



1           The goals of the PLRA’s exhaustion requirement are to: (1) “eliminate unwarranted federal  
2 court interference with the administration of prisons;” (2) “afford corrections officials time and  
3 opportunity to address complaints internally before allowing the initiation of a federal case;” and, (3)  
4 “reduce the quantity and improve the quality of prisoner suits.” Woodford v. Ngo, 548 U.S. 81, 84-85  
5 (2006). Therefore, “the PLRA exhaustion requirement requires full and proper exhaustion.” *Id.* at 92-  
6 94. The Supreme Court held that “the PLRA’s exhaustion requirement applies to all inmate suits  
7 about prison life, whether they involve general circumstances or particular episodes, and whether they  
8 allege excessive force or some other wrong.” Porter, 534 U.S. at 532. Further, the exhaustion of  
9 remedies is required, regardless of the relief sought by the prisoner, as long as the administrative  
10 process can provide some sort of relief on the prisoner's complaint. Booth v. Churner, 532 U.S. 731,  
11 741, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001).

12           The grievance and appeal procedure for inmates in the custody of the California Department of  
13 Corrections and Rehabilitation, is a four-step process. Vaden v. Summerhill, 449 F.3d 1047, 1048-  
14 1049 (9th Cir. 2006); Cal. Code Regs. tit. 15, §§ 3084.1-3084.6. In 2009, generally, the inmate was  
15 required to file an informal inmate appeal within 15 days of the incident. Brown v. Valoff, 422 F.3d  
16 926, 929-930 (9th Cir. Cal. 2005). If denied at this First Level, the inmate can appeal to the Second  
17 Level which, generally, is to the warden or the warden’s designee. *Id.* The Third Level Appeal is  
18 conducted by the CDCR’s Director or designee. *Id.* Only a final decision on the merits from the Third  
19 Level Appeal satisfies the exhaustion requirement under the PLRA. Cal. Code Regs., tit 15, §  
20 3084.7(d)(3) (2011); Brodheim v. Cry, 584 F.3d 1262, 1265 (9th Cir. 2009).

21           Importantly, “[t]he requirements of the prison’s grievance process, not the PLRA, define the  
22 boundaries of proper exhaustion.” Jones v. Bock, 549 U.S. 199, 218 (2007). “[I]f prison regulations do  
23 not prescribe any particular content for inmate grievances, ‘a grievance suffices if it alerts the prison to  
24 the nature of the wrong for which redress is sought. As in a notice pleading system, the grievant need  
25 not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is  
26 object intelligibly to some asserted shortcoming.’” Johnson v. Testman, 380 F.3d 691, 697 (2nd  
27 Cir.2004) (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir.2002)). However, the grievance must  
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1 “provide enough information . . . to allow prison officials to take appropriate responsive measures.  
2 [citation]” Griffin v. Arpaio, 557 F.3d 1117, 1121 (9<sup>th</sup> Cir. 2009).

3 The exhaustion requirement of § 1997e(a) does not impose a pleading requirement, but rather  
4 is an affirmative defense under which defendants have the burden of proving the plaintiff failed to  
5 exhaust the available administrative remedies before filing a complaint in the District Court. Jones,  
6 *supra*, 549 U.S. at 216. A motion raising a prisoner's failure to exhaust the administrative remedies is  
7 properly asserted by way of an unenumerated motion under Fed.R.Civ.P 12(b). Wyatt v. Terhune, 315  
8 F.3d 1108, 1119 (9<sup>th</sup> Cir.2003); Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d  
9 365, 368 (9<sup>th</sup> Cir.1998) (per curium). In determining whether a case should be dismissed for failure to  
10 exhaust the administrative remedies, “the court may look beyond the pleadings and decide disputed  
11 issues of fact” in a procedure that is “closely analogous to summary judgment.” Id. at 1119–20. When  
12 the court concludes the prisoner has not exhausted all of his available administrative remedies, “the  
13 proper remedy is dismissal without prejudice.” Id.

## 14 **II. Statement of Facts**

15 Plaintiff's complaint stems from an incident on August 3, 2009, in which he was attacked by  
16 his cellmate, Vargas. (Doc. 15 at 3-4) Plaintiff claims that before the attack, he reported to the  
17 “inmate clerk responsible for processing bed and cell moves,” that he needed to move because he was  
18 not compatible with his cellmate. Id. at 4. However, he was not moved. In addition, Plaintiff alleges  
19 that during the incident, he moved toward the front of the cell, where a window is located, to alert staff  
20 of the attack. (Doc. 15 at 4) He claims Defendant Aguilera saw the attack but failed to intervene. Id.

21 On August 16, 2009, Plaintiff filed a 602 grievance complaining that, due to his medical  
22 condition, he should not have been placed with a cellmate. (Doc. 1 at 7) Plaintiff asserted that if he  
23 was placed in a single cell, he would not have been attacked on August 3, 2009. Id. Plaintiff asked  
24 that his grievance be granted and that he be provided a single cell until he recovered from his medical  
25 condition. Id.

26 The grievance was denied at the first level on August 30, 2009. Id. Plaintiff appealed to the  
27 second level on September 24, 2009, which was denied also. (Doc. 1 at 7; Doc. 23-3 at 2; Doc. 23-4  
28 at 2) Plaintiff did not appeal to the third level. Id.

1 On the same day as the attack, Plaintiff was issued a rules violation report for assaulting his  
2 cellmate with a weapon. (Doc. 23-3 at 12) In the report, Officer Pease, indicated that he was alerted  
3 that there was a fight in Plaintiff's cell. Id. When he arrived at the cell, Pease observed that both  
4 inmates had injuries that seemed consistent with a fight. Id. When the inmates were ordered to exit  
5 the cell, Vargas reported that Plaintiff had stabbed him in the ear and that because Plaintiff stabbed  
6 him he "battered" Plaintiff in return. (Doc. 23-3 at 13) Plaintiff admitted that he "stabbed [Vargas]  
7 with a pencil" but claimed it was in self-defense. Id. Plaintiff pled not guilty to the rules violation.  
8 Id.

9 On August 28, 2009, after conducting a hearing, the hearing officer found Plaintiff guilty and  
10 assessed a loss of 360 days credit and 10 days loss of yard time. (Doc. 23-3 at 12, 16-19) Plaintiff  
11 appealed the determination on September 15, 2009. (Doc. 23-3 at 6-8) In this appeal, Plaintiff  
12 asserted that Vargas assaulted him and left him unconscious on the cell floor. Id. at 6. He claimed  
13 also that Defendant Aguilera looked into the cell and saw Vargas assaulting him while the two were  
14 on the lower bunk. Id. at 8. He reported that he made eye contact with Aguilera who then stepped  
15 away. Id. Believing that he would not receive any assistance from Aguilera, Plaintiff admitted that he  
16 then stabbed Vargas with the pencil to try to stop the attack. Id. Nevertheless, Plaintiff claimed that "I  
17 did not provok the fight nor did I fight back at anytime." Id. at 7. Plaintiff claimed that he was being  
18 sexually harassed by Vargas and that he reported this to Captain Walker who failed to take any action.  
19 Id. Given all of this, Plaintiff sought a dismissal of the rules violation report. Id. at 6.

20 This appeal was reviewed at the second level and denied on December 30, 2009. (Doc. 23-3 at  
21 9-10, 29, 30. Warden Yates determined that, though Plaintiff had the right to defend himself, he  
22 improperly escalated the violence when he chose to use the pencil as a stabbing weapon. Id. at 31.  
23 Yates reported to Plaintiff that if he wished to pursue a claim against Captain Walker, he had to raise it  
24 in a different appeal because "**This appeal response will only address the appropriateness of the**  
25 **disciplinary.**" (Doc. 23-3 at 31, emphasis added)

26 Plaintiff appealed to the third level of review. (Doc. 23-3 at 4) In this appeal, Plaintiff took  
27 the same position as he had at the second level. Id. Once again, Plaintiff was advised that even if it  
28 was assumed that Plaintiff did not provoke the fight and was only defending himself, this would not

1 absolve him of the offense. Id. Thus, the Appeals Examiner determined that, though he was entitled  
2 to defend himself, Plaintiff improperly escalated the violence through the use of a weapon. Id. Thus,  
3 Plaintiff's appeal was denied. Id. Nevertheless, this determination fully exhausted this grievance.

4 Defendants argue that Plaintiff failed to exhaust his grievance submitted in response to the  
5 incident though they admit that he exhausted the grievance related to the rules violation report. (Doc.  
6 23 at 4) Defendants argue that the grievance related to the rules violation report—which sought a  
7 reversal of the discipline imposed--failed to apprise prison officials of the problem about which  
8 Plaintiff now complains. Id. at 4, 5.

9 Though Plaintiff sought and was granted an extension of time within which to oppose this  
10 motion and was given a warning pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir.  
11 2003), Plaintiff has failed to file any opposition to this motion.

### 12 **III. Analysis**

13 The grievance procedures set forth by the CDCR provide the process by which an inmate may  
14 complain about the conditions of his confinement. Porter, 534 U.S. at 532. Notably, these procedures  
15 are accompanied by deadlines by which the inmate must take action. For example, before 2011, the  
16 inmate must have submitted his grievance within 15 days of the event at issue. (15 Cal. Code. Regs.  
17 Tit. 15, § 3084.6(c)).<sup>1</sup>

18 Here, on August 16, 2009, Plaintiff timely submitted his grievance related to the altercation.  
19 (Doc. 1 at 7) He claimed that his housing classification, which required him to have a cellmate despite  
20 that he had undergone recent back surgery, was in error. Id. Plaintiff sought to have this classification  
21 changed so he would not have a cellmate. Id. When this grievance was denied at the second level,  
22 Plaintiff did not appeal further. (Doc. 23-3 at 2-32; Doc. 23-4 at 2) Importantly, Plaintiff was aware  
23 of Aguilera's role in the event at the time that he submitted this grievance, but failed to note that any  
24 officer contributed to the attack. (Doc. 1 at 7)

25 On the other hand, though the Court agrees that Plaintiff's August 16, 2009 grievance did not  
26 provide notice that Defendant Aguilera failed to protect him from the ongoing attack, the extent of the

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28 <sup>1</sup> Beginning 2011, inmates were provided 30 days to do so. Id.

1 notice provided by the September 15, 2009 grievance, is unclear. (Doc. 23-3 at 6-8) In this later  
2 grievance, Plaintiff complained that Aguilera looked into the cell during the fight and saw the  
3 cellmates fighting. Id. at 8. Plaintiff claims that he made eye contact with Aguilera but she merely  
4 walked away. Id. He accused Aguilera of lying and he blamed her lack of intervention as the impetus  
5 for his use of the weapon. Id. On the other hand, this grievance explicitly sought only to have the  
6 disciplinary determination reversed. (Doc. 23-3 at 6-8) Thus, this express limitation on the relief  
7 sought caused such ambiguity in the grievance that the Court finds it did not sufficiently apprise the  
8 CDCR of the problem for which he now seeks damages. McCollum v. California Dept. of Corrections  
9 and Rehabilitation, 647 F.3d 870, 876 (9th Cir.2011). [“We determine whether an inmate’s claim has  
10 been exhausted by reference to the prison’s own grievance requirements, Griffin v. Arpaio, 557 F.3d  
11 1117, 1120 (9th Cir.2009), which necessitate that the inmate ‘describe the problem and action  
12 requested,’ Cal.Code Regs. § 3084.2(a).”] In fact, a reasonable interpretation, in light of the relief  
13 sought, is that Aguilera’s conduct was mentioned only to justify Plaintiff’s use of the weapon.

14 On the other hand, even if there was no ambiguity, the grievance cannot be construed as  
15 exhausting the issues unrelated to the disciplinary hearing because it was not timely submitted. These  
16 issues were known to Plaintiff at the time of the event and, therefore, he was required to raise them no  
17 later than 15 days after the event, given the requirements of the regulations at the time. Cal.Code  
18 Regs. § 3084.8(b). However, this grievance was not submitted until 45 days after the incident.  
19 The Ninth Circuit has confirmed, “[t]o survive a motion to dismiss, the inmates’ claims must be both  
20 exhausted and timely.” McCollum, 647 F.3d at 876. Thus, because the grievance was not timely  
21 submitted as to conduct unrelated to the disciplinary proceeding, the Court finds Plaintiff has not  
22 exhausted his administrative remedies as to the issues raised in his complaint.

23 In so finding, the Court rejects the notion that an inmate who has suffered a disciplinary  
24 proceeding is given “two bites at the apple” to exhaust non-disciplinary but incident-related, issues.  
25 An inmate is not permitted to submit a grievance that omits claims and then later, revive the very  
26 claims he should have raised initially in an appeal from an adverse disciplinary decision. Woodford v.  
27 Ngo, 548 U.S. at 83-84 (“Proper exhaustion demands compliance with an agency’s deadlines and  
28 other critical procedural rules because no adjudicative system can function effectively without

1 imposing some orderly structure on the course of its proceedings.”) Any other determination would be  
2 nonsensical.<sup>2</sup> Because the Court finds Plaintiff has not exhausted his administrative remedies, this  
3 matter must be dismissed without prejudice.

4 **ORDER**

5 Based upon the foregoing, the Court **DIRECTS** the Clerk of the Court to assign this matter to  
6 a District Judge.

7 **FINDINGS AND RECOMMENDATION**

8 Based upon Plaintiff’s failure to exhaust his administrative remedies, the Court recommends:

- 9 1. That the complaint be **DISMISSED WITHOUT PREJUDICE**.

10 These findings and recommendations are submitted to the United States District Judge  
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B). Within 14 days after  
12 being served with these findings and recommendations, any party may file written objections with the  
13 Court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate  
14 Judge’s Findings and Recommendations.” The parties are forewarned that the Court does not  
15 anticipate granting extensions of time for this purpose. In addition, the parties are advised that failure  
16 to file objections within the specified time may waive the right to appeal the District Court’s order.  
17 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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19 IT IS SO ORDERED.

20 Dated: November 26, 2012

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE

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27 <sup>2</sup> Taken to its logical conclusion, failing to grant the motion to dismiss here would mean that an inmate who suffers an  
28 attack due to an officer’s inaction but who complies with prison rules during the attack would have but one opportunity to  
grieve the situation while an inmate who violates prison rules during the attack, would have two; this cannot be.