appear to support this practice. The Warden and Associate Wardens Logs reflect that requests for forms were referred back to an inmate's unit team. See Docket No. 104, Defs.' Mot. to Submit Addt'l Evidence, Ex. A, Attach. 5, 6.

Defendants themselves assert that an inmate's assigned counselor had the primary duty to provide an inmate with grievance forms. See Docket No. 103, Defs.' Resp. to Mar. 29, 2006 Order to Produce, Fn. 1. Montgomery's counselor, Collins, made brief rounds two to three times per week, but defendants have failed to prove that Collins actually saw Montgomery during those rounds, nor have they provided any evidence which demonstrates that forms were available from other sources. Defendants' evidence simply does not meet their burden to establish that Montgomery had access to administrative remedies during the relevant time period. See Defs.' Ex. 7, Evidentiary Hearing.

2. Personal Logs of the Warden and Associate Wardens

Defendants have also provided the personal logs of the Warden and Associate Wardens, which show how many inmate request to staff member forms were submitted by inmates housed in the SHU from June, 2004 through November 1, 2004. See Docket No. 104, Defs.' Mot. to Submit Addt'l Evidence, Ex. A, Attach. 5, 6. Defendants argue these records demonstrate that

inmates housed in the SHU had an additional avenue to bring grievances to the attention of the Warden and Associate Wardens.

Although these records do establish that an inmate could voice concerns to the Warden or Associate Wardens, these logs confirm that complaints regarding any aspect of the administrative remedy process were referred to the inmate's assigned unit team. The simple fact that an inmate had the ability to make a complaint or request related to the administrative remedy process to the Warden or Associate Wardens does not establish that administrative remedy forms were available to that inmate.

Indeed, the Warden's log establishes that between June, 2004 and November 1, 2004, nearly one quarter of the 73 complaints filed by SHU inmates with the Warden were related to the staff's failure to comply with the provisions of administrative remedy program. As the Associate Wardens' log provides no detail regarding where the complaining inmates were housed, it is impossible for the court to determine whether such complaints documented in the Associate Wardens' logs were made by SHU inmates.⁹ Nonetheless, inmates filed 42 total requests to staff members with the Associate Wardens between June and November, 2004, complaining of inadequacies in the administrative remedy process or staff's compliance with that process. These documents are consistent with the stated basis for Montgomery's protest and support Montgomery's assertion that from June, 2004 through the fall of the same year, there were systemic deficiencies in the administrative remedy procedure precluding his ability to exhaust.

⁹ Defendants have provide approximately 14 pages of log book entries, with 17 entries on each page for the time period in question. Defendants aver that 125 of the entries are from inmates housed in the SHU, yet only a few of the entries give any indication as to where the inmate making the request or complaint is housed.

3. Medical Request Forms

To demonstrate that Montgomery had access to staff and the grievance process, defendants offer Montgomery's inmate request for dental work, dated May 17, 2004; Montgomery's handwritten request for dental work dated August 5, 2004; and Montgomery's dental record, dated October 29, 2004, which establishes that he received dental care following his August 5, 2004 request. See Docket No. 104, Defs.' Mot. to Submit Addt'l Evidence, Ex. A, Attach. 1-3. Montgomery's written requests for medical care have little bearing on the issue of whether Montgomery had access to administrative remedies. Only an inmate's assigned counselor has a duty to provide an inmate with administrative remedy forms, and Montgomery asserts that on several occasions he requested forms from other institutional staff members, but was advised that he should request those forms from his counselor. Montgomery's counselor did not testify, and there are no records which establish that plaintiff had access to grievance forms through his counselor during the relevant period.

Furthermore, according to defendants' evidence, Montgomery made his first request for dental treatment in May, 2004. Plaintiff's allegation that he had no access to administrative remedies while he was housed in the SHU is not undermined by evidence which establishes that he had access to inmate request forms prior to his placement in the SHU in June, 2004.

On balance, the fact that Montgomery sought and obtained dental care on one occasion does not demonstrate that the grievance process was available to him after the August 6, 2004 incident.

IV.

In response, Montgomery and his witness, Adam Martin ("Martin"), detailed the August 6, 2004 incident and stated that it was so egregious, even a person ordinarily reluctant to

complain would have felt compelled to do so. Although Montgomery acknowledged his DWB membership and status as a “convict,” he asserts that he attempted to grieve the August 6, 2004 incident because he felt the force used against him was so excessive and malicious that institutional staff should be held accountable. Specifically, Montgomery alleges he was shot more than twenty times with rubber bullets in response to his protest, and that correctional officers fired chemical munitions in his face. After remaining passive once removed from the recreation cage, Montgomery states he was denied the opportunity to adequately wash the burning chemicals out of his eyes, and that he was neither adequately examined nor treated for the injuries he sustained. Montgomery also alleges he was placed in four point restraints for approximately eighteen hours, and then in ambulatory restraints for an additional twelve hours, though he remained subdued and posed no threat. Montgomery asserts that the episode was so extreme that even a “convict” or gang member would be compelled to seek redress.

Review of the video evidence of the August 6, 2004 incident supports Montgomery’s position.¹⁰ The recordings establish that although the inmates refused to submit to restraints and be removed from the recreation cage, they appeared neither violent nor threatening. In an attempt to persuade the inmates to submit to restraints and return to their cells without incident, correctional officers initiated a confrontation avoidance discussion with Montgomery. At that time, Montgomery stated that he was refusing to submit to restraints because he was having numerous problems with institutional staff regarding incoming mail, visitation, and staff’s failure to respond to his complaints. Montgomery further stated that he had previously voiced his complaints on numerous occasions to multiple staff members, but he received no response. After some discussion with the officers, Montgomery conferred with the other inmates, and they

¹⁰ Pursuant to the court’s Order to produce additional evidence, defendants submitted 12 DVDs related to the August 6, 2004 incident. See Docket No. 112.

continued to refuse to submit to restraints. However, the inmates remained non-threatening and merely alternated between walking the cell and sitting in the shade. Shortly thereafter, officers repeatedly fired rubber bullets at the inmates and chemical munitions into the cell. Montgomery was hit multiple times with rubber bullets and said he was sprayed directly in the face with the chemicals.

Although Montgomery initially resisted the show of force, within seconds he obeyed orders to lie down. Numerous officers in riot gear arrived, and Montgomery remained prone and submissive while placed in restraints. Furthermore, Montgomery remained passive as he was escorted back into the SHU. Although Montgomery voiced repeated complaints of eye pain, correctional officers only allowed him a few seconds in the shower to rinse his eyes and body of the chemical residue. After rinsing, Montgomery was placed face-up on a bunk in four point restraints. On two occasions, a nurse applied saline solution to Montgomery's eyes. As a second inmate was restrained in the same cell, Montgomery began wincing and writhing in pain, complaining extensively that his eyes were burning, and repeatedly asking that his eyes be rinsed again. As depicted on the video, these requests were ignored.

From the time he submitted to restraints in the recreation cage to the time he was placed in four point restraints in the SHU, the video shows that Montgomery neither voiced threats nor exhibited violent behavior. No video footage was provided documenting the hours Montgomery spent in four point restraints. However, video footage of his release from four point restraints, approximately eighteen hours later, revealed him to be non-violent, non-threatening, and compliant as he was placed in ambulatory restraints.

The video recordings of the August, 2004 incident support Montgomery's contention that the force used against him was so excessive even a "convict" or a DWB would feel compelled to

initiate grievance procedures. This video evidence refutes defendants' argument that it was not in Montgomery's nature to complain or seek administrative remedy forms. On camera, Montgomery clearly complained about certain conditions in the SHU, and he stated from the recreation cell that he had previously voiced his complaints regarding visitation, incoming mail, and the inaccessibility of assigned staff to multiple correctional employees, but received no response. Further, after being sprayed with chemicals, Montgomery repeatedly begged to have his eyes rinsed to no avail. Accordingly, there is merit to Montgomery's contention that the August 6, 2004 incident was so egregious even a "convict" or a Dirty White Boy would have filed grievances. While the incident itself certainly could prompt an institutional complaint, the question remains whether there is any evidence to suggest that Montgomery was prevented from doing so.

Montgomery conceded that he saw his Case Manager, Kevin Bowling, the next day, August 7, 2006, while he was still restrained. Montgomery testified that Bowling asked him if he was alright, to which Montgomery replied, "No, but what can I do?" Montgomery acknowledged that he did not complain, discuss filing a grievance, or mention access to any administrative remedies at that time. Montgomery explained that had he done so, he would have received more time in four point restraints. Montgomery excused his failure to file any administrative remedies over the next several weeks by claiming that he "never saw his unit team." Montgomery stated that he was provided two "cop-out" forms by another staff member, one of which he submitted to a nurse. Montgomery states that this form was not accepted and there is no record of it in any log of administrative remedies. Montgomery testified that he never asked any of defendants' witnesses for administrative remedies because he did not see them on his SHU tier.

Montgomery offered the testimony of another inmate, Adam Martin, who testified that the unit team did not start coming through the SHU until around January. Affidavits from several other inmates stated SHU inmates had repeated difficulty contacting their assigned unit team in the summer and fall of 2004. It is worth noting that Montgomery's reason for not filing administrative remedies – the lack of access to his unit team – was one of the stated reasons behind the protest of August 6, 2004.

Both Montgomery and Martin testified that there was some sort of regional BOP investigation into issues concerning the USP Lee SHU after August 6, 2004, including SHU inmates' access to their unit team. Montgomery testified that as a result of this investigation, notepads were posted on each cell door to document visits by institutional staff.

The undersigned finds it to be of critical significance that Montgomery's claim that he did not have access to his unit team during August, 2004 is corroborated by the absence of his Segregation Review Orders ("SROs") during that period. The purpose of an SRO is to evaluate an inmate's continued placement in the segregation unit. As part of the required monthly SRO review, the inmate and/or institutional staff must verify that the inmate has been seen daily by medical staff and by a "responsible officer" designated by the Warden, and that the inmate has received regular exercise. See Docket No. 103, Defs.' Resp. to Mar. 29, 2006 Order to Produce, Ex. A, Attach. 4. At the hearing, Montgomery testified that his team members failed to conduct regularly scheduled SROs during the time period in question, supporting his contention that his unit team did not make regular rounds in the SHU.

Defendants have produced only three SROs concerning Montgomery, completed between June, 2004 and the time of his transfer out of USP Lee in July, 2005. These SROs concern the periods of June 28, 2004 to July 19, 2004; March 14, 2005 to April 4, 2005; and July 12, 2005 to

July 19, 2005. No SROs were provided concerning the twenty day period after August 6, 2004. Nor were any SROs provided through the date of his release from the SHU in October, 2004. As Montgomery was housed in the SHU from June, 2004 through October, 2004, he should have had several SRO reviews during this period. The absence of these SRO reviews supports Montgomery's assertion that he was not seen regularly by his assigned unit team from June, 2004 through October, 2004. Additionally, the absence of an SRO following the August 6, 2004 incident supports plaintiff's contention that he had limited access to unit team members during the period in which he could have filed a timely grievance related to this incident.

Defendants offered SROs concerning plaintiff's witness, inmate Adam Martin, for the period of time in which Martin was housed in the SHU. See Docket No. 104, Defs.' Mot. to Submit Addt'l Evidence, Ex. A, Attach. 4. Defendants contend these records establish that SRO reviews were regularly conducted in the SHU by unit team members. Records indicate that Martin's continued placement in the SHU was reviewed both weekly and monthly, and SROs were generated accordingly. During the period of June, 2004 through October, 2004, at least six SROs concerning Martin's continued placement in the SHU were completed. It appears from this evidence that Martin's unit team was meeting with him and conducting regular SROs. However, Martin's SRO records stand in sharp contrast to Montgomery's. During that same time period, only one SRO was generated relating to Montgomery's continued placement in the SHU. Rather than support defendants' assertion that Montgomery's unit team conducted regular SRO reviews, the paucity of SROs produced regarding Montgomery suggests that he had little interaction with his assigned unit team during this period.

V.

Defendants have not met their burden of establishing Montgomery failed to administratively exhaust the August 6, 2004 incident. The court credits Montgomery's testimony that administrative remedies were unavailable to him during the time period immediately following the August, 2004 incident. Indeed, the lack of access to unit team members was one of the reasons prompting the peaceful protest. Defendants have not offered sufficient evidence to the contrary.

Video footage of the August 6, 2004 incident supports Montgomery's assertion that the events of that day were such that even the most complacent inmate would feel compelled to complain. Defendants acknowledge that an inmate's assigned counselor had the primary duty to provide administrative remedy forms, and, as Collins did not testify, there was no evidence to establish that he saw Montgomery during the relevant period. Significantly, defendants' own records establish that Montgomery's unit team did not conduct monthly SRO reviews regarding his continued placement in the SHU following the August 6, 2004 incident, and only held one SRO review in the two months preceding the incident. The absence of these required SRO reports renders unconvincing defendants' assertions that Montgomery had access to his unit team. Had Montgomery's unit team seen him during this period, one would expect the SRO reports to exist. The absence of the SRO reports speaks volumes as to the failure of defendants to carry their burden on administrative exhaustion.

For these reasons, defendants have not met their burden of proof on the issue of failure to exhaust. Defendants have not shown that Montgomery had available administrative remedies. Thus, his failure to fully grieve and exhaust the instant action before filing his complaint is not a basis on which to dismiss his claims or grant defendants' motion for summary judgment. See

Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (“[A] remedy that prison officials prevent a prisoner from ‘utiliz[ing]’ is not an ‘available’ remedy under 1997e(a). . . .” (citing Johnson v. Garraghty, 57 F. Supp. 2d 321, 329 (E.D. Va. 1999))).

Accordingly, it is **RECOMMENDED** that the defendants’ motion to dismiss, or in the alternative motion for summary judgment, on the issue of administrative exhaustion be denied.

VI.

The clerk is directed to immediately transmit the record in this case to the Honorable Jackson L. Kiser, Senior United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note objections, if they have any, to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusions of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C § 636(b)(1) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by the reviewing court as a waiver of such objection.

Further, the Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

Entered this 18th day of August, 2006.

/s/ Michael F. Urbanski
United States Magistrate Judge