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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DAVY KELVIN POUGH,	)	Civil No. 08CV1498-JM (RBB)
	)	
Plaintiff,	)	<b>REPORT AND RECOMMENDATION</b>
	)	<b>GRANTING IN PART AND DENYING</b>
v.	)	<b>IN PART DEFENDANTS' MOTION TO</b>
	)	<b>DISMISS AND FOR SEVERANCE OF</b>
N. GRANNIS, et al.,	)	<b>PARTIES AND CLAIMS [DOC. NO.</b>
	)	<b>27]</b>
Defendants.	)	
_____	)	

Plaintiff Davy Kelvin Pough, a state prisoner proceeding pro se and in forma pauperis, filed a Complaint on August 14, 2008, pursuant to 42 U.S.C. § 1983 [doc. no. 1]. Plaintiff filed a First Amended Complaint nunc pro tunc to December 11, 2008 [doc. no. 6], a Second Amended Complaint on February 2, 2009 [doc. no. 9], and a Third Amended Complaint on April 8, 2009 [doc. no. 14].<sup>1</sup> A summons was returned unexecuted for Defendant C. Callahan on April 14, 2009 [doc. no. 17]. The remaining six Defendants, Ryan, Almager, Arellano, Bradley, Grannis, and Navarro, waived service of the summons and Plaintiff's Third Amended Complaint [doc. nos. 18-23].

<sup>1</sup> Because Pough's Third Amended Complaint is not consecutively paginated, the Court will use the page numbers assigned by the electronic case filing system.

1           On May 22, 2009, the six appearing Defendants filed a Motion  
2 to Dismiss and for Severance of Parties and Claims with a  
3 Memorandum of Points and Authorities in Support of the Motion, a  
4 Request for Judicial Notice, declarations from N. Grannis and D.  
5 DeGeus, and a Wyatt Notice [doc. no. 27].

6           On June 24, 2009, the Court issued a Klinge/Le/Rand Notice  
7 advising Pough of Defendants' pending Motion to Dismiss for failure  
8 to exhaust and allowing him time to present any additional evidence  
9 demonstrating exhaustion [doc. no. 29]. Plaintiff's Opposition to  
10 Defendants' Motion to Dismiss was filed nunc pro tunc to July 27,  
11 2009, with an exhibit and a declaration from Plaintiff objecting to  
12 the Wyatt Notice [doc. no. 32]. Pough also filed a Request for  
13 Judicial Notice [doc. no. 35]. Although he mistakenly refers to  
14 Defendants moving for "summary judgment," Plaintiff's Opposition  
15 clearly addresses the merits of Defendants' Motion to Dismiss.  
16 (Opp'n 3, 5-17.) Defendants filed a Reply on August 13, 2009 [doc.  
17 no. 37]. The Court found Defendants' Motion suitable for decision  
18 without oral argument pursuant to Civil Local Rule 7.1(d)(1) [doc.  
19 no. 30].

20           The Court has reviewed the Third Amended Complaint and  
21 attachments, Defendants' Motion to Dismiss and attachments,  
22 Plaintiff's Opposition and attachments, the Requests for Judicial  
23 Notice and exhibits, and Defendants' Reply.

24           For the reasons set forth below, the district court should  
25 **GRANT** in part and **DENY** in part Defendants' Motion to Dismiss and  
26 for Severance of Parties and Claims.

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1 **I. FACTUAL BACKGROUND**

2 Plaintiff is currently a prisoner at the California Men's  
3 Colony ("CMC") in San Luis Obispo, California; however, the  
4 allegations in his Third Amended Complaint arise from events that  
5 occurred while he was incarcerated at Centinela State Prison  
6 ("Centinela") in Imperial County, California, between July 6, 2005,  
7 and March 28, 2008. (Third. Am. Compl. 10.)

8 In count one, Pough argues that Defendants enforced prison  
9 policies that denied him adequate time in Centinela's law library  
10 during extended prison lockdowns. (Id. at 12.) Plaintiff contends  
11 that Warden Almager's "uncodified policy regulated Plaintiff['s]  
12 total time of physical access in the law library to less than sixty  
13 (60) hours over the period of a year." (Id.) Specifically, he  
14 claims Defendants Almager, Ryan, Bradley, and Grannis failed in  
15 their duty to provide Plaintiff with constitutionally adequate  
16 access to the courts. (Id. at 20-21.) As a result, Pough explains  
17 he was time barred from pursuing his Petition for Writ of Habeas  
18 Corpus in district court. (Id. at 20.)

19 Plaintiff also argues he was denied equal protection of the  
20 laws when Defendants discriminated against him based on his  
21 membership in a protected class. (Id. at 25.) Pough claims that  
22 Defendants passed over him in favor of other prisoners for  
23 education and work opportunities during the course of three years.  
24 (Id.) He witnessed inmates who had not been at the prison as long  
25 as he receive school and job assignments that he did not. (Id.)  
26 This is significant, he argues, because an inmate's classification  
27 goes from A2B to A1A upon receipt of such assignments. (Id.)  
28 Inmates who earn A1A status are not confined in their cells on

1 weekends, evenings, and holidays. (Id.) Also, Plaintiff states  
2 that AlA prisoners are allowed to make telephone calls every other  
3 day, whereas he is only allowed to make one telephone call per  
4 month. (Id.)

5 Count two advances numerous allegations regarding inadequate  
6 living conditions at Centinela. (Id. at 26-27, 29-31.) Plaintiff  
7 claims that instead of receiving two hot meals per day during  
8 lockdowns, his meals were cold; he also contends the cool  
9 temperature "prom[p]ted contamination." (Id. at 26.) He alleges  
10 the kitchen facility is unsanitary because he believes kitchen  
11 workers do not wear hairnets; he found hair in his food; and he saw  
12 cockroaches near food trays. (Id. at 27.) Plaintiff asserts  
13 prisoners are not given adequate disinfectant to prevent the spread  
14 of disease during lockdowns. (Id.) Pough also claims he has  
15 observed roaches, mice, insects, and other vermin inside the  
16 prison. (Id.) He contends that when prison officials spray  
17 pesticides, prisoners are not given adequate protection against  
18 inhaling the fumes. (Id.)

19 Additionally, Pough asserts that although he is discipline  
20 free, he was denied out-of-cell exercise and confined to his cell  
21 for more than 100 consecutive days, causing him headaches, atrophy,  
22 and painful muscle cramps. (Id. at 28.) He claims he was also  
23 denied satisfactory indoor movement and exercise as a result of his  
24 confinement. (Id.)

25 In count three, Plaintiff alleges he has received inadequate  
26 medical care. (Id. at 32-33.) He argues that the medical care at  
27 Centinela is "wholly inadequate," and "the deficiencies are  
28 systematic." (Id. at 32.) Pough believes physicians do not use

1 medical records when diagnosing prisoners. (Id.) He claims he had  
2 to submit grievances several times to receive medical attention.  
3 (Id.) Further, Plaintiff contends that he experienced throbbing  
4 and numbness in his neck and fingers and loss of muscle tissue in  
5 his shoulder for more than two years before he was diagnosed with  
6 arthritis. (Id.) He was subsequently prescribed aspirin and given  
7 medical accommodations, including a lower bunk, a pillow, and a  
8 thicker mattress. (Id.) Pough also asserts that his request to  
9 receive physical therapy to strengthen muscle groups was never  
10 answered. (Id. at 33 (citing id. Attach. #1 Ex. HH at 1.))

11 An orthopedic surgeon diagnosed Plaintiff with degenerative  
12 cartilage in his shoulder following his July 2, 2007, transfer to  
13 CMC. (Id. at 34.) Plaintiff contends the inadequate medical care  
14 at Centinela caused the degenerated cartilage. (Id.) He also  
15 claims that insufficient care caused abnormalities in his cervical  
16 spine and the abnormal nerve conduction of his right ulnar nerve.  
17 (Id. at 35.) Pough argues that although he requested physical  
18 therapy for his shoulder, the request was never answered. (Id. at  
19 33.)

20 Plaintiff also contends he received inadequate dental care at  
21 Centinela. (Id. at 36-37.) He alleges that he waited more than  
22 two years to receive a teeth cleaning. (Id. at 36.) Also, Pough  
23 claims he filed a request for emergency dental treatment after a  
24 damaged crown exposed a sensitive tooth. (Id.) Officials advised  
25 him to have the tooth extracted because replacement of the cap was  
26 not part of prison dental services. (Id. at 37.) He was  
27 subsequently moved to another yard and a doctor cemented the crown  
28 to Plaintiff's tooth without cleaning or preparing the crown or

1 tooth first. (Id.) Lastly, Pough claims that he has suffered from  
2 Battered Prison Syndrom, a psychological problem, as a result of  
3 mistreatment by prison officials. (Id.)

4 **A. Judicial Notice**

5 Defendants request that the Court take judicial notice of  
6 Magistrate Judge Leo S. Papas's Report and Recommendation issued on  
7 March 23, 2009, in Pough v. Marshall, et al., Case No. 08-cv-1776  
8 BTM (POR) (S.D. Cal. Mar. 23, 2009). (Def's.' Mot. Dismiss & Sever  
9 Attach. #2 Req. Judicial Notice Ex. A.) Likewise, Pough requests  
10 that the Court take judicial notice of his Objections to the Report  
11 and Recommendation. (Pl.s' Req. Judicial Notice Attach. #1 Ex. A.)

12 When ruling on motions to dismiss, courts may consider facts  
13 stated in the complaint, documents attached to the complaint, and  
14 matters of which they take judicial notice. Lovelace v. Software  
15 Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996) (citing Fed.  
16 R. Evid. 201(f)). Courts may take judicial notice of any fact that  
17 is "not subject to reasonable dispute in that it is either (1)  
18 generally known within the territorial jurisdiction of the trial  
19 court or (2) capable of accurate and ready determination by resort  
20 to sources whose accuracy cannot reasonably be questioned." Fed.  
21 R. Evid. 201(b). "A court shall take judicial notice if requested  
22 by a party and supplied with the necessary information." Fed. R.  
23 Evid. 201(d). Judicial notice may be taken of "records of state  
24 agencies and other undisputed matters of public record." Disabled  
25 Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 866  
26 n.1 (9th Cir. 2004) (citing Lee v. City of Los Angeles, 250 F.3d  
27 668, 689 (9th Cir. 2001)).

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1 The Report and Recommendation and Pough's Objections are both  
2 part of the court record and their authenticity is not in dispute.  
3 The Court notes that Pough's habeas corpus petition is on appeal.  
4 Accordingly, the Court takes judicial notice of the Report and  
5 Recommendation, Objections, and Pough's habeas corpus case, Pough  
6 v. Marshall, et al., Case No. 08-cv-1776 BTM (POR) (S.D. Cal. filed  
7 Sept. 26, 2008).

8 **II. LEGAL STANDARDS APPLICABLE TO DEFENDANTS' MOTION TO DISMISS**  
9 **FOR FAILURE TO STATE A CLAIM**

10 **A. Rule 12(b)(6) Motions to Dismiss**

11 A motion to dismiss for failure to state a claim pursuant to  
12 Federal Rule of Civil Procedure 12(b)(6) tests the legal  
13 sufficiency of the claims in the complaint. See Davis v. Monroe  
14 County Bd. of Educ., 526 U.S. 629, 633 (1999). "The old formula --  
15 that the complaint must not be dismissed unless it is beyond doubt  
16 without merit -- was discarded by the Bell Atlantic decision [Bell  
17 Atl. Corp. v. Twombly, 550 U.S. 544, 563 n.8 (2007)]." Limestone  
18 Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 803 (7th Cir. 2008).

19 A complaint must be dismissed if it does not contain "enough  
20 facts to state a claim to relief that is plausible on its face."  
21 Bell Atl. Corp., 550 U.S. at 570. "A claim has facial plausibility  
22 when the plaintiff pleads factual content that allows the court to  
23 draw the reasonable inference that the defendant is liable for the  
24 misconduct alleged." Ashcroft v. Iqbal, \_\_ U.S. \_\_, 129 S.Ct.  
25 1937, 1949 (2009). The court must accept as true all material  
26 allegations in the complaint, as well as reasonable inferences to  
27 be drawn from them, and must construe the complaint in the light  
28 most favorable to the plaintiff. Cholla Ready Mix, Inc. v. Civish,

1 382 F.3d 969, 973 (9th Cir. 2004) (citing Karam v. City of Burbank,  
2 352 F.3d 1188, 1192 (9th Cir. 2003)); Parks Sch. of Bus., Inc. v.  
3 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995); N.L. Indus., Inc. v.  
4 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

5         The court does not look at whether the plaintiff will  
6 “ultimately prevail but whether the claimant is entitled to offer  
7 evidence to support the claims.” Scheuer v. Rhodes, 416 U.S. 232,  
8 236 (1974); see Bell Atl. Corp. v. Twombly, 550 U.S. at 563 n.8. A  
9 dismissal under Rule 12(b)(6) is generally proper only where there  
10 “is no cognizable legal theory or an absence of sufficient facts  
11 alleged to support a cognizable legal theory.” Navarro v. Block,  
12 250 F.3d 729, 732 (9th Cir. 2001) (citing Balistreri v. Pacifica  
13 Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988)).

14         The court need not accept conclusory allegations in the  
15 complaint as true; rather, it must “examine whether [they] follow  
16 from the description of facts as alleged by the plaintiff.” Holden  
17 v. Haqopian, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation  
18 omitted); see Halkin v. VeriFone, Inc., 11 F.3d 865, 868 (9th Cir.  
19 1993); see also Cholla Ready Mix, 382 F.3d at 973 (citing Clegg v.  
20 Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994))  
21 (stating that on Rule 12(b)(6) motion, a court “is not required to  
22 accept legal conclusions cast in the form of factual allegations if  
23 those conclusions cannot reasonably be drawn from the facts  
24 alleged[]”). “Nor is the court required to accept as true  
25 allegations that are merely conclusory, unwarranted deductions of  
26 fact, or unreasonable inferences.” Sprewell v. Golden State  
27 Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

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1 In addition, when resolving a motion to dismiss for failure to  
2 state a claim, courts may not generally consider materials outside  
3 the pleadings. Schneider v. Cal. Dep't of Corrs., 151 F.3d 1194,  
4 1197 n.1 (9th Cir. 1998); Jacobellis v. State Farm Fire & Cas. Co.,  
5 120 F.3d 171, 172 (9th Cir. 1997); Allarcom Pay Television Ltd. v.  
6 Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). "The  
7 focus of any Rule 12(b)(6) dismissal . . . is the complaint."  
8 Schneider, 151 F.3d at 1197 n.1. This precludes consideration of  
9 "new" allegations that may be raised in a plaintiff's opposition to  
10 a motion to dismiss brought pursuant to Rule 12(b)(6). Id. (citing  
11 Harrell v. United States, 13 F.3d 232, 236 (7th Cir. 1993)).

12 "When a plaintiff has attached various exhibits to the  
13 complaint, those exhibits may be considered in determining whether  
14 dismissal [i]s proper . . . ." Parks Sch. of Bus., 51 F.3d at 1484  
15 (citing Cooper v. Bell, 628 F.2d 1208, 1210 n.2 (9th Cir. 1980)).  
16 The court may also consider "documents whose contents are alleged  
17 in a complaint and whose authenticity no party questions, but which  
18 are not physically attached to the pleading . . . ." Branch v.  
19 Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other  
20 grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th  
21 Cir. 2002); Stone v. Writer's Guild of Am. W., Inc., 101 F.3d 1312,  
22 1313-14 (9th Cir. 1996).

23 These Rule 12 (b)(6) guidelines apply to Defendants' Motion to  
24 Dismiss.

25 **B. Standards Applicable to Pro Se Litigants**

26 Where a plaintiff appears in propria persona in a civil rights  
27 case, the court must construe the pleadings liberally and afford  
28 the plaintiff any benefit of the doubt. Karim-Panahi v. Los

1 Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988). The rule  
2 of liberal construction is "particularly important in civil rights  
3 cases." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992).  
4 In giving liberal interpretation to a pro se civil rights  
5 complaint, courts may not "supply essential elements of claims that  
6 were not initially pled." Ivey v. Bd. of Regents of the Univ. of  
7 Alaska, 673 F.2d 266, 268 (9th Cir. 1982). "Vague and conclusory  
8 allegations of official participation in civil rights violations  
9 are not sufficient to withstand a motion to dismiss." Id.; see  
10 also Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir.  
11 1984) (finding conclusory allegations unsupported by facts  
12 insufficient to state a claim under § 1983). "The plaintiff must  
13 allege with at least some degree of particularity overt acts which  
14 defendants engaged in that support the plaintiff's claim." Jones,  
15 733 F.2d at 649 (internal quotation omitted).

16         Nevertheless, the court must give a pro se litigant leave to  
17 amend his complaint "unless it determines that the pleading could  
18 not possibly be cured by the allegation of other facts." Lopez v.  
19 Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (quotation  
20 omitted) (citing Noll v. Carlson, 809 F.2d 1446, 1447 (9th Cir.  
21 1987)). Thus, before a pro se civil rights complaint may be  
22 dismissed, the court must provide the plaintiff with a statement of  
23 the complaint's deficiencies. Karim-Panahi, 839 F.2d at 623-24.  
24 But where amendment of a pro se litigant's complaint would be  
25 futile, denial of leave to amend is appropriate. See James v.  
26 Giles, 221 F.3d 1074, 1077 (9th Cir. 2000).

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1 **C. Stating a Claim Under 42 U.S.C. § 1983**

2 To state a claim under § 1983, the plaintiff must allege facts  
3 sufficient to show (1) a person acting "under color of state law"  
4 committed the conduct at issue, and (2) the conduct deprived the  
5 plaintiff of some right, privilege, or immunity protected by the  
6 Constitution or laws of the United States. 42 U.S.C.A. § 1983  
7 (West 2003); Shah v. County of Los Angeles, 797 F.2d 743, 746 (9th  
8 Cir. 1986).

9 **III. DEFENDANTS' MOTION TO DISMISS**

10 Defendants Almager, Arellano, Bradley, Ryan, Navarro, and  
11 Grannis move to dismiss Pough's Third Amended Complaint. (Defs.'  
12 Mot. Dismiss & Sever Attach. #1 Mem. P. & A. 2.) Defendants assert  
13 Plaintiff failed to exhaust his administrative remedies for many of  
14 his claims. (Id. at 16-19.) In addition, they argue that each of  
15 Pough's six causes of action should be dismissed for failure to  
16 state a cognizable claim for relief. (Id. at 4.) Defendants  
17 allege the Third Amended Complaint fails to comply with Federal  
18 Rule of Civil Procedure 8. (Id. at 3-4); see also Fed. R. Civ. P.  
19 8. They also contend that each Defendant is entitled to qualified  
20 and Eleventh Amendment immunities for all actions taken in their  
21 official capacities. (Defs.' Mot. Dismiss & Sever Attach. #1 Mem.  
22 P. & A. 5, 22-23.)

23 Defendants also move under Federal Rule of Civil Procedure 18  
24 to sever from this lawsuit all unrelated, exhausted claims, other  
25 than the access to court claim, for which the Court grants leave to  
26 amend. (Id. at 19-20); see also Fed. R. Civ. P. 18. Finally,  
27 Defendants move under Federal Rule of Civil Procedure 20 to sever  
28 from this lawsuit all Defendants not properly named in connection

1 with the access to courts claim. (Defs.' Mot. Dismiss & Sever  
2 Attach. #1 Mem. P. & A. 20-21); see also Fed. R. Civ. P. 20.

3 **A. Exhaustion**

4 **1. Motion to Dismiss Unexhausted Claims Pursuant to the**  
5 **Unenumerated Portions of Rule 12(b)**

6 Title 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act  
7 ("PLRA") states: "No action shall be brought with respect to  
8 prison conditions under section 1983 of this title, or any other  
9 Federal law, by a prisoner confined in any jail, prison, or other  
10 correctional facility until such administrative remedies as are  
11 available are exhausted." 42 U.S.C.A. § 1997e(a) (West 2003). The  
12 exhaustion requirement applies regardless of the relief sought.  
13 Booth v. Churner, 532 U.S. 731, 741 (2001) (citation omitted).

14 "[A]n action is "brought" for purposes of § 1997e(a) when the  
15 complaint is tendered to the district clerk[]' . . . ." Vaden v.  
16 Summerhill, 449 F.3d 1047, 1050 (9th Cir. 2006) (quoting Ford v.  
17 Johnson, 362 F.3d 395, 400 (7th Cir. 2004)). Therefore, prisoners  
18 must "exhaust administrative remedies before submitting any papers  
19 to the federal courts." Id. at 1048 (emphasis added).

20 Section 1997e(a)'s exhaustion requirement creates an  
21 affirmative defense. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th  
22 Cir. 2003). "[D]efendants have the burden of raising and proving  
23 the absence of exhaustion." Id. (footnote omitted). Defendants in  
24 § 1983 actions properly raise the affirmative defense of failure to  
25 exhaust administrative remedies through an unenumerated motion to  
26 dismiss under Rule 12(b). Id. (citations omitted).

27 Unlike motions to dismiss for failure to state a claim for  
28 which relief may be granted, "[i]n deciding a motion to dismiss for

1 failure to exhaust nonjudicial remedies, the court may look beyond  
2 the pleadings and decide disputed issues of fact." Id. at 1119-20  
3 (citing Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837  
4 F.2d 365, 369 (9th Cir. 1988)) (footnote omitted). Courts have  
5 discretion regarding the method they use to resolve such factual  
6 disputes. Ritza, 837 F.2d at 369 (citations omitted). "A court  
7 ruling on a motion to dismiss also may take judicial notice of  
8 'matters of public record.'" Hazleton v. Alameida, 358 F. Supp. 2d  
9 926, 928 (C.D. Cal. 2005) (citing Lee v. City of Los Angeles, 250  
10 F.3d at 688 (citations omitted)). But "if the district court looks  
11 beyond the pleadings to a factual record in deciding the motion to  
12 dismiss for failure to exhaust[,]. . . the court must assure that  
13 [the plaintiff] has fair notice of his opportunity to develop a  
14 record." Wyatt, 315 F.3d at 1120 n.14.

15 "[When] the district court concludes that the prisoner has not  
16 exhausted nonjudicial remedies, the proper remedy is dismissal of  
17 the claim without prejudice." Id. at 1120 (citing Ritza, 837 F.2d  
18 at 368 n.3).

## 19 **2. The Administrative Grievance Process**

20 "The California Department of Corrections [CDC] provides a  
21 four-step grievance process for prisoners who seek review of an  
22 administrative decision or perceived mistreatment: an informal  
23 level, a first formal level, a second formal level, and the  
24 Director's level." Vaden, 449 F.3d at 1048-49 (citing Brown v.  
25 Valoff, 422 F.3d 926, 929-30 (9th Cir. 2005)). The administrative  
26 appeal system can be found in title 15, sections 3084.1, 3084.5,  
27 and 3084.6 of the California Code of Regulations. See Brown, 422  
28

1 F.3d at 929-30 (citing Cal. Code Regs. tit. 15, §§ 3084.1(a),  
2 3084.5(a)-(b), (e)(1)-(2), 3084.6(c)).

3 To comply with the CDC's administrative grievance procedure,  
4 an inmate must file his grievance at the informal level "within 15  
5 working days of the event or decision being appealed . . . ." Cal.  
6 Code Regs. tit. 15, § 3084.6(c) (2009); see also Brown, 422 F.3d at  
7 929. An inmate must proceed through all levels of the  
8 administrative grievance process before initiating a § 1983 suit in  
9 federal court. See Vaden, 449 F.3d at 1051.

10 A prisoner's grievances must be "sufficient under the  
11 circumstances to put the prison on notice of the potential claims  
12 and to fulfill the basic purposes of the exhaustion requirement."  
13 Irvin v. Zamora, 161 F. Supp. 2d 1125, 1135 (S.D. Cal. 2001).  
14 Exhaustion serves several important goals, including "allowing a  
15 prison to address complaints about the program it administers  
16 before being subjected to suit, reducing litigation to the extent  
17 complaints are satisfactorily resolved, and improving litigation  
18 that does occur by leading to the preparation of a useful record."  
19 Jones v. Bock, 549 U.S. 199, 219 (2007) (citing Woodford v. Ngo,  
20 548 U.S. 81, 88-91 (2006); Porter v. Nussle, 534 U.S. 516, 524  
21 (2002)).

### 22 3. Plaintiff's Failure To Exhaust

23 Defendants state that Pough only exhausted his claims  
24 concerning law library access, hot meals, and dental care. (Defs.'  
25 Mot. Dismiss & Sever Attach. #1 Mem. P. & A. 18.) Defendants argue  
26 Plaintiff did not exhaust his equal protection claim and the  
27 portion of his living-conditions claim involving the distribution  
28 of disinfectants, the presence of mice and insects, and the

1 exposure to pesticides. (Id. at 18, 23-24.) Also, they contend  
2 Plaintiff did not exhaust his claims relating to outdoor exercise  
3 and medical care for his shoulder condition. (Id.) Defendants  
4 move to dismiss these claims pursuant to the unenumerated portions  
5 of Rule 12(b) on the ground that Plaintiff has not properly  
6 exhausted his administrative remedies. (Id. at 16); Fed. R. Civ.  
7 P. 12(b).

8           **a. Count One: Denial of Equal Protection of the Laws**

9           In count one, Pough alleges he was denied equal protection of  
10 the laws when Defendants discriminated against him, due to his  
11 race, by assigning school and work opportunities to other prisoners  
12 instead of Plaintiff. (Third. Am. Compl. 25.) Defendants contend  
13 Pough did not file an administrative grievance concerning a denial  
14 of programming opportunities or related discrimination. (Defs.'  
15 Mot. Dismiss & Sever Attach. #1 Mem. P. & A. 18; id. Attach. #4 at  
16 6; id. Attach. #3 at 6.)

17           Plaintiff, on the other hand, claims he filed a 602 grievance  
18 on March 26, 2007, complaining that he was being passed over for  
19 programming opportunities. (Pl.'s Opp'n 11-12.) Pough alleges the  
20 grievance was date stamped as received by prison officials on March  
21 28, 2007. (Id. at 12.) Plaintiff contends he did not receive a  
22 response until July 11, 2007, which was approximately 106 days  
23 after he submitted the grievance. (Id.) He argues that any  
24 failure to exhaust his equal protection claim was caused by CDC's  
25 failure to comply with its self-imposed deadlines for responding to  
26 inmate appeals. (Id. (quoting Cal. Code Regs. Tit. 15 §  
27 3084.6(b)(1)).)

28

1 But in their Reply, Defendants state that even if Plaintiff  
2 submitted such an appeal, he failed to provide the Court with a  
3 copy of the grievance, in spite of the Wyatt Notice. (Defs.' Reply  
4 4; Defs.' Mot. Dismiss & Sever Attach. #5 Wyatt Notice.)  
5 Defendants argue that assuming there was a delay in responses,  
6 Plaintiff should have pursued the alleged 602 through all four  
7 review levels. (Defs.' Reply 4 (citing Cal. Code Regs. Tit. 15 §  
8 3084.6(b)(6)).) They contend Pough's failure to appeal the July  
9 11, 2007, decision violates the fifteen-day prisoner appeal time  
10 limit, which does not render his administrative remedies  
11 unavailable. (Id. at 5 (citing Cal. Code Regs. tit. 15, §  
12 3084.6(c)).)

13 In ruling on Defendants' Motion, the Court may "look beyond  
14 the pleadings and decide disputed issues of fact." Wyatt, 315 F.3d  
15 at 1119-20 (citing Ritza, 837 F.2d at 369). Although Plaintiff did  
16 not provide a copy of the 602 with his Opposition, the grievance  
17 was previously submitted as exhibit "Z" to his Third Amended  
18 Complaint. (Third. Am. Compl. Attach. #1 Ex. Z.) In his informal  
19 grievance dated March 26, 2007, Pough states: "I have been without  
20 a job, and I have been disciplinary free, still I am classified as  
21 A2B, for two years many other[] inmates that have been here for far  
22 less time th[a]n I, have gotten jobs an[d] have been reclassified  
23 as A1A." (Id.) On July 11, 2007, Prison official L. White  
24 responded to Plaintiff's grievance, "You are #336 on the support  
25 services waiting list and #125 for Pre Voc." (Id.)

26 Even if the Court were to accept Pough's representation that  
27 he properly submitted this informal grievance, he did not proceed  
28 beyond the informal level and pursue the three-step review process.



1 See Woodford, 548 U.S. at 90. CDC administrative procedures are  
2 not properly exhausted until an inmate has pursued a grievance  
3 through all available levels of review. Brown, 422 F.3d at 935;  
4 Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005); Hazleton, 358  
5 F. Supp. 2d at 929 (citations omitted). Pough could have appealed  
6 the untimely grievance response, but he chose to file this lawsuit  
7 instead. Because Plaintiff did not follow prison grievance  
8 policies, the equal protection claim is unexhausted.

9 Existing Ninth Circuit case law directs the district court to  
10 dismiss unexhausted claims without prejudice. Vaden, 449 F.3d at  
11 1051 (citing Wyatt, 315 F.3d at 1120). But Vaden and Wyatt were  
12 decided prior to Woodford. Since the Supreme Court's decision in  
13 Woodford, it may no longer be appropriate to dismiss Plaintiff's  
14 Third Amended Complaint with leave to amend if it is too late for  
15 him to properly exhaust administrative remedies. An inmate must  
16 submit his grievance "within 15 working days" of the unacceptable  
17 lower level decision. Cal. Code Regs. tit. 15, § 3084.6(c).  
18 Because Pough did not submit a first formal level appeal within  
19 fifteen days of his informal level response, and he has not been  
20 housed at Centinela since March 28, 2008, any attempt to file the  
21 grievance now is untimely and no exceptions apply. See Cal. Code  
22 Regs. tit. 15, § 3084.6(c); Woodford, 548 U.S. at 95-96; see also  
23 Booth, 532 U.S. at 741 (exceptions to the exhaustion requirement  
24 are limited) (footnote omitted). Therefore, Plaintiff's equal  
25 protection claim should be **DISMISSED WITH PREJUDICE**.

26 **b. Count Two: Inadequate Living Conditions**

27 In count two of his Third Amended Complaint, Plaintiff makes  
28 numerous allegations regarding inadequate living conditions at

1 Centinela. (Third. Am. Compl. 26-27, 29-31.) Pough complains that  
2 kitchen workers do not use hairnets. (Id. at 27.) Inmates are not  
3 given cleaning products or disinfectants during lockdowns to  
4 prevent the spread of disease. (Id.) He asserts the kitchen  
5 facility is unsanitary, and he saw cockroaches near food trays as  
6 well as mice and insects inside the prison. (Id.) Finally, he  
7 alleges he was exposed to pesticides when the prison was being  
8 fumigated. (Id.)

9 **i. Hairnets**

10 Pough properly pursued a 602 to the Director's level regarding  
11 kitchen workers' inadequate use of hairnets. (Defs.' Mot. Dismiss  
12 & Sever Attach. #3 Decl. Grannis Ex. C.) The grievances in which  
13 Pough makes this complaint primarily allege the denial of hot  
14 meals. (Id.; id. Attach. #4 Decl. DeGeus Ex. D.) A claim is  
15 exhausted, however, when "plaintiff's grievances were sufficient  
16 under the circumstances to put the prison on notice of the  
17 potential claims and to fulfill the basic purposes of the  
18 exhaustion requirement." Irvin, 161 F. Supp. 2d at 1135.

19 Although the grievances primarily complain about the  
20 temperature of meals, prison officials were nonetheless put on  
21 notice of Plaintiff's hairnet concern. See id. Pough complained  
22 about hairnet usage in his first level grievance by stating, "Meals  
23 are served by CDCR representatives wearing baseball caps." (Defs.'  
24 Mot. Dismiss & Sever Attach. #4 Decl. DeGeus Ex. D at 29.)  
25 Plaintiff requested that workers should "[c]omply with the use of  
26 hair nets pursuant to health and safety standards." (Id.)  
27 Officials acknowledged in their responses to his second and  
28 Director's level appeals that Pough has "concerns with the food

1 being served by CDCR staff merely wearing baseball caps as hair  
2 covering" instead of hairnets, yet they found the issue was moot  
3 because prison officials concluded that the use of baseball caps  
4 complied with health and safety standards. (Id. at 32-34; id.  
5 Attach. #3 Decl. Grannis Ex. C at 4.)

6 Pough properly put the prison on notice of this claim. See  
7 Irvin, 161 F. Supp. 2d at 1135. The portion of Plaintiff's living  
8 conditions claim involving the inadequate use of hairnets is  
9 therefore fully exhausted.

10 **ii. Disinfectants, unsanitary kitchen, mice and**  
11 **insects, exposure to pesticides**

12 Plaintiff also submitted a grievance alleging he was not given  
13 cleaners or disinfectants during lockdowns. (Third. Am. Compl.  
14 Attach. #1 Ex. Q at 1.) Centinela officials granted the grievance  
15 at the first formal level of review, and Plaintiff did not pursue  
16 it beyond the first level. (Id. at 3; Defs.' Mot. Dismiss & Sever  
17 Attach. #4 Decl. DeGeus Ex. C at 28.) Pough also did not submit a  
18 grievance claiming the kitchen was unsanitary or that he saw  
19 cockroaches near food trays. Nor did he submit a grievance  
20 regarding the presence of mice and insects or the exposure to  
21 pesticides during fumigations. (Defs.' Mot. Dismiss & Sever  
22 Attach. #4 Decl. DeGeus at 6; id. Attach. #3 Decl. Grannis at 6.)  
23 Because Plaintiff did not follow the CDC's grievance process for  
24 these claims, they are unexhausted and should not be considered by  
25 the Court. See Vaden, 449 F.3d at 1048.

26 Since the Supreme Court's decision in Woodford, it may no  
27 longer be appropriate to dismiss Plaintiff's Third Amended  
28 Complaint with leave to amend if it is too late for him to properly

1 exhaust administrative remedies. An inmate must submit his  
2 grievance "within 15 working days" of the unacceptable lower level  
3 decision. Cal. Code Regs. tit. 15, § 3084.6(c). Because Pough did  
4 not submit a second level appeal within fifteen days of his first  
5 formal level response, any attempt to file it now is untimely and  
6 no exceptions apply. See Cal. Code Regs. tit. 15, § 3084.6(c));  
7 Woodford, 548 U.S. at 95-96; see also Booth, 532 U.S. at 741  
8 (exceptions to the exhaustion requirement are limited) (footnote  
9 omitted). Therefore, the portion of Plaintiff's living conditions  
10 claim concerning the lack of disinfectant distribution, kitchen  
11 sanitation, cockroaches near food trays, the presence of mice and  
12 insects, and the exposure to pesticides should all be **DISMISSED**  
13 **WITH PREJUDICE.**

14 **iii. Denial of outdoor exercise**

15 Also in count two, Plaintiff asserts he was denied outside  
16 exercise and confined to his cell for more than 100 consecutive  
17 days and was unable to exercise or even walk indoors. (Third Am.  
18 Compl. 28.) As a result, Pough argues he suffered from headaches,  
19 atrophy, and muscle cramps. (Id.)

20 Plaintiff submitted grievances at the informal, first formal,  
21 second formal, and Director's review levels. (Id. Attach. #1 Ex. Y  
22 at 1-2.) The appeal was screened out at the Director's level on  
23 August 3, 2007, and returned to Plaintiff because it lacked  
24 necessary documentation. (Defs.' Mot. Dismiss & Sever Attach. #1  
25 Mem. P. & A. 18 (citing id. Attach. #3 Decl. Grannis at 3; id. Ex.  
26 A at 1.)) Pough notes that the missing document was a Program  
27 Status Report. (Pl.'s Opp'n 14.)

28

1 Defendants move to dismiss the outdoor exercise claim because  
2 Plaintiff did not exhaust his administrative remedies through the  
3 Director's level. (Defs.' Mot. Dismiss & Sever Attach. #1 Mem. P.  
4 & A. 19.) Plaintiff claims the appeal was improperly screened out  
5 because prison officials could have secured the report themselves  
6 by using methods Pough did not have access to, like facsimile,  
7 telephone, and the internet. (Pl.'s Opp'n 14-15.) In their Reply,  
8 Defendants state that California regulations do not impose a duty  
9 on prison officials to provide inmates with missing documentation  
10 needed to complete their appeals. (Defs.' Reply 5 (citing Cal.  
11 Code Regs. Tit. 15, § 3084.3(c)(5)).) In fact, adherence to these  
12 regulations determines whether an inmate's remedies are exhausted.  
13 (Id. at 5-6 (citing Jones, 549 U.S. at 218).)

14 An inmate appeal may be rejected if necessary supporting  
15 documents are not attached. Vlasich v. Hoffman, No. 03-15349, 2003  
16 U.S. App. LEXIS 17119, at \*3 (9th Cir. Aug. 11, 2003) (citing  
17 Cal. Code Regs. tit. 15, § 3084.3(c)(4)-(5)). The appeals  
18 coordinator who rejects the grievance must complete an Appeals  
19 Screening Form that provides clear instructions for the inmate to  
20 follow in order to qualify the appeal for processing. Cal. Code  
21 Regs. tit. 15, § 3084.3(d).

22 Pough explains that he understood his appeal was defective  
23 only because it lacked the Program Status Report and that  
24 resubmission of his appeal with the report would have eliminated  
25 any defect. (Pl.'s Opp'n 14.) Plaintiff claims he was unable to  
26 provide the status report and requested an interview to discuss the  
27 matter further. (Id. at 14-15.) He subsequently submitted an  
28 "Inmate Request for Interview" regarding the status report. (Id.

1 at 14.) But Pough has not provided the Court a copy of his  
2 interview request regarding the Program Status Report or any other  
3 documents evidencing an attempt to obtain the report. Even if  
4 Plaintiff asked for an interview and received no response, he  
5 nonetheless failed to try to obtain the Program Status Report and  
6 timely resubmit his Director's level grievance so as to fully  
7 exhaust his outdoor exercise claim. See Brown, 422 F.3d at 929-30.

8 Plaintiff failed to comply with the prison's grievance  
9 procedures before filing suit in federal court. See Vaden, 449  
10 F.3d at 1051; 142 U.S.C. § 1997e(a). He no longer has time to  
11 exhaust his remedies by resubmitting his outdoor exercise appeal  
12 with the proper documentation; nor are there applicable exceptions.  
13 Cal. Code Regs. tit. 15, § 3084.6(c); see Booth, 532 U.S. at 741;  
14 Woodford, 548 U.S. at 95-96. Accordingly, Plaintiff's claim  
15 regarding out-of-cell exercise should be **DISMISSED**.

16 The question, however, is whether Pough should be given leave  
17 to amend. The record is incomplete. The Court cannot conclude  
18 whether Plaintiff chose not to resubmit this grievance or was  
19 foreclosed from doing so. In his Opposition, Pough makes a general  
20 reference to not having access to the status report and receiving  
21 no response to his request for an interview with prison officials  
22 about the need for the report. (See Opp'n 14-15.) Plaintiff  
23 should be given leave to amend this claim to allege any relevant  
24 facts relating to obtaining the status report and resubmitting this  
25 grievance. See Hoaglen v. Reinke, No. CV-08-272-S-BLW, 2009 U.S.  
26 Dist. LEXIS 82860, at \*\*18-19, 25 (D. Idaho Sept. 11, 2009)  
27 (dismissing claims without prejudice); Tanksley v. CDC Avenal State  
28 Prison Officers, No. 08-CV-00732-LJO-SMS PC, 2009 U.S. Dist. LEXIS

1 60939, at \*\*6-7 (E.D. Cal. July 16, 2009) (noting that Plaintiff  
2 offered "no explanation for his failure to correct and resubmit the  
3 grievance" but recommending a dismissal without prejudice); Adams  
4 v. Kernan, No. CIV S-07-0707-GEB-EFB P, 2009 U.S. Dist. LEXIS  
5 20126, at \*18 (E.D. Cal. Mar. 13, 2009) (same). This claim should  
6 be **DISMISSED WITHOUT PREJUDICE** and with leave to amend.

7           c.    Count Three: Inadequate Medical Care

8                   i.    **Shoulder condition**

9           In count three, Pough contends he was denied adequate medical  
10 care for his shoulder condition. (Third. Am. Compl. 32.) He  
11 claims Centinela officials ignored his medical request to receive  
12 physical therapy. (Id. at 33 (citing id. Attach. #1 Ex. HH).)  
13 Plaintiff was diagnosed with degenerative cartilage in his shoulder  
14 after transferring to CMC and argues Centinela's inadequate care  
15 caused the deterioration. (Id. at 34.)

16           Plaintiff has not shown that he even attempted to submit a 602  
17 grievance for this claim. The medical claim relating to Pough's  
18 shoulder injury is therefore unexhausted and cannot be considered.  
19 See Woodford, 548 U.S. at 95 (sanctioning noncompliance with  
20 procedural rules gives prisoners an incentive to comply.)  
21 Plaintiff no longer has time to exhaust his administrative  
22 remedies. See Cal. Code Regs. tit. 15, § 3084.6(c); Woodford, 548  
23 U.S. at 95-96. Pough's claim concerning inadequate medical care  
24 for a shoulder condition should be **DISMISSED WITH PREJUDICE**.

25                   ii.   **Psychological condition**

26           Pough alleges in count three he has suffered psychological  
27 problems as a result of mistreatment by prison officials. (Third  
28

1 Am. Compl. 37.) In particular, he claims that he has suffered from  
2 Battered Prison Syndrom. (Id.)

3 Plaintiff did not submit a grievance regarding the  
4 prison's failure to provide medical care for his psychological  
5 problems. It appears Pough's claim that he has Battered Prison  
6 Syndrom is offered as evidence that he suffered damages caused by  
7 Defendants' alleged constitutional violations. (See id. at 37-38.)  
8 Plaintiff may seek to introduce evidence that he has psychological  
9 problems to show he suffered damages as a result of the alleged  
10 violations; however, to the extent Plaintiff is attempting to  
11 allege a claim for Battered Prison Syndrome, the claim is  
12 unexhausted. The Court should not consider it as a separate cause  
13 of action, and any claim for relief should be **DISMISSED WITH**  
14 **PREJUDICE.** See Vaden, 449 F.3d at 1051; see also Woodford, 548  
15 U.S. at 95.

16 **d. Exhaustion Summary**

17 Defendants do not challenge, and Plaintiff has exhausted, the  
18 claims concerning access to law libraries, hot meals, use of  
19 hairnets, and dental care. (Defs.' Mot. Dismiss & Sever Attach. #1  
20 Mem. P. & A. 18; Third. Am. Compl. Attach. #1 Ex. A; id. Attach. #1  
21 Ex. M; Defs.' Mot. Dismiss & Sever Attach. #3 Decl. Grannis Ex. C;  
22 Third Am. Compl. Attach. #1 Ex. EE at 4-5.) Accordingly, Pough  
23 should be permitted to proceed with these four exhausted claims.  
24 See Jones, 549 U.S. at 221. But Plaintiff's claims regarding an  
25 unsanitary kitchen, the presence of mice and insects, and exposure  
26 to pesticides should be **DISMISSED WITHOUT PREJUDICE.** Pough's  
27 claims regarding equal protection, lack of disinfectant, lack of  
28 outdoor exercise, and inadequate medical care for his shoulder



1 condition and Battered Prison Syndrome were not exhausted and  
2 should be **DISMISSED WITH PREJUDICE.**

3 **B. Plaintiff's Claims Are Without Merit**

4 Defendants move to dismiss the Third Amended Complaint under  
5 Federal Rule of Civil Procedure 12(b)(6) because each of  
6 Plaintiff's allegations fail to state a federal claim upon which  
7 relief can be granted. (Defs.' Mot. Dismiss & Sever Attach. #1  
8 Mem. P. & A. 4.) The Court may grant a motion to dismiss for  
9 failure to state a claim if the complaint does not contain enough  
10 facts to state a claim that is "plausible on its face." Bell Atl.  
11 Corp., 550 U.S. at 570. "[F]acial plausibility [is] when the  
12 plaintiff pleads factual content that allows the court to draw the  
13 reasonable inference that the defendant is liable for the  
14 misconduct alleged." Ashcroft v. Iqbal, \_\_ U.S. at \_\_, 129 S.Ct.  
15 at 1949.

16 **1. Count One: Denial of Access to the Courts**

17 "Under the First and Fourteenth Amendments to the  
18 Constitution, state prisoners have a right of access to the  
19 courts." Phillips v. Hust, 477 F.3d 1070, 1075 (9th Cir. 2007)  
20 (citing Lewis v. Casey, 518 U.S. 343, 346 (1996)). The right of  
21 access requires prison officials to provide inmates the opportunity  
22 to prepare, serve, and file court documents in cases affecting  
23 their liberty. Id. at 1075-76 (quotation omitted). But prisoners  
24 do not have a constitutional right to a law library. Lewis, 518  
25 U.S. at 350-51. Law libraries are just one means of assuring  
26 prisoners meaningful access to the courts. Id.

27 There are two types of access to courts claims: backward-  
28 looking and forward-looking. See Christopher v. Harbury, 536 U.S.

1 403, 413-14 (2002). A backward-looking claim concerns a lost  
2 opportunity to litigate. Id. at 413-14. A forward-looking claim,  
3 on the other hand, concerns "official action [that] is presently  
4 denying an opportunity to litigate for a class of potential  
5 plaintiffs." Id. at 413. Pough's cause of action is a backward-  
6 looking claim. He argues that Defendants' prison policies denied  
7 him adequate time in the library during race-related lockdowns,  
8 which caused his federal habeas corpus petition to be dismissed as  
9 untimely. (Third. Am. Compl. 12, 20.) To adequately plead a  
10 backward-looking denial of access claim, Plaintiff must allege  
11 three elements: "1) the loss of a 'nonfrivolous' or 'arguable'  
12 underlying claim; 2) the official acts frustrating the litigation;  
13 and 3) a remedy that may be awarded as recompense but that is not  
14 otherwise available in a future suit." Phillips, 477 F.3d at 1076  
15 (citing Christopher, 536 U.S. at 413-14).

16 **a. Non-frivolous Nature of the Underlying Claim**

17 To have standing to bring this claim, Plaintiff must allege he  
18 suffered an actual injury. Lewis, 518 U.S. at 351; Vandelft v.  
19 Moses, 31 F.3d 794, 798 (9th Cir. 1994). To succeed, a prisoner  
20 must have been denied the necessary tools to litigate a  
21 nonfrivolous claim attacking a conviction, sentence, or conditions  
22 of confinement. Christopher, 536 U.S. at 415; Lewis, 518 U.S. at  
23 353 & n.3. Plaintiff need not show that he would have been  
24 successful on the merits of his claims, but only that they were not  
25 frivolous. Allen v. Sakai, 48 F.3d 1082, 1085 & n.12 (9th Cir.  
26 1994). "A claim is frivolous if it is without arguable merit  
27 either in law or fact." Bilal v. Driver, 251 F.3d 1346, 1349 (11th  
28 Cir. 2001) (citations omitted); see also Carroll v. Gross, 984 F.2d

1 392, 393 (11th Cir. 1993) (per curiam) (stating that frivolous  
2 claims are those with "little or no chance of success[.]") (internal  
3 citations omitted).

4 Pough filed a First Amended Petition for Writ of Habeas Corpus  
5 in federal court asserting his guilty pleas at trial were  
6 involuntary and that he received ineffective assistance of counsel.  
7 (Third. Am. Compl. Attach. #1 Ex. C at 3.) Also, Plaintiff argued  
8 that the trial court abused its discretion by summarily denying his  
9 motion to withdraw his pleas and violated his right to a jury trial  
10 by imposing an upper-term sentence. (Id.) There is nothing before  
11 the Court to suggest that the claims Pough presented in his habeas  
12 petition were frivolous. Plaintiff's Third Amended Complaint  
13 alleges a plausible claim that Pough's habeas corpus petition was a  
14 nonfrivolous attack on his criminal conviction and sentence.

15 **b. Causation**

16 Plaintiff must also show "the alleged violation of his rights  
17 was proximately caused" by a state actor. Phillips, 477 F.3d at  
18 1077 (citing Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir.  
19 1991)). The proximate cause analysis focuses on whether it was  
20 foreseeable that the state actor's conduct would result in a  
21 deprivation of the prisoner's right to access the courts. Id.  
22 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning  
23 Agency, 216 F.3d 764, 784-85 (9th Cir. 2000)).

24 To show his right of access to the courts was violated by  
25 inadequate library time, Plaintiff must allege facts showing that  
26 "shortcomings in the library or legal assistance program hindered  
27 his efforts to pursue a legal claim." Lewis, 518 U.S. at 351.  
28 Notably, "an inmate cannot establish relevant actual injury simply

1 by establishing that his prison's law library or legal assistance  
2 program is subpar in some theoretical sense." Id.

3 Pough asserts his inadequate access to the law library  
4 prevented him from timely pursuing habeas corpus relief. (Third.  
5 Am. Compl. 19-20.) He alleges that he was "restricted to his  
6 housing unit during race-related lockdown[s] for weeks and [months]  
7 at a time, and denied access to the facility law library, [and]  
8 subsequently denied mean[ing]ful access to the courts[.]" (Id. at  
9 19 (citation omitted).) Plaintiff contends that Defendants  
10 Almager, Ryan, Bradley, and Grannis caused him harm because AEDPA  
11 "does[] not recognize Penitentiary Lockdown or modified programs as  
12 'unreasonable' for the purpose of a delay in the filing of a  
13 petition . . . ." (Id. at 21.) As a result, Pough's federal  
14 habeas corpus petition was time barred. (Id.) Plaintiff also  
15 complains that during facility lockdowns, the prison did not  
16 provide him modified legal access programs or access to a person  
17 trained in the law. (Id.)

18 Plaintiff does not state exact dates of each lockdown he  
19 alleges interfered with his access to the law library, but it  
20 appears that the lockdowns generally occurred between November or  
21 December 2006 and March 2007. Pough explains, "In December of  
22 2006, Centinela . . . had been on lockdown for approximately thirty  
23 (30) days . . . ." (Id. at 22.) "[On] January 30, 2007, Centinela  
24 . . . was still on lockdown . . . ." (Id.) Plaintiff was  
25 permitted a two-hour visit to the law library on February 6, 13,  
26 20, and 21 in 2007, but was unable to access the library on  
27 February 6 and 21 because the facility was on lockdown. (Id. at  
28

1 23.) He also mentions that on March 9, 2007, the prison was again  
2 on lockdown. (Id.)

3 Elsewhere in the Third Amended Complaint, Plaintiff asserts  
4 that his "total time of physical access in the law library [was]  
5 less than sixty (60) hours over the period of a year." (Id. at  
6 12.) But Pough does not explain when this occurred or whether he  
7 took advantage of all the library time available to him during that  
8 period.

9 Pough presented his complaints about his access to the law  
10 library during lockdowns to the court in connection with his  
11 federal habeas corpus petition. (Defs.' Mot. Dismiss & Sever  
12 Attach. #2 Req. Judicial Notice Ex. A; Pl.s' Req. Judicial Notice  
13 Attach. #1 Ex. A.) After briefing of the current Motion was  
14 completed, United States District Judge Barry Ted Moskowitz issued  
15 an order dismissing Pough's Petition for a Writ of Habeas Corpus.  
16 Pough v. Marshall, et al., Case No. 08-cv-1776 BTM (POR) (S.D. Cal.  
17 Sept. 16, 2009) (order) [doc. no. 28].

18 Judge Moskowitz wrote:

19 From January 17, 2006, when his conviction became  
20 final, until November 21, 2006, when the lockdown began,  
21 a period of 308 days, Petitioner indicates that he had  
22 access to the law library and his legal materials.  
23 Although he contends that he had less than sixty hours of  
24 library time during that period, and that meaningful  
25 research was difficult due to overcrowding and lack of a  
26 reasonable amount of time in the library, he has not  
27 alleged facts which demonstrate that he was prevented  
28 from filing his federal petition during that time.  
However, assuming equitable tolling was available during  
the lockdown period, and 57 days remained on the  
limitations period when tolling due to the lockdown  
began, this action is still untimely. Under this  
scenario the limitations period would be equitably tolled  
from November 21, 2006 until, at the very latest, June 4,  
2008, when Petitioner indicates that he had been  
transferred to another institution where access to the  
law library was available and he was in possession of his  
personal property. As of June 4, 2008, Petitioner's

1 state supreme court habeas petition, which had been filed  
2 on January 4, 2008, was under submission. Assuming that  
3 petition statutorily tolled the limitations period,  
4 tolling would have ended when the petition was denied on  
5 July 9, 2008, and Petitioner would have had 57 days left  
6 when the limitations period resumed running on July 10,  
7 2008. He initiated this action on September 25, 2008, 81  
8 days later.

9 Id. at 3 (citations omitted). Judge Moskowitz added, "[A]ssuming  
10 equitable tolling was available during the time period Petitioner  
11 was on lockdown and was not allowed access to the law library,  
12 . . . this action is nevertheless untimely." Id. at 6.

13 Thus, the district court found that Pough's federal petition  
14 was untimely even when the period of time during which Plaintiff  
15 was on lockdown was excluded from the limitations period. Pough  
16 has not alleged a sufficient causal connection between the  
17 allegedly inadequate library access and his untimely habeas  
18 petition. See Bryant v. Arizona Attorney General, 499 F.3d 1056,  
19 1060 (9th Cir. 2007) (citations omitted); see also Lewis, 518 U.S.  
20 at 351.

21 Additionally, several courts have refused to find  
22 constitutional violations where inmates' access to law libraries  
23 was restricted. See, e.g., Rhinehart v. Gomez, No. 93cv3747, 1995  
24 U.S. Dist. LEXIS 8382, at \*\*20-21 (N.D. Cal. June 8, 1995) (finding  
25 no denial of access to courts where prisoner could access law  
26 library for only two hours every two weeks); Zatko v. Rowland, 835  
27 F. Supp. 1174, 1178 (N.D. Cal. 1993) (holding that two hours of  
28 access to library per week was reasonable); Magee v. Waters, 810  
F.2d 451, 452 (4th Cir. 1987) (finding one hour per week in law  
library of city jail did not violate inmate's constitutional  
rights); Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851,  
858 (9th Cir. 1985) (noting that prisoners are not guaranteed

1 unlimited access to the law library). Plaintiff's Third Amended  
2 Complaint does not adequately allege an injury caused by  
3 Defendants' failure to provide him law library access during  
4 facility lockdowns.

5 **c. Remedy**

6 The premature nature of this claim also warrants its  
7 dismissal. Assuming Pough alleged facts sufficient to establish  
8 the loss of a nonfrivolous claim that was proximately caused by a  
9 state actor, he fails to show he has no remedy other than the  
10 relief available in this denial-of-access suit. See Phillips, 477  
11 F.3d at 1078-79.

12 The third element is satisfied where the plaintiff has no  
13 remedy by which he can obtain relief other than the one requested  
14 in his denial-of-access suit. Id. at 1076 (citing Christopher, 536  
15 U.S. at 413-14). "A backward-looking denial-of-access claim [must]  
16 provide a remedy that could not be obtained on an existing claim."  
17 Christopher, 536 U.S. at 428. Premature access to courts claims  
18 should be dismissed without prejudice. Delew v. Wagner, 143 F.3d  
19 1219, 1222-23 (9th Cir. 1998); see Karim-Panahi v. Los Angeles  
20 Police Dep't., 839 F.2d 621, 625 (9th Cir. 1988) (ordering  
21 dismissal without prejudice where plaintiff's allegations would be  
22 mooted if he were to succeed in claims that remained pending)  
23 (citations omitted); see also Logan v. Doe, No. 1:02-cv-06428-AWI-  
24 SMS PC, 2007 U.S. Dist. LEXIS 28559, at \*29-30 (E.D. Cal. Apr. 18,  
25 2007) (finding no evidence that plaintiff "forever lost the ability  
26 to challenge his conviction as a result of the dismissal of the  
27 petition" when he was simultaneously litigating similar issues).

28

1 After dismissing Pough's federal habeas petition as untimely,  
2 Judge Moskowitz issued a Certificate of Appealability. Pough v.  
3 Marshall, et al., Case No. 08-cv-1776 BTM (POR) (S.D. Cal. Sept.  
4 16, 2009) (order) [doc. no. 28]. The Ninth Circuit received  
5 Pough's notice of appeal and set a time schedule for the appeal.  
6 Pough v. Marshall, et al., Case No. 09-56644, (9th Cir. Oct. 15,  
7 2009) (time schedule order) [doc. no. 33]. Prior to the resolution  
8 of the appeal, it is impossible to determine whether Plaintiff has  
9 lost all other available remedies by which he could obtain relief.  
10 See Phillips, 477 F.3d at 1079; see also Delew, 143 F.3d at 1223  
11 (dismissing § 1983 claim without prejudice while wrongful death  
12 action was pending in state court because plaintiffs had not shown  
13 denial of access rendered all remedies ineffective); Karim-Panahi,  
14 839 F.2d at 625 (stating that because the resolution of the instant  
15 suit remained in question, plaintiff's claim was not ripe for  
16 judicial consideration.)

17 Plaintiff's legal access claim should be **DISMISSED WITHOUT**  
18 **PREJUDICE**, pending resolution of the Ninth Circuit appeal. Pough  
19 may seek to amend this claim after his habeas corpus petition is  
20 fully resolved.

21 **d. Supervisor Liability**

22 Alternatively, Pough fails to state a claim because he has not  
23 alleged how Defendants Almager, Ryan, Bradley and Grannis caused  
24 the constitutional violation.

25 Section 1983 of the Civil Rights Act does not authorize  
26 bringing a cause of action based on respondeat superior liability.  
27 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692-93 (1978) ("[T]he  
28 fact that Congress did specifically provide that A's tort became



1 B's liability if B 'caused' A to subject another to a tort suggests  
2 that Congress did not intend § 1983 liability to attach where such  
3 causation was absent.") (footnote omitted); see also Motley v.  
4 Parks, 432 F.3d 1072, 1081 (9th Cir. 2005). State officials are  
5 subject to suit in their personal capacity if "they play an  
6 affirmative part in the alleged deprivation of constitutional  
7 rights." King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987) (citing  
8 Rizzo v. Goode, 423 U.S. 362, 377 (1976)). A supervisor may be  
9 found personally liable if he "set[s] in motion a series of acts by  
10 others . . . , which he knew or reasonably should have known, would  
11 cause others to inflict the constitutional injury." Motley, 432  
12 F.3d at 1081 (quoting Larez v. City of Los Angeles, 946 F.2d 630,  
13 646 (9th Cir. 1991)).

14 The Third Amended Complaint alleges Warden Almager "failed to  
15 provide Plaintiff with Constitutionally adequate physical access to  
16 Centinela's facility law library during institutional lockdowns."  
17 (Third Am. Compl. 12.) Pough explains that Almager had an  
18 "uncodified policy" that limited his access to the law library.  
19 (Id. at 12, 17-18.) He also claims that Associate Warden Ryan took  
20 part in establishing and enforcing these policies. (Id. at 13.)  
21 Plaintiff cites sections of the Departmental Operations Manual,  
22 California Code of Regulations, and changes to California  
23 Department of Correction and Rehabilitation regulations that he  
24 presumably believes Almager failed to follow. (Id. at 12.)  
25 Finally, he states Almager "was aware of, and acquiesced in, the  
26 unconstitutional restrictions and conditions of Plaintiff." (Id.  
27 at 18.)

28

1 Without more than conclusory allegations that Defendants  
2 Almager and Ryan were aware of or caused constitutional violations,  
3 Plaintiff fails to state a claim against them based on anything  
4 other than supervisory liability. For this additional reason, this  
5 claim against Almager and Ryan should be **DISMISSED WITHOUT**  
6 **PREJUDICE.**

7 Plaintiff's allegations against Ryan, Bradley, and Grannis  
8 also fail because those claims appear to be based on their handling  
9 of Pough's inmate grievances and appeals. Plaintiff asserts that  
10 Ryan, Bradley, and Grannis each were "aware of, and acquiesced in,  
11 the unconstitutional restrictions and conditions of Plaintiff."  
12 (Id. at 19.) Plaintiff adds that Ryan reviewed his grievance at  
13 the first formal level of review, and Bradley reviewed Pough's  
14 appeal. (Id.)

15 42 U.S.C. § 1983 provides the following:

16 Every person who, under color of any statute,  
17 ordinance, regulation, custom, or usage, of any State or  
18 Territory or the District of Columbia, subjects, or  
19 causes to be subjected, any citizen of the United States  
20 or other person within the jurisdiction thereof to the  
deprivation of any rights, privileges, or immunities  
secured by the Constitution and laws, shall be liable to  
the party injured in an action at law, suit in equity, or  
other proper proceeding for redress . . . .

21 42 U.S.C.A. § 1983.

22 Section 1983 "is not itself a source of substantive rights,  
23 but merely provides a method for vindicating federal rights  
24 elsewhere conferred." Graham v. Connor, 490 U.S. 386, 393-94  
25 (1989) (internal citations omitted); Crompton, 947 F.2d at 1420;  
26 see also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617  
27 (1979) (explaining that § 1983 "by itself does not protect anyone  
28 against anything[.]"); Sprint Telephony PCS v. County of San Diego,

1 490 F.3d 700, 717 (9th Cir. 2007). "In § 1983 cases, it is the  
2 constitutional right itself that forms the basis of the claim."  
3 Crater v. Galaza, 508 F.3d 1261, 1269 (9th Cir. 2007) (emphasis  
4 omitted). "There is no legitimate claim of entitlement to a  
5 grievance procedure." Mann v. Adams, 855 F.2d 639, 640 (9th Cir.  
6 1988) (citations omitted).

7 Because Pough fails to assert that Ryan, Bradley, and Grannis  
8 took any action against him other than denying his grievances and  
9 appeals, he has failed to allege a constitutional violation against  
10 them. Additionally, Plaintiff makes conclusory allegations that  
11 Defendants "had an affirmative duty to provide Plaintiff with  
12 Constitutionally adequate access to the courts . . . ." (Third Am.  
13 Comp. 20.) But again, he does not state how they failed to do so  
14 other than relying on supervisory liability. See Shehee v.  
15 Luttrell, 199 F.3d 295, 300 (6th Cir. 1999) (finding no liability  
16 where plaintiff alleged defendants denied his administrative  
17 grievance and failed to correct "alleged retaliatory behavior").  
18 For these additional reasons, Plaintiff's legal access claim  
19 against Ryan, Bradley, and Grannis should be **DISMISSED WITH**  
20 **PREJUDICE.**<sup>2</sup>

21 **2. Count Two: Living Conditions as Cruel and Unusual**  
22 **Punishment**

23  
24  
25 <sup>2</sup> Almost as an aside, Pough alleges that Defendants  
26 discriminated against him "base[d] upon his membership in a  
27 protected class . . . ." (Id. at 25.) Defendants correctly point  
28 out that "Plaintiff does not allege who discriminated against him,  
at what time, under what circumstances, and to what protected class  
he belongs that motivated the discrimination." (Defs.' Mot.  
Dismiss & Sever Attach. #1 Mem. P. & A. 11.) If Pough is  
attempting to allege an equal protection claim, he has failed to  
state a claim for relief.

1           a.     Denial of Hot Meals and Inadequate Use of Hairnets

2           Defendants seek to dismiss count two because Plaintiff fails  
3 to state an Eighth Amendment claim against them for food service  
4 amounting to cruel and unusual punishment. (Defs.' Mot. Dismiss &  
5 Sever Attach. #1 Mem. P. & A. 12.) Plaintiff asserts that during  
6 lockdowns he was deprived of two regular hot meals and instead  
7 received cold meals under conditions that prompted contamination.  
8 (Third Am. Compl. 26, 38, 42-43, 46.) He also alleges that kitchen  
9 workers do not wear hairnets all the time, in violation of his  
10 right to be free from cruel and unusual punishment. (Id. at 5, 27,  
11 38.) Pough claims he "regularly found hair in food from  
12 Centinela's State kitchen" and that some meals are served by  
13 officers wearing baseball caps. (Id. at 26-27.)

14           To satisfy the requirements for an Eighth Amendment  
15 conditions-of-confinement claim, the prisoner must allege facts  
16 sufficient to show that a prison official's acts or omissions  
17 deprived him of the "minimal civilized measure of life's  
18 necessities" and that the defendant acted or failed to act "in the  
19 face of an unjustifiably high risk of harm that is either known or  
20 so obvious that it should be known." Farmer v. Brennan, 511 U.S.  
21 825, 834, 836 (1994) (quotation and citation omitted). "The  
22 discrete basic human needs that prison officials must satisfy  
23 include food, clothing, shelter, sanitation, medical care, and  
24 personal safety." Toussaint v. McCarthy, 801 F.2d 1080, 1107  
25 (1986) (citing Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir.  
26 1982); see also Farmer, 511 U.S. at 832 (citations omitted)  
27 (containing a list of basic necessities). In complaints regarding  
28 food, the prisoner must show he was deprived food in a quantity and

1 of a quality that was adequate to maintain his health. See Keenan  
2 v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996). Additionally, a  
3 prisoner must show defendants acted with deliberate indifference to  
4 a substantial risk of serious harm. See Farmer, 511 U.S. at 847;  
5 Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995).

6 Pough alleges Defendants had actual knowledge of, and refused,  
7 his request for alternative cell-feeding procedures because of the  
8 grievances he submitted. (Third Am. Compl. 26, 29-31.)  
9 Plaintiff's assertions regarding the denial of hot meals are  
10 insufficient to state an Eighth Amendment claim. See LeMaire, 12  
11 F.3d at 1456 (holding the fact that food is sometimes served cold  
12 does not amount to a constitutional violation) (citations omitted);  
13 Saunders v. Plummer, No. C-94-1007 DLJ, 1994 U.S. Dist. LEXIS 8249,  
14 at \*3 (N.D. Cal. June 9, 1994) (finding inmate's allegation that  
15 meal trays were cold and milk was sometimes spoiled "did not come  
16 remotely close" to alleging a cognizable claim); Jones v. City &  
17 County of San Francisco, 976 F. Supp. 896, 910-11 (N.D. Cal. 1997)  
18 (discussing food preparation). Likewise, Pough's assertions  
19 regarding hairnet usage are insufficient to state an Eighth  
20 Amendment claim. See Johnson v. Santa Clara County, No. C 00-1068  
21 SI (pr), 2001 U.S. Dist. LEXIS 4526, at \*5 (D. Cal. April 5, 2001)  
22 (citation omitted) (stating that food handled without hairnets does  
23 not amount to a violation of a prisoner's constitutional rights).

24 Pough is being fed adequately. The denial of hot meals or the  
25 inadequate use of hairnets "falls short of the threshold  
26 deprivation necessary to form the basis of an Eighth Amendment  
27 violation." See LeMaire, 12 F.3d at 1456. "The fact that the  
28 food occasionally contains foreign objects or sometimes is served

1 cold, while unpleasant, does not amount to a constitutional  
2 deprivation.'" Id. (quoting Hamm v. DeKalb County, 774 F.2d 1567,  
3 1575 (11th Cir. 1985)). At most, Plaintiff states the cold food  
4 temperatures "prom[p]ted contamination." (Third Am. Compl. 26);  
5 see Jones, 976 F. Supp. at 910 (finding that inmates have a  
6 constitutional right to have food served under conditions that do  
7 not present an immediate danger to their health); Johnson, 2001  
8 U.S. Dist. LEXIS 4326, at \*4-5. But his conclusory allegations do  
9 not state a plausible claim that the food service presents an  
10 immediate danger.

11 Even if the food service described posed a "sufficiently  
12 serious" risk to Plaintiff's health, he fails to allege facts that  
13 show Defendants were deliberately indifferent to the risk. See  
14 Farmer, 511 U.S. at 836, 847. Prison officials may escape  
15 liability "if they respond[] reasonably to the risk, even if the  
16 harm ultimately was not averted." Id. at 844. Pough was informed  
17 in his second level appeal response that a proposal was made to  
18 Warden Almager recommending new cell-feeding procedures and that  
19 Almager set up a committee to review the current procedures.  
20 (Third Am. Compl. 30; id. Attach. #1 Ex. SE at 3.) And in his  
21 third level appeal response, Pough was advised that Warden Almager  
22 implemented new procedures and required cooks to randomly take the  
23 temperatures of food to ensure the hot temperature is maintained.  
24 (Defs.' Mot. Dismiss Attach. #3 Decl. Grannis Ex. C).

25 Pough attempts to state a claim against Navarro and Arellano  
26 based upon their supervisory responsibilities. (Third Am. Compl.  
27 42-43.) He has not alleged sufficient facts to state a claim  
28 against them in their supervisory roles. King v. Atiyeh, 814 F.2d

1 at 568. Pough has not alleged facts sufficient to show deliberate  
2 indifference. See Farmer, 511 U.S. at 844.

3 For all these reasons, count two of Plaintiff's Third Amended  
4 Complaint regarding cruel and unusual punishment due to the denial  
5 of hot meals during prison lockdowns, seeing roaches near food  
6 trays, seeing mice in the prison, breathing dissipated pesticide  
7 fumes, and the inadequate use of hairnets should be **DISMISSED WITH**  
8 **PREJUDICE**.

9 In addition, Defendants are correct that the claim relating to  
10 outdoor exercise fails to allege specifics to state a claim for  
11 relief. (Defs.' Mot. Dismiss & Sever Attach. #1 Mem. P. & A. 13.)  
12 Because this Court has recommended that Plaintiff be given leave to  
13 allege further facts relating to the exhaustion of this claim, the  
14 Court will likewise recommend that the outdoor exercise claim be  
15 **DISMISSED WITHOUT PREJUDICE**. Plaintiff must allege which  
16 Defendants are charged with liability for this deprivation and  
17 specifics concerning when the deprivation occurred.

18 **3. Count Three: Deliberate Indifference to Serious Medical**  
19 **Needs**

20 Plaintiff argues in count three that he was denied adequate  
21 medical care for his shoulder and cervical spine, and he was denied  
22 adequate dental care, naming only Warden Almager as a Defendant.  
23 (Third Am. Compl. 31-38, 46.) Pough appears to complain that he  
24 suffered for over two years before being diagnosed with chronic  
25 arthritis, that he should have received physical therapy sooner,  
26 and should have been given a "high quality multivitamin." (Id. at  
27 33.) In addition, Plaintiff claims he waited more than two years  
28 to have a teeth cleaning; he was not properly treated for a damaged

1 crown that caused him pain; and Almager was deliberately  
2 indifferent to his dental care needs. (Id. at 38.)

3       The Eight Amendment requires that inmates receive a system of  
4 "ready access to adequate dental care." Hoptowit, 682 F.2d at  
5 1253. Two elements comprise an Eighth Amendment claim for  
6 deliberate indifference to serious medical needs. Jett v. Penner,  
7 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429  
8 U.S. 97, 104 (1976)). "First, the plaintiff must show a 'serious  
9 medical need' by demonstrating that 'failure to treat a prisoner's  
10 condition could result in further significant injury or the  
11 'unnecessary and wanton infliction of pain.'" [Citation omitted.]  
12 Second, the plaintiff must show the defendant's response to the  
13 need was deliberately indifferent." Id. (citing McGuckin v. Smith,  
14 974 F.2d 1050, 1060 (9th Cir. 1992), overruled on other grounds by  
15 WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en  
16 banc)).

17       "Examples of serious medical needs include '[t]he existence of  
18 an injury that a reasonable doctor or patient would find important  
19 and worthy of comment or treatment; the presence of a medical  
20 condition that significantly affects an individual's daily  
21 activities; or the existence of chronic and substantial pain.'" Lopez v. Smith,  
22 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc)  
23 (citing McGuckin, 974 F.2d at 1059-60).

24       The prisoner must allege the defendant purposefully ignored or  
25 failed to respond to his pain or medical needs because an  
26 inadvertent failure to provide adequate care does not constitute a  
27 violation. Estelle, 429 U.S. at 105-06; see also Wood v.  
28 Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990) (noting that



1 although plaintiff's treatment was not "as prompt or efficient as a  
2 free citizen might hope to receive," it was not constitutionally  
3 deficient). The official must have acted with deliberate  
4 indifference to an indication that the prisoner faced a substantial  
5 risk of serious harm. Farmer, 511 U.S. at 847.

6 Pough alleges that he suffered from a narrowing at the C4-C5  
7 level "due to a large uncovertebral joint spur." (Third Am. Compl.  
8 34.) In addition, he exhibited "moderately severe right unlar  
9 neuropathy." (Id. at 35.)

10 Plaintiff also claims he filed a request for emergency  
11 treatment after a damaged crown exposed a "sensitive tooth." (Id.  
12 at 36.) Pough submitted grievances complaining that he had tooth  
13 decay and "sever[e]" pain due to the crown on one of his molars.  
14 (Id. Attach. #1 Ex. EE at 1.) His later grievances requested pain  
15 reliever and an examination by an off-site dental specialist. (Id.  
16 at 1-2.) These allegations are sufficient to establish that Pough  
17 had a serious medical need, as a reasonable patient would find his  
18 shoulder, spine, and dental conditions "significantly affect[] an  
19 individual's daily activities." See Lopez, 203 F.3d at 1131  
20 (quoting McGuckin, 974 F.2d at 1059-60).

21 To satisfy the second element, Pough must allege Defendant  
22 Almager knew Pough faced a substantial risk of serious harm. See  
23 Farmer, 511 U.S. at 836. Plaintiff alleges that his request for  
24 physical therapy to address the needling sensation in his fingers  
25 was never answered. (Third Am. Compl. 33.) He also claims that  
26 after requesting emergency treatment, he was advised to have the  
27 tooth extracted because replacement of the cap was not part of  
28 prison dental services. (Id. at 37.) Pough states he was

1 subsequently moved to another yard where a dentist cemented the  
2 crown to his tooth without cleaning or preparing the crown or tooth  
3 first. (Id.) Plaintiff alleges that “[a]s a proximate result of  
4 [Almager’s] policies, practices, customs, procedures, acts, and  
5 omissions,” Pough suffered immediate and irreparable injury. (Id.  
6 at 38.)

7 Almager moves to dismiss because Pough fails to state a claim  
8 based on specific factual allegations but rather relies on  
9 supervisory liability. (Defs.’ Mot. Dismiss & Sever Attach. #1  
10 Mem. P. & A. 15.) Also, Almager argues the Third Amended Complaint  
11 has not placed him on notice of how he is responsible. (Id.) The  
12 Court, however, must construe the pleadings liberally and construe  
13 all facts in the light most favorable to Plaintiff. See  
14 Karim-Panahi, 839 F.2d at 623 (citation omitted); Cholla Ready Mix,  
15 382 F.3d at 973 (citing Karam, 352 F.3d at 1192).

16 As discussed above, § 1983 of the Civil Rights Act does not  
17 authorize an inmate to bring a cause of action based on respondeat  
18 superior liability. Monell, 436 U.S. at 692; see also Motley, 432  
19 F.3d at 1081. Pough has not sufficiently alleged liability against  
20 Almager. He does not allege facts showing how the Warden was  
21 involved with the denial of his dental care or shoulder and spine  
22 treatment. See Hunt v. Dental Dep’t, 865 F.2d 198, 200 (9th Cir.  
23 1988) (citing Estelle, 429 U.S. at 107; Wood, 852 F.2d at 1212)).  
24 Pough does not allege Almager played an affirmative part in his  
25 access to medical and dental care. See King, 814 F.2d at 568  
26 (citing Rizzo, 423 U.S. at 377). Nor does he argue Almager knew  
27 Plaintiff faced a substantial risk of serious harm when he was  
28 denied physical therapy, a multivitamin, and teeth cleaning or when

1 his crown was affixed without proper preparation. (See Third Am.  
2 Compl. 37); Farmer, 511 U.S. at 836. Without more than a  
3 conclusory statement that Pough's medical and dental care was "a  
4 proximate result of the Defendant[s] policies, practices, customs,  
5 procedures, acts, and omissions," the Third Amended Complaint does  
6 not state a claim against Almager based on deliberate indifference  
7 to a substantial risk of harm. (See Third Am. Compl. 38); Monell,  
8 436 U.S. at 691.

9 It is not clear that Plaintiff's claim cannot be saved by the  
10 allegation of additional facts. See Lopez, 203 F.3d at 1127.  
11 Therefore, the Court recommends that Plaintiff's deliberate  
12 indifference to dental care needs claim against Warden Almager be  
13 **DISMISSED WITHOUT PREJUDICE**, except to the extent Pough is alleging  
14 a deliberate indifference claim based upon his teeth cleaning, this  
15 claim should be **DISMISSED WITH PREJUDICE**. Because Plaintiff has  
16 failed to allege a claim based upon his shoulder and spine ailment,  
17 this claim should also be dismissed. Furthermore, it appears that  
18 Pough will not be able to exhaust this claim, so it should be  
19 **DISMISSED WITH PREJUDICE**.

20 **C. Federal Rule of Civil Procedure 8 Violation**

21 Defendants move to dismiss Pough's Third Amended Complaint  
22 under Federal Rule of Civil Procedure Rule 41(b) because it  
23 violates Federal Rule of Civil Procedure 8(a). (Def.' Mot.  
24 Dismiss & Sever Attach. #1 Mem. P. & A. 3-4.) They complain that  
25 Pough's forty-seven page Third Amended Complaint and seventy pages  
26 of exhibits contain too much irrelevant information and too little  
27 information about the facts that support the claims for relief.  
28 (Id.) Defendants also point out that local rule 8.2 states that

1 "[a]dditional pages not to exceed fifteen (15) in number may be  
2 included with the court approved form complaint, provided the form  
3 is completely filled in to the extent applicable in the particular  
4 case." (Id. at 4); see S.D. Cal. Civ. L.R. 8.2. Plaintiff  
5 responds that his pleadings comply with Federal Rule of Civil  
6 Procedure 8, and the Court must give him the benefit of any doubt  
7 because he is a pro se plaintiff. (Pl.'s Opp'n 5-6 (citations  
8 omitted).)

9 Under Rule 8(a) of the Federal Rules of Civil Procedure, a  
10 complaint must contain a "short and plain statement of the claim  
11 showing that the pleader is entitled to relief . . . ." Fed. R.  
12 Civ. P. 8(a). "The plaintiff must allege with at least some degree  
13 of particularity overt acts which defendants engaged in that  
14 support the plaintiff's claim." Jones, 733 F.2d at 649 (internal  
15 quotation omitted).

16 As discussed above, for those claims Pough has properly  
17 exhausted, he has not stated a claim. The Court has recommended  
18 that Defendants' Motion to Dismiss be granted for each of the  
19 exhausted claims, some with leave to amend and some without. Thus,  
20 a Fourth Amended Complaint will be filed, so the Court need not  
21 decide whether the Third Amended Complaint violates Rule 8 of the  
22 Federal Rules of Civil Procedure. Defendants' Motion to Dismiss  
23 Plaintiff's Third Amended Complaint for failure to comply with Rule  
24 8 should be **DENIED** as moot. Even so, Pough is admonished that his  
25 Fourth Amended Complaint should comply with the federal rules and  
26 this Court's local rules. The deficiencies pointed out by  
27 Defendants should be corrected.

28

1 **D. Immunity**

2 **1. Eleventh Amendment Immunity**

3 The Defendants argue that they cannot be sued for damages "in  
4 their official capacity" in federal court; for that reason, Pough's  
5 claims for monetary damages against them in their official capacity  
6 should be dismissed. (Defs.' Mot. Dismiss & Sever Attach. #1 Mem.  
7 P. & A. 5.) The Eleventh Amendment grants the states immunity from  
8 private civil suits. U.S. Const. amend. XI; Henry v. County of  
9 Shasta, 132 F.3d 512, 517 (9th Cir. 1997), as amended, 137 F.3d  
10 1372 (9th Cir. 1998). "[A] suit against a state official in his or  
11 her official capacity is not a suit against the official but rather  
12 is a suit against the official's office." Will v. Mich. Dep't of  
13 State Police, 491 U.S. 58, 71 (1989) (citing Brandon v. Holt, 469  
14 U.S. 464, 471 (1985)).

15 Plaintiff makes claims against Defendants Ryan, Bradley, and  
16 Grannis in their individual and official capacities; he asserts  
17 claims against Arellano, Navarro, and Almager in their official  
18 capacities; but against all he seeks prospective injunctive and  
19 monetary relief. (Third Am. Compl. 2-3, 40-47.) Plaintiff's claim  
20 for monetary damages is properly alleged against Defendants in  
21 their individual capacities. See Kentucky v. Graham, 473 U.S. 159,  
22 166 (1985). But the claims against Defendants in their official  
23 capacities are claims against the State of California, which is  
24 absolutely immune from liability for damages. See Brandon, 469  
25 U.S. at 471.

26 Accordingly, Defendants are entitled to sovereign immunity,  
27 and their Motion to Dismiss monetary claims against them in their  
28 official capacities should be **GRANTED WITHOUT LEAVE TO AMEND.**

1           **2.     Qualified Immunity**

2           Defendants argue that they are each entitled to qualified  
3 immunity because Plaintiff fails to allege that any Defendant  
4 "caused a constitutional violation which was clearly established in  
5 the circumstances in which they are alleged to have acted."  
6 (Defs.' Mot. Dismiss & Sever Attach. #1 Mem. P. & A. 23.) Indeed,  
7 the Court should attempt to resolve this threshold immunity  
8 question at the earliest possible stage of litigation. See Hunter  
9 v. Bryant, 502 U.S. 224, 227 (1991) (citations omitted); Crawford-  
10 El v. Britton, 523 U.S. 574, 598 (1998) (noting that the purpose of  
11 resolving immunity issues early is so that officials are not  
12 subjected to unnecessary discovery).

13           As noted above, the Court has recommended that each of  
14 Plaintiff's claims be dismissed. The qualified immunity issue  
15 therefore remains premature until, and if, Pough amends his  
16 complaint. See Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 793-94  
17 (2nd Cir. 2002) (explaining that ruling on qualified immunity in  
18 the context of a Rule 12(b)(6) motion would be premature because  
19 the issue "turns on factual questions that cannot be resolved at  
20 this stage of the proceedings[]"); see also Harlow v. Fitzgerald,  
21 457 U.S. 800, 818 (1982) (stating government officials are shielded  
22 from liability if their conduct does not violate a constitutional  
23 right that was clearly established) (citations omitted).

24 Defendants' Motion to Dismiss based on qualified immunity should be  
25 **DENIED WITHOUT PREJUDICE** as premature.

26 **E.     Severance**

27           Defendants argue that Pough's Third Amended Complaint  
28 violates Rules 18 and 20 of the Federal Rules of Civil Procedure

1 because it contains unrelated claims against unrelated Defendants  
2 "who are not alleged to share in any common question of fact or law  
3 . . . ." (Defs.' Mot. Dismiss & Sever Attach. #1 Mem. P. & A. 2-  
4 3.) They move to sever from this lawsuit all exhausted claims,  
5 other than the dominant access to court claim. (Id. at 19-20.)  
6 Also, they seek to sever all Defendants who are not properly named  
7 in connection with the access to court claim. (Id. at 20-21.)

8 As previously discussed, the Court has recommended that  
9 Plaintiff's claims be dismissed, some with and some without  
10 prejudice. Defendants' Motion to Sever parties and claims is  
11 therefore premature. A more appropriate time to consider what  
12 claims and which parties should proceed separately would be at the  
13 conclusion of discovery or after a ruling on any summary judgment  
14 motions. See Benitez v. American Standard Circuits, Inc., No. 08-  
15 CV-1998, 2009 U.S. Dist. LEXIS 22113, at \*17 (N.D. Ill. Mar. 18,  
16 2009) (conclusion of discovery); Combs v. Grand Victoria Casino &  
17 Resort, No. 08-CV-0414-RLY-JMS, 2008 U.S. Dist. LEXIS 75726, at \*10  
18 (S.D. Ind. Sept. 30, 2008) (after summary judgment). Defendants'  
19 Motion for Severance of Parties and Claims should be **DENIED WITHOUT**  
20 **PREJUDICE** as premature.

#### 21 IV. CONCLUSION

22 For the reasons stated above, Defendants' Motion to Dismiss  
23 should be **GRANTED** in part and **DENIED** in part.

24 Plaintiff's claims regarding equal protection, disinfectant  
25 distribution, an unsanitary kitchen, the presence of mice and  
26 insects, pesticide exposure, and medical care for his shoulder  
27 condition or psychological problems should be **DISMISSED WITH**  
28 **PREJUDICE** for failure to exhaust administrative remedies.

1 Defendants' Motion to Dismiss count one against Defendant  
2 Almager for violating Plaintiff's right to access the courts and  
3 equal protection should be **GRANTED**. Because Pough appears unable  
4 to exhaust the claims, the count should be **DISMISSED WITH**  
5 **PREJUDICE**. Likewise, count one against Defendants Ryan, Bradley,  
6 and Grannis, alleging they violated Plaintiff's right to access the  
7 courts and equal protection should be **DISMISSED WITH PREJUDICE**.  
8 Count two against Defendants Navarro, Arellano, and Almager, which  
9 alleges cruel and unusual punishment due to the denial of hot meals  
10 and inadequate use of hairnets should be **DISMISSED WITH PREJUDICE**  
11 **AND WITHOUT LEAVE TO AMEND**. Count three alleges deliberate  
12 indifference to Plaintiff's serious medical and dental needs; the  
13 count should be **DISMISSED WITHOUT PREJUDICE AND WITH LEAVE TO**  
14 **AMEND**, except the claims relating to teeth cleaning, shoulder  
15 treatments, and Pough's spine ailments should be **DISMISSED WITH**  
16 **PREJUDICE**.

17 Defendants' Motion to Dismiss Plaintiff's Third Amended  
18 Complaint for failure to comply with Rule 8 of the Federal Rules of  
19 Civil Procedure should be **DENIED** as moot. Defendants' Motion to  
20 Dismiss monetary claims against them in their official capacities  
21 should be **GRANTED**. Defendants' Motion to Dismiss based on  
22 qualified immunity and for severance should be **DENIED WITHOUT**  
23 **PREJUDICE** as premature.

24 This Report and Recommendation will be submitted to the United  
25 States District Court judge assigned to this case, pursuant to the  
26 provisions of 28 U.S.C. § 636(b)(1). Any party may file written  
27 objections with the Court and serve a copy on all parties on or  
28 before January 29, 2010. The document should be captioned



1 "Objections to Report and Recommendation." Any reply to the  
2 objections shall be served and filed on or before February 15,  
3 2010. The parties are advised that failure to file objections  
4 within the specified time may waive the right to appeal the  
5 district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.  
6 1991).

7 **IT IS SO ORDERED.**

8  
9 DATE: January 6, 2010

  
RUBEN B. BROOKS  
United States Magistrate Judge

10  
11 cc: Judge Miller  
12 All Parties of Record  
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