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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
10

11 DEON SHIRLEY,

No. CIV S-05-2468-FCD-CMK-P

12 Plaintiff,

13 vs.

ORDER

14 J. TUGGLE, et al.,

15 Defendants.  
16 \_\_\_\_\_/

17 Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant  
18 to 42 U.S.C. § 1983. Plaintiff originally filed this action, jointly with several other inmates, in  
19 December 2005. In March 2006, the court issued an order severing the claims of Plaintiff from  
20 those of the other plaintiff inmates, and dismissing his original complaint. Plaintiff filed a first  
21 amended complaint on April 26, 2006, and a second amended complaint on July 21, 2006. The  
22 second amended complaint (Doc. 26) is the operative pleading in this action, and named the  
23 following defendants: Tuggle, Clemmons, Franz, and Wong.<sup>1</sup>  
24 \_\_\_\_\_

25 <sup>1</sup> Plaintiff's first amended complaint named one additional defendant, Brown, who  
26 was not named in his second amended complaint. The Clerk of the Court will be directed to  
terminate Brown as a defendant in this action.

1 On December 28, 2006, the defendants filed a motion to dismiss Plaintiff's  
2 second amended complaint for his failure to exhaust his administrative remedies. In the motion  
3 to dismiss, Defendants argued Plaintiff did not comply with the procedural guidelines in  
4 exhausting his administrative remedies prior to filing this action. The court found that Plaintiff  
5 did not file an individual grievance, and the group grievance filed by another inmate did not  
6 follow the proper procedure for filing a group appeal. The court, therefore, determined that  
7 Plaintiff failed to comply with the prison system's grievance procedure, and granted the motion  
8 to dismiss. (See Docs. 36, 38). Judgment was entered on March 27, 2007, and Plaintiff filed a  
9 notice of appeal on April 20, 2007.

10 On May 26, 2009, the Ninth Circuit Court of Appeals issued an opinion vacating  
11 this court's judgment and remanding this case for further proceedings.<sup>2</sup> The Ninth Circuit  
12 specifically found that

13 [a]lthough defendants submitted a declaration by a current Appeals  
14 Coordinator at Folsom State Prison stating that the appeal was not  
15 classified as a group appeal, the prison's Formal Level Appeal  
16 Response referred to the "inmates" and "workers" affected by the  
17 issue, granted the appeal, and gave no indication that the appeal  
18 was procedurally infirm. Under the circumstances, defendants did  
19 not meet their burden of proving non-exhaustion. See *Wyatt [v.*  
20 *Terhune]*, 315 F.3d [1108,] 1119 [(9th Cir. 2003)] (holding that  
defendants have the burden of raising and proving the absence of  
exhaustion); see also Cal. Dep't of Corr. Operations Manual §§  
54100.8, 8.1, 8.2; cf. *Ngo v. Woodford*, 539 F.3d 1108, 1109-10  
(9th Cir. 2008) (holding that inmate whose formal appeal was  
rejected as untimely had not properly exhausted administrative  
remedies).

21 The decision of the Ninth Circuit is essentially a denial of Defendants' motion to  
22 dismiss. As such, Defendants will now be required to file an answer to Plaintiff's second  
23 amended complaint (Doc. 26).

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26 <sup>2</sup>

The Ninth Circuit's Mandate issued June 19, 2009.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants shall file an answer to Plaintiff's second amended complaint within 30 days of the date of this order; and

2. The Clerk of the Court is directed to terminate M. Brown as a defendant in this action.

DATED: July 8, 2009

  
CRAIG M. KELLISON  
UNITED STATES MAGISTRATE JUDGE