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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Ernie Pete Ortega,

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No. CV 07-2451-PHX-MHM (JCG)

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Plaintiff,

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ORDER

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vs.

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Dora Schriro, et al.,

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Defendants.

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Plaintiff Ernie Pete Ortega brought this civil rights action under 42 U.S.C. § 1983

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against various employees of the Arizona Department of Corrections (ADC) (Doc. # 78).

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The Court ordered a response to Counts I through V of the Second Amended Complaint

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(SAC) and dismissed Count VI for failure to state a claim (see Doc. # 77 at 4, adopting Doc.

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55 at 7).¹ The Court then dismissed Count I and II (in part) (Doc. # 107 at 7). Defendants

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Childs, Provencio, Antonelli, and Carrillo have now moved to dismiss Count II (in part) and

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Count V of the SAC (Doc. # 97). The motion is fully briefed (Doc. ## 105, 116). The Court

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will grant the motion.

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I. Background

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Plaintiff's claims stem from his incarceration at the Arizona State Prison Complex-

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Eyman Rynning Unit in Florence, Arizona (Doc. # 78 at 1). The surviving claims in Count

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¹ The Court also dismissed that portion of Count IV alleging that Provencio, Weerts, and Kimble denied Plaintiff's grievances in violation of the Fourteenth Amendment (Doc. # 77 at 4, adopting Doc. # 55 at 5).

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1 II are that (1) Childs refused to issue Plaintiff his Native American items, (2) Provencio
2 delayed Plaintiff's grievances, and (3) Henderson refused Plaintiff's request for a special
3 religious diet (id. at 8). And in Count V, Plaintiff claimed that Antonelli and Carrillo were
4 deliberately indifferent to Plaintiff's safety when they moved him to the East Yard, where
5 he was assaulted due to his race (id. at 12).²

6 Defendants Childs, Provencio, Antonelli, and Carrillo now move to dismiss Counts
7 II (in part) and V on the ground that Plaintiff failed to exhaust his administrative remedies
8 (Doc. # 97).

9 **II. Exhaustion**

10 **A. Legal Standard**

11 The Prison Litigation Reform Act (PLRA) provides that a prisoner may not bring a
12 lawsuit with respect to prison conditions under § 1983 unless all available administrative
13 remedies have been exhausted. See 42 U.S.C. § 1997e(a); Vaden v. Summerhill, 449 F.3d
14 1047, 1050 (9th Cir. 2006); Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005). He must
15 complete the administrative review process in accordance with the applicable rules. See
16 Woodford v. Ngo, 548 U.S. 81, 92 (2006). Exhaustion is required for all suits about prison
17 life, Porter v. Nussle, 534 U.S. 516, 523 (2002), regardless of the type of relief offered
18 through the administrative process, Booth v. Churner, 532 U.S. 731, 741 (2001).

19 Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 216 (2007).
20 Defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315
21 F.3d at 1119. Because exhaustion is a matter of abatement in an unenumerated Rule 12(b)
22 motion, a court may look beyond the pleadings to decide disputed issues of fact. Id. at 1119-
23 20. Further, a court has broad discretion as to the method to be used in resolving the factual
24 dispute. Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th
25 Cir. 1988) (quotation omitted).

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28 ² Counts III and IV also remain (Doc. # 77 at 4, adopting Doc. # 55 at 7).

1 **B. Parties' Contentions**

2 **1. Defendants**

3 In support of their motion, Defendants submit the declaration of Aurora Aguilar, ADC
4 Hearing Officer (Doc. # 97, Ex. 1, Aguilar Decl. ¶ 1). Aguilar attests the following: her
5 responsibilities include investigating and tracking grievance appeals to the ADC Director's
6 Office and maintaining the ADC Central Office Grievance Log, which records all non-
7 medical, final grievance appeals (*id.*). ADC has promulgated Department Order (DO) 802
8 Inmate Grievance Procedure, which establishes and governs the inmate grievance procedure
9 (*id.* ¶ 3, Attach. A). Inmates may use the grievance procedure for issues related to property,
10 staff, visitation, mail, food service, institutional procedures, Department Written Instructions,
11 program access, medical care, religion, and conditions of confinement (Aguilar Aff. ¶ 4, DO
12 802.01 § 1.1.1). A copy of the grievance procedure is available at each unit's Inmate
13 Resource Library (Aguilar Decl. ¶ 7). The grievance procedure is a four-step process, which
14 is generally as follows: (1) an inmate must submit an inmate letter to his assigned
15 Correctional Officer (CO) III, attempting to informally resolve a complaint within 10 days
16 after becoming aware of a problem; (2) if the inmate is not satisfied with the response, he
17 may file a formal grievance to the Grievance Coordinator within 10 calendar days of receipt
18 of the response to the inmate letter; (3) if the inmate is not satisfied with that response, he
19 may file a grievance appeal to a higher official—the Deputy Warden or Warden—within 10
20 calendar days of the receipt of the Coordinator's response; and (4) if the inmate is not
21 satisfied with the response to his grievance appeal, he may appeal to the ADC Director
22 within 10 calendar days of receipt of the response from the Warden or Deputy Warden (*id.*
23 ¶ 5). Expiration of the time limit for a response at any level in the process entitles the inmate
24 to proceed to the next level of review (DO 802.07 § 1.2.4). Aguilar further attests that she
25 reviewed the ADC Central Office Grievance Appeal Log for any final grievance appeals by
26 Plaintiff addressing: (1) the denial of Native American Religious Church items; (2) failure
27 to provide grievance forms at the Eyman-Rynning Unit; and (3) deliberate indifference to
28 Plaintiff's safety by Defendants Antonelli and Carrillo after being moved to the East Yard,

1 but no final grievance appeals were filed (Aguilar Decl. ¶ 9).

2 **2. Plaintiff's Response**

3 The Court issued an Order informing Plaintiff of his obligation to respond and the
4 evidence necessary to successfully rebut Defendants' contentions pursuant to Wyatt v.
5 Terhune, 315 F.3d 1108, 1120 n. 14 (9th Cir. 2003) (Doc. # 99). In response, Plaintiff first
6 alleges that he attempted to file a grievance as to his claims against Provencio and Child but
7 various ADC employees took advantage of the grievance system, which precluded Plaintiff
8 from exhausting his claims (Doc. # 105 at 1). As for Plaintiff's claims against Antonelli and
9 Carrillo, Plaintiff argues that his claims are not grievable as conditions of confinement or
10 staff complaints, but are actually disciplinary complaints, which are not grievable (id. at 3).

11 In support of his response, Plaintiff submits 285 pages of various documents and
12 grievances (Doc. # 106, Exs.).

13 **3. Defendants' Reply**

14 Defendants maintain that Plaintiff failed to specifically reference any grievances in
15 his voluminous response that would support his contention that he was prevented from
16 exhausting (Doc. # 116). Further, Defendants reiterate that Plaintiff failed to fully exhaust
17 his claims against Childs, Provencio, Antonelli, and Carrillo and they should be dismissed.

18 **III. Analysis**

19 As articulated above, Defendants have the burden of proving lack of exhaustion and
20 therefore must demonstrate that there were remedies available to Plaintiff. See Wyatt, 315
21 F.3d at 1119; Brown, 422 F.3d at 936-37. Defendants submit evidence that a grievance
22 procedure was available at the prison and that Plaintiff did not file any final grievance
23 appeals as to his allegations that: (1) Childs retaliated against him by denying him Native
24 American Religious Church items; (2) Provencio retaliated against him by failing to provide
25 grievance forms at the Eyman-Rynning Unit; and (3) Antonelli and Carrillo were deliberately
26 indifferent to Plaintiff's safety when they moved him to the East Yard where he was
27 immediately assaulted by gang members (Doc. # 97, Ex. 1, Aguilar Decl. ¶ 9).

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1 **A. Count II against Childs and Provencio**

2 In his response, Plaintiff does not dispute that he failed to fully exhaust these claims.
3 Rather, Plaintiff contends that he exhausted all the administrative remedies that were
4 available to him. The Court finds Plaintiff’s arguments unavailing for the following reasons.

5 First, with respect to Plaintiff’s claims that Childs refused to issue Plaintiff his Native
6 American items and Provencio intentionally delayed Plaintiff’s grievances or denied him
7 forms, Plaintiff merely states that “in previously submitted documents as exhibits the
8 Plaintiff shows that Provencio and Sambora took unfair advantage of the grievance system”
9 (Doc. # 105 at 1). This conclusory and self-serving statement is patently insufficient to rebut
10 Defendants’ evidence that Plaintiff failed to exhaust his retaliation claims against Childs and
11 Provencio. Plaintiff appears to reference generally documents submitted to the Court at
12 Dockets ## 36 and 50, which total 377 pages (Doc. # 105 at 2). Additionally, Plaintiff
13 submitted 285 additional pages of largely irrelevant exhibits with his response to Defendants’
14 motion (Doc. # 106). In his response, Plaintiff failed to specifically reference a *single*
15 document in all these exhibits, and the Court declines to search through 662 pages of random
16 and unindexed documents in order to find evidence to support Plaintiff’s conclusory claims.
17 See Orr v. Bank of America, 285 F.3d 764, 775 (9th Cir. 2002) (quoting Huey v. UPS, Inc.,
18 165 F.3d 1084, 1085 (7th Cir. 1999) (“Judges need not paw over the files without assistance
19 from the parties.”)).

20 But even a cursory review of Plaintiff’s exhibits belies his contention that he was
21 prevented from exhausting his administrative remedies as to his claims against Childs and
22 Provencio. Indeed, myriad grievance responses—as to unrelated issues—explicitly inform
23 Plaintiff how to remedy deficient grievances. And Defendants have identified an inmate
24 letter response instructing Plaintiff to file a formal grievance as to his claim against
25 Provencio (Doc. # 36-4 at 5). But Plaintiff did not ever file a grievance as to this claim and
26 has not shown that he could not.

27 Moreover, Plaintiff’s argument that he was unable to exhaust is undercut by his
28 demonstrated ability to file literally hundreds of grievances and fully exhaust some of his

1 claims. In fact, Defendants concede exhaustion as to Plaintiff's retaliation claim against
2 Henderson in Count II, Count III, and Count IV. In short, inmates are required to exhaust
3 their claims in compliance with the prison's grievance procedure. Woodford, 548 U.S. at 92.
4 Plaintiff does not explain *how* he was prevented from exhausting his claims against Childs
5 and Provencio. Defendants' motion to dismiss will therefore be granted.

6 **B. Count V against Antonelli and Carrillo**

7 Plaintiff contends that with respect to his deliberate indifference claim in Count V, he
8 could not exhaust because the ADC's grievance procedure does not permit grievances as to
9 disciplinary issues (Doc. # 105 at 3). While Plaintiff is correct that the ADC grievance
10 procedure does not allow inmate complaints regarding inmate disciplinary issues, the
11 grievance procedure clearly accepts grievances as to conditions-of-confinement claims or
12 complaints regarding staff (Doc. # 31, Ex. 1, Attach. A, DO 802.01 § 1.1.1.1). Plaintiff's
13 claim in Count V is that Antonelli and Carrillo were deliberately indifferent to a serious risk
14 to his safety when they placed him on the East Yard with gang members who immediately
15 assaulted him (Doc. # 78 at 12). The Court rejects Plaintiff's tepid argument that his failure-
16 to-protect claim is really a non-grievable inmate disciplinary claim. Further, Plaintiff offers
17 no evidence that he *ever* attempted to file a grievance as to this claim and was told it was
18 non-grievable.³ Consequently, the Court finds that Plaintiff failed to exhaust his claim
19 against Antonelli and Carrillo in Count V and Defendants' motion to dismiss will be granted.

20 **IV. Dismissal of Parties**

21 In the Court's December 23, 2009 Order, the Court dismissed Count I and Count II
22 (in part) for failure to exhaust (Doc. # 107). In this Order, Counts II (in part) and Count V
23 will be dismissed for failure to exhaust. As a result, Defendants Hewitt, Sikori, Kraicinski,
24 Owens, Sambora, Childs, Provencio, Antonelli, and Carrillo must be dismissed because no
25 claims remain against them.

27 ³ Even if the Court were to accept Plaintiff's argument that his claim in Count V is
28 really an ADC inmate disciplinary claim—which it does not—Plaintiff offers no evidence
that he fully appealed ADC disciplinary case No. 08-A17-008.

1 **IT IS ORDERED:**

2 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendants' Motion
3 to Dismiss (Doc. # 97).

4 (2) Defendants' Motion to Dismiss (Doc. # 97) is **granted**.

5 (3) The claims within Count II alleging that (1) Childs refused to issue Plaintiff
6 his Native American items and (2) Provencio delayed Plaintiff's grievances are dismissed
7 without prejudice for failure to exhaust.

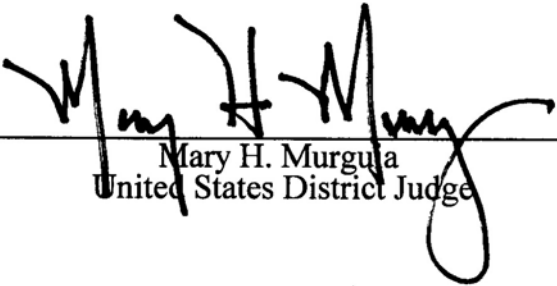
8 (4) Count V is dismissed without prejudice for failure to exhaust.

9 (5) Defendants Hewitt, Sikori, Kraicinski, Owens, and Sambora, Provencio,
10 Childs, Antonelli, and Carrillo are dismissed because no claims remain against them.

11 (6) The following claims remain: Count II alleging that Henderson retaliated
12 against Plaintiff by refusing his request for a special religious diet; Count III alleging that
13 Durrenburg was deliberately indifferent to Plaintiff's safety; and Count IV alleging that
14 Durrenburg filed false disciplinary reports against Plaintiff.

15 DATED this 5th day of February, 2010.

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Mary H. Murgula
United States District Judge