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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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10 EARL WARNER,  
11 Plaintiff,  
12 v.  
13 MATTHEW L. CATE, et al.,  
14 Defendants.  
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Case No. 1:12-cv-01146-LJO-MJS (PC)

**ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS TO DENY  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**(ECF No. 59)**

**CASE TO REMAIN OPEN**

16 Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil  
17 rights action brought pursuant to 42 U.S.C. § 1983. The matter was referred to a United  
18 States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 of the  
19 United States District Court for the Eastern District of California.

20 On May 19, 2015, the Magistrate Judge issued findings and recommendations to  
21 deny Defendants' motion for summary judgment and to require an evidentiary hearing to  
22 resolve factual disputes concerning exhaustion. (ECF No. 59.) Defendants filed  
23 purported objections. (ECF No. 60.) The objections do not take issue with the findings  
24 and recommendations but instead ask that other issues collateral to exhaustion also be  
25 addressed in the recommended evidentiary hearing. Specifically, Defendants ask that  
26 the evidentiary hearing address the issue of whether Plaintiff's initial appeal submission  
27 was timely. According to Defendants, the issue of timeliness falls outside the scope of  
28

1 exhaustion, and instead is a matter of “procedural default.” Defendants thus contend  
2 that they are excused from not having raised the timeliness issue in their exhaustion  
3 motion. They argue that permitting them to address this issue at the evidentiary hearing  
4 will preserve judicial resources by obviating the need to address the issue later, in a  
5 substantive motion for summary judgment or in a separate evidentiary hearing.

6 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has  
7 conducted a de novo review of this case. Having carefully reviewed the entire file, the  
8 Court finds the findings and recommendations to be supported by the record and by  
9 proper analysis.

10 Defendants’ request to add the issue of “procedural default” to the evidentiary  
11 hearing will be denied. Defendants’ contention that timeliness is not an aspect of  
12 exhaustion is incorrect. The case relied on by Defendants, Ngo v. Woodford, 403 F.3d  
13 620 (9th Cir. 2005), was reversed by the United States Supreme Court on precisely this  
14 basis. Woodford v. Ngo, 548 U.S. 81 (2006) (holding that “proper” exhaustion is  
15 required, including compliance with administrative deadlines). Defendants’ assertion  
16 that they have a continuing opportunity to raise the issue of “procedural default” is  
17 incorrect; the time for argument regarding timeliness of an administrative appeal is in  
18 the motion for summary judgment based on exhaustion.

19 Nevertheless, it is apparent that factual disputes regarding timeliness may bear  
20 on whether administrative remedies were effectively unavailable to Plaintiff. Thus, the  
21 Court will refer the matter back to the Magistrate Judge to determine the extent to which  
22 issues of timeliness may or need be addressed in the evidentiary hearing.

23 Accordingly, it is HEREBY ORDERED that:

- 24 1. The Court adopts the findings and recommendations (ECF No. 59), filed  
25 May 19, 2015, in full;
- 26 2. Defendants’ motion for summary judgment (ECF No. 41), filed August 18,  
27 2014, is DENIED;
- 28 3. The Court REFERS the matter back to the Magistrate Judge for further

1 proceedings on the issue of exhaustion; and

- 2 4. The case shall remain open for resolution of the exhaustion issue and, if  
3 necessary, further proceedings on Plaintiff's claims.

4 IT IS SO ORDERED.

5 Dated: June 9, 2015

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE

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