20-17519

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIKEB SADDOZAI,

Plaintiff-Appellant,

v.

RON DAVIS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

No. 5:18-cv-05558-BLF (PR)
The Honorable Beth L. Freeman, District Judge

ANSWERING BRIEF

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INTRODUCTION

The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), has a clear textual mandate: "No action shall be brought with respect to prison conditions…until such administrative remedies as are available are exhausted." Congress sought to reduce the quantity and improve the quality of inmate filings by making exhaustion of available remedies a mandatory pre-condition to suit in all prisoner cases. No exceptions except for the one baked into the text—availability. And since the PLRA's enactment decades ago, the Supreme Court has consistently held that exhaustion is a pre-suit condition and that unexhausted claims cannot be heard in court. Because Plaintiff-Appellant Saddozai violated the letter and spirit of the PLRA's pre-suit exhaustion requirement by filing suit first and exhausting later, the district court correctly dismissed his case without prejudice.

Saddozai admitted below that he defied the statute's decree by prematurely bringing suit against Officer Clawson just days after initiating the prison's grievance process. But because the third amended complaint alleged that administrative remedies were exhausted during the litigation, Saddozai contends that Federal Rule of Civil Procedure 15 overrides the PLRA's pre-suit exhaustion mandate. This nullification of the statute is untenable.

Requiring exhaustion is not a mere "technicality" or "empty formalism" as Saddozai suggests—it is the heart of the PLRA's statutory scheme. To allow an inmate to cure non-compliance by simply amending a complaint during the litigation defeats the purpose of administrative exhaustion—to allow prison officials an opportunity to address an inmate's grievance *before* they are haled into court. That is why this Court long ago held that the consequence of a bringing a premature claim is dismissal without prejudice to refiling a new action. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam).

Saddozai's proposed rule would make enforcement of the "mandatory" exhaustion requirement dependent on a court's *discretion* to allow amended pleadings. This exception effectively resurrects the permissive and weak pre-PLRA scheme, where courts could only require exhaustion if it served the "interests of justice" and could stay proceedings to allow inmates to pursue administrative remedies during the litigation. But the Supreme Court's decision in *Ross v. Blake*, 578 U.S. 632 (2016) flatly rejected the notion that courts have *any* discretion to excuse non-compliance with the PLRA's command, especially in ways that mirrored the pre-PLRA regime that Congress abolished.

Saddozai cites a trio of Ninth Circuit decisions—*Rhodes v. Robinson*, 621 F.3d 1002 (9th Cir. 2010), *Cano v. Taylor*, 739 F.3d 1214 (9th Cir. 2014), and *Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017)—he contends created an exception allowing pleading rules to trump the PLRA and longstanding precedent barring unexhausted claims. This Court should limit those cases to their facts. *Rhodes* and *Cano* involved inmates who, unlike Saddozai, raised only new and exhausted claims in an amended pleading; no unexhausted claims ever came to court. Although *Jackson* broadly stated that "exhaustion requirements apply based on when a plaintiff files the operative complaint," that statement should be cabined to the unique situation the Court confronted—a plaintiff who was no longer a prisoner when he filed his amended complaint, rendering the PLRA and its objectives inapplicable. *Jackson*, 870 F.3d at 935. But unlike the non-prisoner plaintiff in *Jackson*, Saddozai was a prisoner when he filed his amended complaint, as he is today, so the congressional objectives underpinning the PLRA apply with full force here. If Saddozai is correct that *Rhodes* fundamentally changed the exhaustion rules, then it is clearly irreconcilable with *Ross*'s intervening authority and should not be followed.

Lastly, Saddozai cannot escape the exhaustion requirement by showing that his administrative remedies were unavailable before he filed suit. His

failure to exhaust was clear from the face of his complaint, and his allegations and grievance documents demonstrate that the administrative process was not only capable of use, he used it.

The Court should affirm the judgment.

STATEMENT OF JURISDICTION

Saddozai brought this action under 42 U.S.C. § 1983. (ER-136.) The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. On December 2, 2020, the district court entered judgment for Defendant Clawson. (ER-3.) Saddozai timely filed his notice of appeal on December 28, 2020. (ER-148; *see* Fed. R. App. P. 4(a)(1)(A).) This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. When a prisoner violates the PLRA's exhaustion requirement by initiating litigation without first exhausting administrative remedies, can the prisoner escape that violation by filing an amended pleading under Federal Rule of Civil Procedure 15?

2. Was Saddozai's failure to exhaust his claim against Officer Clawson clear from the face of his operative complaint?

ADDENDUM STATEMENT

The relevant statutes and regulations are contained in an addendum attached to the end of this brief. 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

A. The Prison Litigation Reform Act

In 1996, Congress enacted the PLRA to stem a "disruptive tide of frivolous prisoner litigation" by decreasing the quantity and improving the quality of inmate cases. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006); *see also Jones v. Bock*, 549 U.S. 199, 203 (2007) ("What this country needs, Congress decided, is fewer and better prisoner suits."). The "centerpiece" of this legislative effort was a mandatory administrative exhaustion requirement, 42 U.S.C. § 1997e(a), applicable in all cases challenging prison conditions. *Id*. Entitled "Suits by Prisoners," § 1997e(a) requires:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C § 1997e(a).

With the PLRA, Congress revised and "invigorated" the largely discretionary exhaustion scheme then in effect under the Civil Rights of Institutionalized Persons Act (CRIPA). *Porter v. Nussle*, 534 U.S. 516,

523–24 (2002). Under CRIPA, district courts had discretion to require exhaustion if "appropriate and in the interests of justice," and could stay a prisoner's § 1983 action for 180 days while the prisoner pursued administrative remedies. *Id*. (citing 42 U.S.C. § 1997e(a)(1) (1994 ed.)). The PLRA eliminated that discretion by making exhaustion of all available remedies mandatory in all prisoner cases regardless of the relief sought. *Id*.

The PLRA's "invigorated" exhaustion requirement is mandatory. *Ross v. Blake*, 578 U.S. 632, 642–43 (2016). The statute "requires prisoners to exhaust prison grievance procedures before filing suit." *Jones*, 549 U.S. at 202. And prisoners must "properly" exhaust, which means a prisoner must complete the administrative review process in accordance with the applicable procedural rules. *Woodford*, 548 U.S. at 88. Unexhausted claims must be dismissed without prejudice to refiling them in a new suit. *McKinney v. Carey*, 311 F.3d 1198, 1200–01 (9th Cir. 2002) (per curiam).

Courts may not excuse non-compliance with the statute based on extra-textual exceptions. *Ross*, 578 U.S. at 639. "The only limit to § 1997e(a)'s mandate is the one baked into its text: An inmate need exhaust only such administrative remedies as are 'available.'" *Id*. at 648. An administrative remedy is "available" if it is "capable of use to obtain some relief for the action complained of." *Id.* at 643–44 (internal quotation marks omitted).

The Supreme Court has identified three situations where an administrative procedure was not capable of use: (1) where the procedure operates as a dead end with "officers unable or consistently unwilling to provide relief;" (2) where the administrative process is so opaque that "no ordinary prisoner can discern or navigate it;" and (3) where prison officials use "machination, misrepresentation, or intimidation" to thwart inmates' use of the process. *Id*.

B. California's Prison Grievance Process

The California Department of Corrections and Rehabilitation provides inmates with an administrative-grievance process to seek relief regarding any policy, decision, action, or condition that has an adverse effect on their welfare. Cal. Code Regs. tit. 15, § 3084.1(a) (2018).[1] State regulations establish the procedural requirements that inmates must follow to request and obtain relief. *Id*. §§ 3084-3084.9.

To initiate the grievance process, an inmate must submit a CDCR Form 602 to the prison's appeals office. *Id*. § 3084.2(a). Inmates have 30 days

[1] Unless otherwise noted, Defendant cites to the 2018 version of the regulations, which was in effect during the relevant times alleged in Saddozai's complaint. In March 2020, the grievance regulations set forth at sections 3084-3084.9 of Title 15 were repealed and replaced with a new regulatory framework, now codified at sections 3480-3487. *See* Cal. Code Regs. tit. 15, § 3480. The new regulations went into effect on June 1, 2020. *Id*.

from the event or decision being challenged to submit a grievance. *Id*. § 3084.8(b). Grievances are screened before being accepted for review and may be rejected or cancelled for various procedural defects. *Id*. §§ 3084.5, 3084.6. A rejected grievance may be accepted if the identified defects are corrected and the grievance is resubmitted within 30 days. *Id*. § 3084.6(a)(1). A cancelled grievance may not be accepted, but the cancellation decision may be separately appealed. *Id*. § 3084.6(e). Cancellation or rejection decisions do not exhaust administrative remedies. *Id*.

In 2018, the grievance process had three levels of administrative review. *Id*. § 3084.7. An inmate needed to obtain a decision at all three levels to exhaust administrative remedies. *Id*. § 3084.1(b). Decisions at the first and second levels were due 30 working days after receiving the grievance at each level. *Id*. § 3084.8(c)(1)-(2). Third-level responses from the central Office of Appeals were due 60 working days after receipt of an inmate's appeal. *Id.* § 3084.8(c)(3).

C. Saddozai's § 1983 Action

Saddozai has been an inmate in the custody of the California Department of Corrections and Rehabilitation throughout this litigation.

(ER-136.) During the relevant time in 2018, Defendant-Appellee Clawson was a correctional officer at San Quentin State Prison. (ER-137.)

Saddozai alleged that Officer Clawson violated his Eighth Amendment rights during an incident at San Quentin on August 14, 2018. (ER-106, 142.) Saddozai alleged that four other inmates attacked him. (ER-106.) During the attack, Officer Clawson allegedly fired his "block gun," but instead of hitting the "four intended targets," he shot Saddozai on his lower back towards his buttocks. (*Id*.) Saddozai alleged that Clawson failed to protect him from harm, because instead of firing his weapon, he should have used pepper spray to quell the incident. (*Id*.)

On September 11, 2018, Saddozai filed his initial complaint under § 1983, alleging that Officer Clawson violated his rights by shooting him during the August 14 melee. (ER-142.) Saddozai's initial complaint also raised various unrelated claims against different prison officials at San Quentin. (ER-137–46.) When the district court screened Saddozai's complaint under 28 U.S.C. § 1915A, it dismissed the complaint with leave to amend for violating joinder rules under Federal Rules of Civil Procedure 18 and 20. (ER-132–33.)

Saddozai amended his complaint, but did not fix the joinder problem. (ER-122–30.) His amended complaint still included multiple unrelated

claims against various defendants. (*Id*.) So the district court again screened and dismissed the complaint under Rules 18 and 20. (ER-118–19.)

On August 15, 2019, Saddozai filed his second amended complaint, re-alleging only his claim against Officer Clawson based on the August 14 incident. (ER-112–13.) The district court found Saddozai stated an Eighth Amendment claim against Clawson and ordered service. (ER-99 (citing CD 22).) All remaining claims were dismissed for failure to state a claim and misjoinder. (*Id*. at n.1.)

In the second amended complaint, Saddozai identified for the first time the prison grievance related to his claim against Officer Clawson. (ER-111.) He alleged that grievance number SQ-A-18-02997 exhausted his administrative remedies on February 5, 2019—about five months *after* he brought his action against Officer Clawson. (*Id*.) Clawson therefore moved to dismiss the action because it was clear from the face of Saddozai's complaint that he did not exhaust his administrative remedies prior to bringing suit. (ER-99.) Clawson's motion, however, was mooted because Saddozai filed a third amended complaint within 21 days of the motion under Federal Rule of Civil Procedure 15(a)(1)(B). (*Id*.)

Saddozai's third amended complaint, filed on March 6, 2020, re-alleged his Eighth Amendment claim against Officer Clawson for the

August 14 use-of-force incident. (ER-104–06.)[2] Saddozai also re-admitted that he did not exhaust his administrative remedies for grievance SQ-A-18-02997 until February 5, 2019. (ER-104.) Because Saddozai admitted he did not exhaust until after he brought suit, Officer Clawson therefore renewed his motion to dismiss. (ER-5.)

Saddozai opposed Clawson's motion, asserting that prison officials "repeatedly rejected/canceled" his grievances. (ER-69.) But he also admitted that he resubmitted his grievance, and it was accepted and exhausted. (*Id.*) In support of his opposition, Saddozai attached his grievance records for SQ-A-18-02997. Those records revealed the timeline of events concerning his grievance processing.

- **August 25, 2018**: Saddozai submitted a Form 602 inmate grievance, log number SQ-A-18-02997, alleging that on August 14, 2018 three inmates attacked him, and during the incident an

[2] Saddozai also asserted supervisory liability claims against the Warden, CDCR Director, and other unnamed individuals. (*See* ER-6–8.) As with his earlier complaints, the district court screened and dismissed these claims for failure to state a claim and misjoinder. (*Id.*) Because Saddozai's opening brief does not challenge any of the screening dismissals of his claims, they are deemed waived. *Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148 (9th Cir. 2016).

officer misused force by shooting him in the lower-right buttocks. (ER-74–75.)

- **August 28, 2018**: The prison's appeals office rejected Saddozai's grievance for exceeding the regulatory limit on grievances during a 14-day period. (ER-85.) The screening notice instructed Saddozai to resubmit his grievance on September 12, 2018. (ER-85.)
- **September 26, 2018**: The appeals office rejected Saddozai's resubmitted grievance again on procedural grounds, this time for including excessive unrelated verbiage and voluminous documentation. (ER-84.) The screening notice instructed Saddozai to resubmit a corrected grievance (ER-84), which he did on October 2, 2018 (ER-63.)
- **October 15, 2018**: The prison issued the first-level response to Saddozai's corrected grievance. (ER-81.) The response found Saddozai's allegations were unsubstantiated, but partially granted the grievance insofar as his claims were investigated and addressed. (*Id.*) On October 28, 2018, Saddozai appealed the decision to the second level of review. (ER-64.)

- **November 6, 2018**: The prison issued the second-level response to Saddozai's grievance. (ER-78.) The response also partly granted the appeal, finding staff did not violate policies or procedures. (ER-79–80.) Saddozai appealed that decision to the third level of review on November 27, 2018 (ER-62), and it was received by CDCR's Office of Appeals (OOA) on December 10, 2018 (ER-75).
- **February 5, 2019**: The Office of Appeals issued a final decision on Saddozai's grievance. (ER-77.) Due to time constraints, the Office of Appeals adopted the second-level response as CDCR's final decision, and informed Saddozai that his administrative remedies were exhausted. (*Id*.)

The district court granted Officer Clawson's motion to dismiss. (ER-13–15.) The court agreed it was clear from the face of Saddozai's third amended complaint, and the grievance documents attached to his opposition, that he did not exhaust his administrative remedies before he filed suit on September 11, 2018. (ER-13.)[3] The court acknowledged that under *Rhodes*

[3] As the district court noted, Saddozai actually signed his verified complaint on August 29, 2018—just four days after he initiated the grievance process. (ER-15, 138.)

v. Robinson, 621 F.3d 1002 (9th Cir. 2010), an inmate may comply with the PLRA's exhaustion requirement by exhausting newly added claims before filing an amended complaint. (ER-12.) But the court concluded that *Rhodes* did not apply because Saddozai's claim against Officer Clawson was not "newly added"—he brought that claim in his initial complaint. (ER-13–14.) Citing *McKinney v. Carey*, 311 F.3d 1198 (9th Cir. 2002) (per curiam), the court held that Saddozai could not exhaust during the litigation and his claim had to be dismissed. (*Id*.)

The district court also concluded that Saddozai failed to demonstrate that administrative remedies were unavailable to him. (ER-14.) The court found that Saddozai's grievance records submitted with his opposition confirmed the dates of his grievances and appeals alleged in his third amended complaint. (ER-13.) As the court found, Saddozai's records did not reflect any improper screening or obstruction of the grievance process. (ER-14–15.) Rather, the documents showed that Saddozai failed to comply with grievance procedures, was given opportunities to correct the procedural defects, and could proceed once he complied. (*Id*.)

The district court entered judgment and Saddozai appealed. (ER-3, 148.)

SUMMARY OF ARGUMENT

The district court properly dismissed Saddozai's action without prejudice, for his failure to comply with the PLRA's mandatory pre-suit exhaustion requirement. Saddozai brought suit against Officer Clawson just days after he initiated the prison's grievance process. It was indisputably premature. Although Saddozai eventually exhausted his claim during the litigation, he could not undo his non-compliance with the PLRA's command. He admitted in his operative complaint that he did not exhaust until months after he brought his action. Under the longstanding rule of *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam), dismissal of his claim was required.

Saddozai contends that his failure to exhaust should be excused because he eventually exhausted before he filed an amended complaint under Federal Rule of Civil Procedure 15. The Court should reject this contention.

First, the plain language and history of the PLRA make unambiguous that exhaustion of administrative remedies must occur before a claim is first brought to court. The purpose of the PLRA's pre-suit exhaustion mandate—providing prisons an opportunity to address grievances *before* litigation begins—is defeated if inmates are allowed to exhaust *after* they file suit.

Second, Rule 15 does not create an exception that overrides the PLRA's substantive requirement that prisoners exhaust before filing suit. Rule 15's allowance for curative pleadings would impermissibly re-introduce judicial discretion into the PLRA's mandatory exhaustion scheme. When an inmate sues prematurely and exhausts during the litigation, enforcement of the exhaustion requirement becomes dependent on the court's discretion to allow supplemental pleadings. This is untenable because PLRA exhaustion is not left to court discretion.

Third, this Court's caselaw confirms that Rule 15 and the PLRA can be harmonized by requiring claims raised in an amended complaint to be exhausted before they are first asserted in the litigation. A claim-by-claim approach allows only new, properly exhausted claims to be asserted in an amended or supplemental complaint, while preventing unexhausted claims from proceeding.

Fourth, this Court's decision in *Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017), which allowed a supplemental pleading to cure a former inmate's prior failure to exhaust, should be limited to the precise factual scenario and holding in that case—a plaintiff who was in custody when he initiated his suit but was free when he amended his complaint is not a "prisoner" subject to a PLRA exhaustion defense. Saddozai was an inmate when he brought

his initial complaint, and when he brought the operative third amended complaint, and was always subject to the PLRA's dictates. Extending *Jackson* to Saddozai's situation would create tension in the caselaw and conflict with the PLRA's text and purpose. Alternatively, if Saddozai is correct that the case *Jackson* relied on—*Rhodes v. Robinson*, 621 F.3d 1002 (9th Cir. 2010)—fundamentally changed the exhaustion rules, then it is clearly irreconcilable with the Supreme Court's intervening authority in *Ross v. Blake*, 578 U.S. 632 (2016) and should not be followed.

Lastly, Saddozai cannot demonstrate that his administrative remedies were unavailable before he filed suit. His failure to exhaust was clear from the face of his complaint, and his allegations and grievance documents demonstrate that the administrative process was not only capable of use, he used it.

The Court should therefore affirm the judgment.

STANDARD OF REVIEW

This Court reviews de novo the district court's "interpretation of 42 U.S.C. § 1997e(a)'s exhaustion requirement" and the district court's exhaustion ruling. *Vaden v. Summerhill*, 449 F.3d 1047, 1049 (9th Cir. 2006); *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc) (legal rulings on exhaustion of administrative remedies).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED SADDOZAI'S ACTION FOR FAILURE TO COMPLY WITH THE PLRA'S PRE-SUIT EXHAUSTION REQUIREMENT

Under the PLRA, "[n]o action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is mandatory and "unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007). "Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002).

"[T]he PLRA's text suggests no limits on an inmate's obligation to exhaust" so long as administrative remedies are "available." *Ross v. Blake*, 578 U.S. 632, 639 (2016). An inmate does not comply with this obligation by exhausting available remedies during the litigation. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam). When that happens, dismissal without prejudice to refiling a new action is necessary to further Congress' objectives. *Id*. at 1200–01; *see McNeil v. United States*, 508 U.S. 106, 111–12 (1993) (affirming dismissal under Federal Tort Claims Act,

where plaintiff failed to exhaust prior to filing suit, but did so during the litigation); *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 31–32 (1989) (failure to comply with statutory prefiling requirements required dismissal and refiling of suit).

Saddozai disregarded these precepts and sued Officer Clawson before exhausting his available administrative remedies. By prematurely bringing suit, Saddozai did what the PLRA expressly forbids. That he eventually exhausted during the litigation and re-alleged his claim in an amended complaint does not cure the statutory violation. By bringing suit early, prison officials had no opportunity to remedy Saddozai's grievance before the litigation began, defeating the statute's purpose. Because Saddozai failed to heed the PLRA's clear statutory command, the district court properly dismissed his suit.

Saddozai contends that the PLRA's exhaustion provision does not mean what it says—i.e., he *may* bring an action without administratively exhausting, so long as he eventually does so by the time he amends under Federal Rule of Civil Procedure 15. (Appellant's Opening Br. (AOB) 13–14.) This interpretation of § 1997e(a) cannot be squared with the statutory text or the caselaw.

Saddozai misreads Supreme Court and Circuit precedents to justify reversal of the district court. *Jones v. Bock* did not hold that the Federal Rules of Civil Procedure, including Rule 15, displaced the PLRA's prefiling requirements. Rather, *Jones* makes clear that "the PLRA's screening requirement does not—explicitly or implicitly—justify deviating from the usual procedural practice *beyond the departures specified by the PLRA itself*." 549 U.S. at 214 (emphasis added). And, consistent with the PLRA, this Court's decisions in *Rhodes v. Robinson* and *Cano v. Taylor* only allowed inmates to bring newly-alleged and properly-exhausted claims in an amended pleading. Neither case allowed an inmate to bring an unexhausted claim to court, then cure that violation by filing an amended pleading. Lastly, *Jackson v. Fong* does not control this case because it concerned a fundamentally different factual and legal premise—whether a plaintiff who was in custody when he initiated his suit but was free when he filed his operative amended complaint is a "prisoner" subject to the PLRA.

A. The Text, History, and Purpose of the PLRA Establish that Inmates Must Exhaust Administrative Remedies Before a Claim Is First Brought to Court

Interpretation of the PLRA begins with its text. *Ross*, 578 U.S. at 639. This Court's task is to give effect to the will of Congress, and where it has been expressed in reasonably plain terms, that language must ordinarily be

regarded as conclusive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). It is also critical to place the statutory language in the proper context, and confirm that the interpretation comports with the statute's history and purpose. *See Ross*, 578 U.S. at 640–41. And in the exhaustion context, congressional intent is of "paramount importance." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). This is because exhaustion is grounded in deference to Congress' power to delegate authority to administrative agencies, and to set the rules under which federal courts may decide claims. *Id*. at 144–45; *Ross*, 578 U.S. at 639 ("Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to.").

The text of § 1997e(a) says that an action may not be "brought" by a prisoner until administrative remedies are exhausted. Although the Supreme Court has not specifically defined the word "brought," it has repeatedly emphasized that the PLRA's unambiguous language reflects a requirement that exhaustion occur before filing suit. As the Supreme Court stated in *Jones*, the PLRA "requires prisoners to exhaust prison grievance procedures *before* filing suit." 549 U.S. at 202 (emphasis added). This conclusion was repeated in *Ross*: the PLRA "mandates that an inmate exhaust 'such administrative remedies as are available' *before* bringing suit." 578 U.S. at 635 (emphasis added); *see also Booth v. Churner*, 532 U.S. 731, 738 (2001)

("The available remedy must be exhausted *before* a complaint under § 1983 may be entertained.") (cleaned up, emphasis added).

Consistent with these Supreme Court pronouncements, this Court has held that "brought" refers to the point at which the plaintiff began the litigation: "'brought' must mean 'got under way' or some similar phrase [to ensure] that the litigation does not start until the administrative process has ended." *Vaden v. Summerhill*, 449 F.3d 1047, 1050 (9th Cir. 2007) (quoting *Ford v. Johnson*, 362 F.3d 395, 399 (7th Cir. 2004)). Thus, a plaintiff "may initiate litigation in federal court only after the administrative process ends and leaves his grievances unredressed." *Id*.

The history and purpose of § 1997e(a) further confirm that compliance with the statute must occur before the litigation begins. The PLRA's exhaustion requirement serves two important congressional objectives: protecting administrative agency authority and promoting judicial efficiency. Both are nullified when an inmate brings a claim to court before exhausting his available administrative remedies. *McKinnney*, 311 F.3d at 1200–01.

First, by requiring that a prison have an opportunity to correct its own mistakes "before it is haled into court," the exhaustion requirement limits federal-court interference with prison administration. *Woodford*, 548 U.S. at 89, 93. Pre-suit exhaustion also discourages "disregard of [the agency's]

procedures" by incentivizing "parties to do what they would otherwise prefer not to do, namely, to give the agency a fair and full opportunity to adjudicate their claims." *Id*. at 89–90.

Second, requiring inmates to exhaust the prison's grievance process "before allowing the initiation of a federal case" promotes judicial efficiency. *Porter*, 534 U.S. at 524–25. The Supreme Court explained that "corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation." *Id*. at 525. Further, "[i]n other instances, the internal review might filter out frivolous claims." *Id*. (quotation marks omitted). And, "for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy." *Id*.

Thus, the text and purpose of the PLRA make clear that pre-suit exhaustion is mandatory and no longer left to the discretion of the district court—a prisoner's initiation of a suit in federal court is prohibited unless and until available administrative remedies have been exhausted. *See id*. at 532; *Woodford*, 548 U.S. at 84.

B. Federal Rule of Civil Procedure 15 Does Not Override the PLRA's Substantive Requirements

1. Saddozai's Reliance on *Jones v. Bock* Is Misplaced

In *Jones v. Bock*, the Supreme Court held that when the PLRA is silent on a particular procedural point, courts should not deviate from usual practice under the Federal Rules of Civil Procedure "beyond the departures specified by the PLRA itself." 549 U.S. at 214. Relying on *Jones*, Saddozai argues that assessing PLRA compliance when the action or claim is first brought, rather than when the operative complaint is filed, conflicts with the general rule that an amended complaint supersedes the original. (AOB 30–32.) This contention lacks merit. Pre-suit exhaustion *is* a departure from the usual procedural practice. And non-compliance with the statute's terms requires dismissal. *See, e.g., Hallstrom*, 493 U.S. at 31 ("As a general rule, if an action is barred by the terms of a statute, it must be dismissed.").

First, the PLRA is not silent as to the relevant point in time for the exhaustion analysis. As discussed above, the statute plainly requires compliance before an action is "brought." 42 U.S.C. § 1997e(a). Indeed, the Supreme Court in *Jones* acknowledged that the PLRA "requires prisoners to exhaust prison grievance procedures before filing suit." *Jones*, 549 U.S. at 202. Nothing in *Jones* enables a party to use pleading rules to circumvent Congress's mandate. Rather, *Jones* confirmed that "no unexhausted claim may be considered." *Id*. at 219–20; *id.* at 211 ("There is no question that exhaustion is mandatory under the PLRA and that

unexhausted claims cannot be brought in court."); *see also Wexford Health v. Garrett*, 140 S.Ct. 1611, 1612 (2020) (Thomas, J., dissenting from denial of certiorari) (*Jones* "actually confirms that the PLRA's prefiling requirements displace the Federal Rules of Civil Procedure, including Rule 15.").

Noting that the Supreme Court's decision referred to § 1997e(a)'s language—"no action shall be brought"—as "boilerplate," Saddozai contends that the statute contains no language authorizing courts to depart from the "normal" operation of the Federal Rules. (AOB 30–32 & n.8.) In other words, because that language is boilerplate and no other part of § 1997e(a) specifically addresses amended pleadings, Congress must have intended to allow prisoners to bring prematurely filed claims to court. This overreading ignores the actual context of the Supreme Court's analysis and renders the statute's words meaningless.

Jones looked at a Sixth Circuit rule requiring dismissal of an entire action when an inmate brought a mix of exhausted and non-exhausted claims. 549 U.S. at 203. The Court characterized the phrase, "no *action* shall be brought" as "boilerplate" only to explain that the PLRA speaks to the dismissal of defective claims, not necessarily an entire complaint. *Id*. at 220. Use of the word "action" did not evince a requirement that courts

depart from the normal claim-by-claim approach to a defective complaint: "only the bad claims are dismissed; the complaint as a whole is not." *Id*. at 221. But even reading § 1997e(a)'s "boilerplate" so that "action" means "claim" as *Jones* suggests—i.e., "no *claim* shall be brought"—Saddozai still violated its proscription. He brought his claim against Officer Clawson on September 11, 2018, but did not exhaust until November 2018. Under *Jones*, that "bad claim" must be dismissed.

Saddozai also points to other exhaustion-type cases that have allowed curative amendments to avoid dismissals based on "procedural technicalities." (AOB 25–27 & n.6–7.) But, unlike those cases, the PLRA's mandatory pre-suit exhaustion requirement is not a mere technicality. For example, *Mathews v. Diaz*, 426 U.S. 67 (1976) dealt with the Social Security Act's exhaustion provision, 42 U.S.C. § 405(g), which provides that, after submitting an application to the agency and obtaining a final decision, an individual "may obtain a review of such decision by a civil action." *See Mathews*, 426 U.S. at 75. Similarly, in *U.S. for Use of Atkins v. Reiten*, 313 F.2d 673, 674 (9th Cir. 1963), the statute provided that a plaintiff "shall have the right to sue" after a 90-day period had elapsed. At most, Saddozai's collection of cases shows that "an exhaustion provision with a different text

and history from [the PLRA] might be best read to give judges leeway to create exceptions." *See Ross*, 578 U.S. at 642 n.2.

A more apt comparison is the Supreme Court's decision in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), which required dismissal and refiling of an action where the plaintiffs complied with statutory prefiling requirements during the litigation. Like the PLRA, the statute in *Hallstrom* (42 U.S.C. § 6972(b)) made exhaustion "a mandatory, not optional, condition for suit," stating: "No action may be commenced" unless prefiling notice and delay requirements were met. *Hallstrom*, 493 U.S. at 25–26. Like the PLRA, the purpose of the requirement was to give administrative agencies a chance to address and correct the alleged problem, thus obviating the need for suit. *Id*. at 29. And like Saddozai, the petitioners complied with statute's requirement after bringing suit, claimed they cured the defect, and argued dismissal on a procedural technicality was inappropriate. *Id*. at 24, 27–29. The Supreme Court rejected their arguments, explaining that courts had no discretion to disregard "the procedural requirements specified by the legislature." *Id*. at 31. Dismissal of the suit "serve[d] important federal goals" and was necessary to honor Congress' intent. *Id*. at 31–32. Affirming the dismissal of Saddozai's action for non-compliance with the

PLRA's pre-suit exhaustion requirement would serve the same federal goals and honor the same congressional intent.

2. Allowing Amended Pleadings to Cure PLRA Non-Compliance Makes Mandatory Exhaustion Contingent on the District Court's Discretion

As the Supreme Court repeatedly emphasized, both the text and history of the PLRA unambiguously establish that "[e]xhaustion is no longer left to the discretion of the district court." *Ross*, 578 U.S. at 641; *Porter*, 534 U.S. at 520. The plain language of § 1997e(a) "means a court may not excuse a failure to exhaust" for any reason other than unavailability of remedies. *Ross*, 578 U.S. at 639 (collecting cases "rejecting every attempt" to deviate from the textual mandate). Further, the PLRA was itself a repudiation of the weak discretionary exhaustion regime under CRIPA, where district courts had discretion to require exhaustion if it served "the interests of justice," and could stay a case to allow inmates to pursue their administrative remedies while an action was pending. *Id.*; *Porter*, 534 U.S. at 520.

But if an amended or supplemental pleading can cure a failure to exhaust before suit, then enforcement of the nominally "mandatory" prefiling requirement becomes a matter of broad judicial discretion under Rule 15—i.e., whether the PLRA applies depends on whether the district court will allow leave to amend or supplement. *See Jackson v. Fong*, 870

F.3d 928, 936 (9th Cir. 2017) ("District court discretion is critical to assessing the fairness of amended pleadings" that purport to cure a failure to exhaust). Rule 15(a) authorizes district courts to "freely give leave when justice so requires" at any time before trial. Rule 15(d) likewise gives courts broad discretion to permit supplemental pleadings "on just terms." Such unbridled discretion conjures the standardless and ineffectual CRIPA scheme Congress rejected and replaced with the PLRA. There is no functional difference between a court's discretion under Rule 15 to grant leave to amend (or an extension of time to do so) so an inmate may cure a failure to exhaustion "when justice so requires," and the discretion under CRIPA to stay a case to allow an inmate to do the same thing if it serves the "interests of justice." This result defies the PLRA's and *Ross*'s prohibition on discretionary exceptions.

"When Congress amends legislation, courts must 'presume it intends [the change] to have real and substantial effect.'" *Ross*, 578 U.S. at 641–42. Allowing curative pleadings confers discretion on courts that is incompatible with mandatory exhaustion statutes like the PLRA, which establish mandatory exhaustion regimes, and foreclose judicial discretion. *See id.* at 639.

Saddozai argues that this weakening of the exhaustion requirement can be justified by the terms of § 1997e(a)'s neighboring provision, § 1997e(c)(2). (AOB 33.) Saddozai contends that this adjacent section demonstrates that the PLRA's mandatory exhaustion requirement really is discretionary. (*Id*.) This contention should be rejected.

Under § 1997e(c)(2), when an inmate's claim is, on its face, frivolous, malicious, fails to state a claim, or barred by immunity, "the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies." Saddozai apparently contends that this provision means a district court may, for example, allow an inmate's facially frivolous claims to proceed so he may exhaust his remedies as to such claims during the litigation—a "similar situation to [his]." (AOB 33.) This tortured reading makes little sense. The provision does not give courts discretion to choose whether or not to dismiss—only to choose the basis for the dismissal. Moreover, the Supreme Court in *Jones* accurately described § 1997e(c)(2)'s operation: it "allows a court to dismiss a claim for one of [the stated] reasons without first determining whether the claim is exhausted." 549 U.S. at 222.

3. Saddozai's Interpretation of Rule 15 Is Inconsistent with the Rule and Caselaw

The premise of Saddozai's argument that Rule 15 overrides the PLRA's pre-suit exhaustion requirement, is the notion that an amended (or supplemental) pleading "completely supercedes any earlier complaint, rendering the original complaint nonexistent and, thus, its filing date irrelevant." (AOB 22.) But this blanket statement is not entirely accurate and creates its own inconsistencies with Rule 15 and the caselaw.

First, while an amended complaint supersedes the original, "it normally does so only with regard to the pleading's substance, not its procedural effect." *Barnes v. Sea Hawaii Rafting, LLC*, 889 F.3d 517, 531 (9th Cir. 2018). For example, when a claim is dismissed without leave to amend, it need not be repleaded in an amended complaint to preserve it for appeal—the procedural effect of the original complaint "survives its amendment." *Id*. The same is true of the relation-back doctrine under Rule 15(c), which expressly contemplates that the timing of an original complaint remains relevant. *Id*. ("A timely-filed claim is not rendered untimely when included in an amended complaint filed after the statute of limitations has passed.").

In the context of exhaustion, the Tenth and Eighth Circuits have thus concluded that "the operative complaint supersedes the original complaint's *allegations*, but not its *timing*." *May v. Segovia*, 929 F.3d 1223, 1228–29 (10th Cir. 2019) (emphasis in original); *Foulk v. Charrier*, 262 F.3d 687,

696 (8th Cir. 2001) (applying relation-back rule to exhaustion analysis). While it is true that an amended complaint's allegations supersede those in the original complaint, that cannot change the historical fact that Saddozai had not exhausted when he brought his action against Officer Clawson. *See Harris v. Garner*, 216 F.3d 970, 981 (11th Cir. 2000) (en banc) ("No amendment or supplement to a pleading can change a historical fact.").

Second, allowing an inmate sue first and exhaust during the litigation would create tension with this Court's rule in *Brown v. Valoff*, 422 F.3d 926, 942 (9th Cir. 2005), that inmates are entitled to tolling of the statute of limitations while they pursue the prison grievance process. *Brown* explained that tolling was necessary because "a prisoner may *not* proceed to federal court while exhausting administrative remedies," but completing the process could endanger the prisoner's ability to file suit within the limitations period. *Id*. This justification for tolling evaporates if an inmate may bring suit prematurely and simply use an amended pleading to circumvent the prefiling requirement.

C. This Court's Precedents Confirm that Under the PLRA, a Claim Must Be Exhausted Before It Is First Brought—Not During the Litigation

1. *McKinney v. Carey* and *Vaden v. Summerhill* Require Premature Claims to be Dismissed and Refiled

For nearly two decades, it has been the law of this Circuit that "a prisoner does not comply with [the PLRA's exhaustion] requirement by exhausting available remedies during the course of the litigation." *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam). As explained in *McKinney*, the statute "clearly contemplates exhaustion *prior* to the commencement of the action." *Id*. (quoting *Medina-Claudio v. Rodriguez-Mateo*, 292 F.3d 31, 36 (1st Cir. 2002)). By filing the action without properly exhausting, the prisoner-plaintiff violates the statute and dismissal is therefore required. *See McKinnney*, 311 F.3d at 1199–200. The Court recognized that dismissal might "occasion the expenditure of additional resources on the part of the parties and the court," but found that Congress decided this potential concern was "outweighed by the advantages of requiring exhaustion prior to filing suit." *Id*. Dismissal without prejudice to bringing a new suit "provides a strong incentive" for inmates to respect the administrative process, thereby furthering the objectives of Congress, while "permitting exhaustion *pendente lite* will inevitably undermine attainment of them." *Id*. at 1200-01.

In *Vaden v. Summerhill*, this Court applied *McKinney* to further clarify at which point the prisoner must complete the administrative process. 449 F.3d 1047, 1048 (9th Cir. 2007). The focus, ultimately, was the point at

which the plaintiff began the litigation: "'brought' must mean 'got under way' or some similar phrase [to ensure] that the litigation does not start until the administrative process has ended." *Id*. at 1050 (quoting *Ford v. Johnson*, 362 F.3d 395, 399 (7th Cir. 2004).) A plaintiff "may initiate litigation in federal court only after the administrative process ends and leaves his grievances unredressed." *Id*. Allowing a plaintiff to initiate his lawsuit any earlier "would be inconsistent with the objective of the statute." *Id*.

In *Ford v. Johnson*, the Seventh Circuit explained why it is necessary to dismiss a suit under the PLRA, even if the inmate exhausted his administrative remedies while the litigation was pending. "[P]ostponing suits induces people to concentrate their attention on negotiation of alternative dispute resolution, so that some fraction of the time parties will not need to litigate at all. Once litigation commences, however, that casts a pall over negotiation or the administrative process, because it commits both resources and mental energies to court." 362 F.3d at 398. To prevent that, "it is essential to keep the courthouse doors closed until those efforts have run their course." *Id*. If an inmate exhausts while his suit is pending, the premature action should be dismissed "followed by a new suit that unquestionably post-dates the administrative decision." *Id*. at 401; *see*

McKinney, 311 F.3d at 1200–01 (dismissal without prejudice is necessary to further congressional objectives in the PLRA).

2. *Rhodes v. Robinson*, *Akhtar v. Mesa*, and *Cano v. Taylor* Require Claims Raised in an Amended Complaint To Be Exhausted Before the Claim Is First Asserted

The district court also correctly concluded that this Court's decision in in *Rhodes v. Robinson*, 621 F.3d 1002 (9th Cir. 2010) did not compel a departure from the *McKinney*'s rule requiring dismissal of a prematurely brought action. Rather, as this Court's decision in *Akhtar v. Mesa*, 698 F.3d 1202, 1210 (9th Cir. 2012) confirms, because Saddozai raised his excessive-force claim against Officer Clawson in his initial complaint, he was required to exhaust before he filed his initial complaint. Contrary to Saddozai's contention, *Rhodes* has no application to this case and neither does *Cano v. Taylor*, 739 F.3d 1214 (9th Cir. 2014). Those cases involved properly exhausted claims brought in an amended complaint *for the first time*. Neither case held that a prematurely filed claim may be excused by filing an amended complaint after exhausting during the litigation.

In *Rhodes*, this Court reaffirmed that *McKinney* and *Vaden* "stand for the proposition that a prisoner must exhaust his administrative remedies for the claims contained within his complaint before that complaint is tendered

to the district court." *Id*. at 1005. But the Court acknowledged that those cases did not address when a prisoner files an amended complaint raising "newly-alleged claims" based on conduct that occurred *after* the initial complaint was filed, and which were properly exhausted before being alleged for the first time. *Id*. at 1004–05. These "newly-added claims" were proper subjects for a supplemental pleading under Federal Rules of Civil Procedure 15(d), but by definition could not possibly have been exhausted before the original complaint was brought. *Id*. The Court thus sought to "harmonize" the PLRA with the general rules of pleading under Rule 15. *Id*. at 1005–07. The Court held that the PLRA's exhaustion requirement is satisfied "so long as [the prisoner] exhausted his administrative remedies with respect to *the new claims* asserted in his [amended complaint] before he tendered that complaint to the court for filing." *Id*. at 1007 (emphasis added).

The *Rhodes* court explained that a prisoner in this situation has complied with both the letter and purpose of the PLRA's exhaustion requirement. *Id*. at 1006–07 (discussing *Barnes v. Briley*, 420 F.3d 673 (7th Cir. 2005)). First, the prisoner did not violate the letter of the PLRA because he never brought an unexhausted claim to court—he asserted only "properly exhausted claims in his original complaint and later raised new, properly

exhausted claims in his [amended complaint]." *Id*. at 1006. Second, the purpose of the PLRA was satisfied because by properly exhausting the prison's grievance process, the prisoner "afford[ed] those defendants the opportunity to address his grievances *before he filed suit against them.*" *Id*. at 1006 (quoting *Barnes*, 420 F.3d at 678) (emphasis added).

Saddozai contends that *Rhodes* effectively abrogated *McKinney* and *Vaden* because it "announced a 'general rule of pleading'": an amended pleading "completely supercedes any earlier complaint, rendering the original complaint nonexistent and, thus, its filing date irrelevant." (AOB 22.) In his view, this statement created a broad exception allowing a failure to exhaust to be excused by filing an amended or supplemental pleading. But this argument disregards the facts and the Court's explicit reasoning in *Rhodes*—namely, the practical impossibility of exhausting claims based on incidents that had not yet happened when the suit was filed, and the absence of any prematurely filed claims.

In *Akhtar v. Mesa*, 698 F.3d 1202 (9th Cir. 2012), this Court confirmed that *Rhodes* did not change *McKinney*'s longstanding rule that exhaustion is a prerequisite to bringing a claim to court. The inmate-plaintiff, Akhtar, filed an initial complaint alleging a deliberate-indifference claim based on his housing needs. 698 F.3d at 1206–07. Akhtar filed an amended

complaint re-alleging his deliberate-indifference claim, which was then dismissed for failure to exhaust. *Id*. In framing the exhaustion analysis, this Court made clear that Akhtar's filing of an amended complaint did not change his obligation to exhaust his claim before he first brought it to court. *Id*. at 1210 (citing *McKinney*, 311 F.3d at 1200–01). "Akhtar asserted his claim for [deliberate indifference] in his initial complaint….Thus, [he] was required to exhaust this claim before he filed his initial complaint." *Id*. *Rhodes* did not change the analysis because Akhtar's claim was not "based on conduct that occurred after the filing of the initial complaint." *Id*.

In *Cano v. Taylor*, 739 F.3d 1214 (9th Cir. 2014), this Court applied *Rhodes* to address whether claims arising before the original complaint's filing date may be added to the suit through an amended complaint after they are exhausted—i.e., claims that had accrued but were not initially raised and were exhausted after the original complaint was filed. *Id*. at 1220. There, the prisoner filed an amended complaint that added two new claims to his lawsuit that were later dismissed for failure to exhaust. *Id*. at 1216. The claims "arose as causes of action prior to the filing of the initial complaint, but were … exhausted between the filing of the initial complaint and the [amended complaint], *when they were added*." *Id*. at 1220 (emphasis added). Like *Rhodes*, the dismissed claims were first asserted in the

amended complaint, which superseded the initial complaint. *Id*. For those claims, "the date of the [amended complaint's] filing is the proper yardstick" for exhaustion. *Id*. A contrary rule would unnecessarily curtail a district court's discretion to allow "the addition of *a new claim* in an amended complaint." *Id*. Thus, *Cano* held that if the claim was administratively exhausted before it was first alleged in the suit, the exhaustion requirement is satisfied. *Id*.

3. *Jackson v. Fong* Is an Outlier That Does Not Control This Case

In *Jackson v. Fong*, 870 F.3d 928, 936 (9th Cir. 2017), the panel majority departed from the more limited holdings of *Rhodes* and *Cano*, and broadly concluded that "exhaustion requirements apply based on when a plaintiff files the operative complaint."[4] But *Jackson* arose from a fundamentally different factual predicate and concerned the application of the PLRA to a former inmate who was released from incarceration during the pendency of the litigation. *Id*. at 931. Further, for the reasons discussed above, the premise of *Jackson*'s purported exception to the PLRA is

[4] Judge McCalla, sitting by designation, concurred in the judgment only. *Id*. at 938. In his view, "[t]he ability to amend a complaint…does not permit plaintiffs to override the substantive requirement contained in the PLRA." *Id*.

fundamentally inconsistent with the statute and Supreme Court and Circuit precedents. For these reasons, *Jackson*'s allowance of an amended pleading to cure a failure to exhaust should be limited to that particular factual setting.

Throughout the opinion, the Court made clear that the decision hinged on the plaintiff's change in prisoner status. *Id*. at 933 ("The exhaustion requirement…does not apply to non-prisoners."). The Court held that "a plaintiff who was in custody at the time he initiated his suit but was free when he filed his amended operative complaint is not a 'prisoner' subject to a PLRA exhaustion defense." *Id*. at 931. The Court further explained that because the plaintiff had been released from prison, allowing his suit to proceed on an amended complaint did not implicate the PLRA's objectives. *Id*. at 936. This is because "once a prisoner is no longer in custody, there is nothing to gain by forcing the prisoner through the administrative process." *Id*. At that point, "there is no internal process left to undermine." *Id*.

Unlike *Jackson*, Saddozai was an inmate when he brought this action, and has remained incarcerated throughout. Thus, he remained subject to the PLRA's exhaustion requirement at the time of his operative, third amended complaint. And his failure to comply with the PLRA's pre-suit requirement directly implicates the statute's objectives. *See McKinney*, 391 F.3d at 1200–01 ("permitting exhaustion *pendente lite* will inevitably undermine"

the congressional objectives of the PLRA). The Court's statement that "exhaustion requirements apply based on when a plaintiff files the operative complaint," *Jackson*, 870 F.3d at 936, should be limited to the unique factual and legal circumstance in the case—i.e., a prisoner who is released from custody during the litigation is not subject to the PLRA at all, and thus may permissibly amend the complaint to reflect that changed circumstance.

Moreover, the ruling in *Jackson* has not been widely adopted. The Tenth Circuit declined to follow it. *May*, 929 F.3d at 1228–29 (discussing amended complaints under Rule 15(a)). The Fifth and Eleventh Circuits have held that amended pleadings cannot excuse non-compliance with the exhaustion requirement. *Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019); *Harris*, 216 F.3d at 981. Some courts in this Circuit have distinguished *Jackson* based on the incarcerated status of the plaintiff. *See Vickers v. Thompson*, No. 15-CV-00129-SAB-PC, 2018 WL 6201944, at *6 (E.D. Cal. Nov. 28, 2018); *Washington v. Stark*, No. 18-CV-00564-LJO-SAB-PC, 2019 WL 343133, at *6 (E.D. Cal. Jan. 28, 2019). Only the Third Circuit has followed *Jackson* to allow an amended complaint to cure non-compliance with § 1997e(a)'s requirement. *Korb v. Haystings*, 860 F. App'x

222, 225 (3d Cir. 2021)[5] (citing *Garrett v. Wexford Health*, 938 F.3d 69 (3d Cir. 2019)).

This Court should limit *Jackson*'s holding to cases involving former-inmates who are released during the pendency of their cases.

D. If *Rhodes* Established the Broad Operative-Complaint Exception that Saddozai Asserts, Then That Decision Should Be Deemed Overruled By *Ross v. Blake's* Intervening Authority

As mentioned, Saddozai contends that *Rhodes* "announced a 'general rule of pleading'" that controls the PLRA exhaustion analysis: an amended pleading "completely supercedes any earlier complaint, rendering the original complaint nonexistent and, thus, its filing date irrelevant." (AOB 22.) He asserts that *Cano* and *Jackson* merely applied this operative-complaint exception to slightly different factual scenarios. (AOB 18–19.) But if that is correct, this Court should not follow those flawed precedents given the Supreme Court's intervening decision in *Ross v. Blake*. *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc) (when an intervening Supreme Court decision is clearly irreconcilable with existing Ninth Circuit precedent, a three-judge panel should reject the prior

[5] On November 5, 2021, the prison officials in *Korb* filed a petition for certiorari with the Supreme Court, *Haystings v. Korb,* No. 21-692. After an extension, the inmate's response is presently due on January 10, 2022.

precedent). *Ross* undercut the reasoning underlying the prior decision in *Rhodes* (as well as *Cano*) such that the cases are clearly irreconcilable. And although *Jackson* subsequently extended the exception created by those cases, the decision did not mention or acknowledge the impact *Ross* had on the Court's prior precedents, and is therefore not binding. *Head v. Wilkie*, 936 F.3d 1007, 1012 (9th Cir. 2019) (three-judge panel was not bound by later decisions that did not address then-intervening authority); *SEIU Loc. 121RN v. Los Robles Reg'l Med. Ctr.*, 976 F.3d 849, 858 (9th Cir. 2020) (same).

In *Ross*, the Supreme Court explicitly rejected the Fourth Circuit's attempt to adopt an extra-textual exception that "permitt[ed] some prisoners to pursue litigation even when they have failed to exhaust available administrative remedies" based on "special circumstances." 578 U.S. at 635. The Court rejected that "freewheeling approach to exhaustion as inconsistent with the PLRA." *Id.* Pointing to the unambiguously mandatory language of the statute—"no action shall be brought"—the Court explained that the PLRA created an obligation "impervious to judicial discretion." *Id.* at 639 (quoting *Miller v. French*, 530 U.S. 327, 337 (2000)). This means "a court may not excuse a failure to exhaust." *Id.* The PLRA "foreclose[es] judicial discretion." *Id.*

Further, the Court rejected the Fourth Circuit's exception based on its similarity to the provisions of the permissive exhaustion scheme that Congress abolished under CRIPA. *Id*. at 640–41. The Court noted that CRIPA gave district courts discretion to require exhaustion if "appropriate and in the interests of justice." *Id*. at 641. This allowed a court to "look to all the particulars of a case to decide whether to excuse a failure to exhaust available remedies." *Id*. The Fourth Circuit's special-circumstances exception did the same thing and therefore could not stand. *Id*. The Fourth Circuit had "acted as though the amendment—from a largely permissive to a mandatory exhaustion regime—had not taken place." *Id*.

The purported "operative complaint" exception set out in *Rhodes* (at least, as articulated by Saddozai (AOB 18-22)) cannot be reconciled with the Supreme Court's reasoning in *Ross*. Like the Fourth Circuit's exception, *Rhodes* permits an inmate to pursue litigation even when they have failed to exhaust available administrative remedies. As previously discussed, *supra* Argument I.B.2, allowing an inmate to cure a failure to exhaust through pleading rules would give district courts discretion over whether to enforce the PLRA's requirement. *See* Fed. R. Civ. P. 15(a) (courts should "freely give leave when justice so requires"); Fed. R. Civ. P. 15(d) advisory comm. note, 1963 Am. ("where a supplemental pleading is offered, the court is to

determine *in the light of the particular circumstances* whether filing should be permitted"). "That approach, if applied broadly, would resurrect CRIPA's scheme." *Ross*, 578 U.S. at 641. The decision in *Jackson*, which failed to even mention *Ross*, confirms that "discretion" and "fairness" is a fundamental aspect of the exception: "District court discretion is critical to assessing the fairness of amended pleadings" that purport to cure a failure to exhaust. 870 F.3d at 936. Again, this does not differ from the freewheeling "special circumstances" exception the *Ross* Court expressly disavowed. Tellingly, *Jackson* also incorrectly noted that the PLRA's exhaustion defense was subject to "equitable considerations." 870 F.3d at 933 n.2. Though *Jackson* disclaimed needing to rely on such considerations for the disposition, the statement underscores the flawed logic of the decision and its irreconcilable conflict with *Ross*'s analysis.

II. SADDOZAI'S FAILURE TO EXHAUST WAS CLEAR FROM THE FACE OF HIS COMPLAINT

Saddozai does not dispute that he exhausted the prison's grievance process regarding the August 14 incident only after he brought suit against Officer Clawson on September 11, 2018. (AOB 11.) His third amended complaint plainly alleged that he completed the second level of review in

November 2018 and "exhausted" his claim in February 2019. (ER-104.)[6] Instead, he contends that the district court could not dismiss his action because his administrative remedies were allegedly unavailable before he even filed his initial complaint. (AOB 37–40.) He raises three grounds of unavailability: (1) the warden told him his claim was "rejected"; (2) the first-level reviewer "misrepresented" the grievance process; and (3) he was denied timely access to grievance forms. (*Id*.) None have merit.

Under the PLRA, an administrative remedy is "available" if it is "capable of use to obtain some relief for the action complained of." *Ross*, 136 S.Ct. at 1859 (internal quotation marks omitted). The Supreme Court has identified three situations where an administrative procedure was not capable of use: (1) where the procedure operates as a dead end with "officers unable or consistently unwilling to provide relief;" (2) where the administrative process is so opaque that "no ordinary prisoner can discern or navigate it;" and (3) where prison officials use "machination, misrepresentation, or intimidation" to thwart inmates' use of the process. *Id*.

[6] As shown by Saddozai's opposition papers, the third-level decision adopted the second-level decision in full, deeming his grievance exhausted at that time. (ER-77.)

First, Saddozai claims he was "thwarted" from using the grievance process because he alleged in his first amended complaint that the warden at San Quentin told him "his claims related to the August 2018 attack had been rejected." (AOB 37 (citing ER-122, 127).) But, once the former complaint is superseded by an amended pleading, the former complaint cannot be used to cure defects in the new pleading. *Bullen v. De Bretteville*, 239 F.2d 824, 833 (9th Cir. 1956), *overruled on other grounds, Lacey v. Maricopa Cty.*, 693 F.3d 896, 925 (9th Cir. 2012) (en banc); Wright, Miller, & Kane, 6 Fed. Prac. & Proc. Civ. § 1476 (3d ed.).

In any event, Saddozai's allegations do not plausibly allege that his administrative remedies were unavailable. He alleged that he "alerted supervisory officials and (SQSP) facility Warden Ron Davis during an Institutional Classification Committee (ICC) meeting about ongoing abuse and mistreatment, and [his] complaints went ignored without remedy." (ER-127.) Even if "abuse and mistreatment" refer to the August 14 incident, the regulations are clear that he must submit a Form 602 to initiate the grievance process. Cal. Code Regs. tit. 15, § 3084.1. His bare assertion that his complaints at the classification meeting were "ignored," does not show that he was thwarted from using the grievance process. And his third amended

complaint and opposition papers admit that the grievance process was available because he actually used it.[7]

Second, Saddozai contends that despite what his operative complaint said, his Form 602 submitted with his opposition papers reflect that the first-level grievance reviewer "attempted to deter" him from exercising his rights, and "misrepresented" the appeal process. (AOB 38 (citing ER-60).) Although Saddozai contends this shows the grievance process was thwarted, this allegation was made *in his appeal to the second level of review*. As Saddozai admitted, that appeal was accepted and addressed on the merits in a November 2018 decision. (ER-68.) This situation is distinguishable from *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009), where the inmate's grievance was canceled as untimely and the inmate was told that he could not appeal further. Saddozai not only had an available remedy, he used it and exhausted the process.

[7] In ruling on Defendant's motion to dismiss, the district court properly considered the grievance documents Saddozai submitted with his opposition papers. *See United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (documents not attached to the complaint are incorporated by reference where (1) the complaint refers to the documents, (2) the documents are central to plaintiff's claim, and (3) no party questions the documents' authenticity).

But even if the first-level reviewer's alleged statements could plausibly show that Saddozai's remedies were no longer available at that point, his suit was still premature. He filed his suit on September 11, 2018. (ER-136.) But his grievance was not even accepted for review until he re-submitted it on October 2, 2018. (ER-63.) The first-level interview occurred on October 15, and the decision was issued that same day. (ER-81.)

Lastly, Saddozai points to his allegation that he was "denied complaint and medical forms…to initiate a civil action, and to receive medical treatment, while housed in disciplinary." (ER-108.) But again, even if true, this allegation does not plausibly show that his administrative remedies were unavailable. Unlike the inmate in *Marella*, Saddozai unquestionably had "timely" access to grievance forms. (AOB 39 (citing *Marella*, 568 F.3d at 1027).) Saddozai admitted that he submitted a Form 602 on August 25, 2018 (ER-74–75)—well within the 30-day time frame for initiating the grievance process. Cal. Code Regs. tit. 15, § 3084.2(a).

Saddozai's own records establish that the grievance process was "capable of use," and therefore "available," at every turn throughout the process. Under *Ross*, he was therefore obligated to use it and he did. None of his allegations meet the definition of unavailability under *Ross*

CONCLUSION

The district court correctly dismissed Saddozai's action without prejudice for non-compliance with the PLRA's exhaustion requirement. This Court should affirm the judgment.

Dated: December 10, 2021

Respectfully submitted,

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20-17519

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIKEB SADDOZAI,

Plaintiff-Appellant,

v.

RON DAVIS, et al.,

Defendants-Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: December 10, 2021

Respectfully submitted,

ROB BONTA
Attorney General of California
MONICA N. ANDERSON
Senior Assistant Attorney General
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I-A. Institutionalized Persons

42 U.S.C.A. § 1997e

§ 1997e. Suits by prisoners

Effective: March 7, 2013
Currentness

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 [1] of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 [1] of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 [1] of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) “Prisoner” defined

As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

CREDIT(S)

(Pub.L. 96-247, § 7, May 23, 1980, 94 Stat. 352; Pub.L. 103-322, Title II, § 20416(a), Sept. 13, 1994, 108 Stat. 1833; Pub.L. 104-134, Title I, § 101[(a)][Title VIII, § 803(d)], Apr. 26, 1996, 110 Stat. 1321, 1321-71; renumbered Title I, Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327; Pub.L. 113-4, Title XI, § 1101(a), Mar. 7, 2013, 127 Stat. 134.)

Notes of Decisions (1337)

Footnotes

1 See Reference in Text note below.

42 U.S.C.A. § 1997e, 42 USCA § 1997e

Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

United States Code Annotated - 1994

42 U.S.C.A. § 1997e
UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21—CIVIL RIGHTS
SUBCHAPTER I-A—INSTITUTIONALIZED PERSONS

§ 1997e. Exhaustion of remedies

(a) Applicability of administrative remedies

(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.

(b) Minimum standards for development and implementation of system for resolution of grievances of confined adults; consultation, promulgation, submission, etc., by Attorney General of standards

(1) No later than one hundred eighty days after May 23, 1980, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of Title 5. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.
(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c) Procedure for review and certification of systems for resolution of grievances of confined adults for determination of compliance with minimum standards; suspension or withdrawal of certification for noncompliance; development, etc., by Attorney General

(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

(d) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 1997a or 1997c of this title.

1981 Main Volume Credit(s)

(Pub.L. 96-247, § 7, May 23, 1980, 94 Stat. 352.)

HISTORICAL NOTES

UNCONSTITUTIONALITY OF LEGISLATIVE VETO PROVISIONS

<The provisions of former section 1254(c)(2) of Title 8, Aliens and Nationality, which authorized a House of Congress, by resolution, to invalidate an action of the Executive Branch, were declared unconstitutional in Immigration and Naturalization Service v. Chadha, 1983, 103

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 15

Rule 15. Amended and Supplemental Pleadings

Currentness

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) ***Notice to the United States.*** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; amended by Pub.L. 102-198, § 11, December 9, 1991, 105 Stat. 1626; amended April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

See generally for the present federal practice, [former] Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills--Form); U.S.C. Title 28, § 399 [now 1653] (Amendments to show diverse citizenship) and [former] 777 (Defects of form; amendments). See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 28, r. r. 1-13; O. 20, r. 4; O. 24, r. r. 1-3.

Note to Subdivision (a). The right to serve an amended pleading once as of course is common. 4 Mont.Rev.Codes Ann. (1935) § 9186; 1 Ore.Code Ann. (1930) § 1-904; 1 S.C.Code (Michie, 1932) § 493; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 28, r. 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, *Code Pleading* (1928), pp. 498, 509.

Note to Subdivision (b). Compare [former] Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice," (e.g., Ark.Civ.Code (Crawford, 1934) § 155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced (e.g., N.M.Stat.Ann. (Courtright, 1929) §§ 105-601, 105-602).

Note to Subdivision (c). "Relation back" is a well recognized doctrine of recent and now more frequent application. Compare Ala.Code Ann. (Michie, 1928) § 9513; Smith-Hurd Ill.Stats. ch. 110, § 170(2); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-3(4). See U.S.C., Title 28, § 399 [now 1653] (Amendments to show diverse citizenship) for a provision for "relation back."

Note to Subdivision (d). This is an adaptation of former Equity Rule 34 (Supplemental Pleading).

1963 Amendment

Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. See *Bonner v. Elizabeth Arden, Inc.,* 177 F.2d 703 (2d Cir. 1949); *Bowles v. Senderowitz,* 65 F.Supp. 548 (E.D.Pa.), rev'd on other grounds, 158 F.2d 435 (3d Cir. 1946), cert. denied, *Senderowitz v. Fleming,* 330 U.S. 848, 67 S.Ct. 1091, 91 L.Ed. 1292 (1947); cf. *LaSalle Nat. Bank v. 222 East Chestnut St. Corp.,* 267 F.2d 247 (7th Cir.), cert. denied, 361 U.S. 836, 80 S.Ct. 88, 4 L.Ed.2d 77 (1959). But see *Camilla Cotton Oil Co. v. Spencer Kellogg & Sons,* 257 F.2d 162 (5th Cir. 1958); *Genuth v. National Biscuit Co.,* 81 F.Supp. 213 (S.D.N.Y.1948), app. dism., 177 F.2d 962 (2d Cir. 1949); 3 Moore's *Federal Practice* ¶15.01[5] (Supp.1960); 1A Barron & Holtzoff, *Federal Practice & Procedure* 820-21 (Wright ed. 1960). Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective. As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms. The amendment does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation of the doctrine of laches, or the availability of other defenses. All these questions are for decision in accordance with the principles applicable to supplemental pleadings generally. Cf. *Blau v. Lamb,* 191 F.Supp. 906 (S.D.N.Y.1961); *Lendonsol Amusement Corp. v. B. & Q. Assoc., Inc.,* 23 F.R.Serv. 15d.3, Case 1 (D.Mass.1957).

1966 Amendment

Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 U.S.C. § 405(g) (Supp. III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a nonexistent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision * * * that suit be brought within sixty days * * *" *Cohn v. Federal Security Adm.,* 199 F.Supp. 884, 885 (W.D.N.Y.1961); see also *Cunningham v. United States,* 199 F.Supp. 541 (W.D.Mo.1958); *Hall v. Department of HEW,* 199 F.Supp. 833 (S.D.Tex.1960); *Sandridge v. Folsom, Secretary of HEW,* 200 F.Supp. 25 (M.D.Tenn.1959). [The Secretary of Health, Education, and Welfare has approved certain ameliorative regulations under 42 U.S.C. § 405(g). See 29 Fed.Reg. 8209 (June 30, 1964); Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review,* 53 Geo.L.J. 19, 42-43 (1964); see also *Simmons v. United States Dept. HEW,* 328 F.2d 86 (3d Cir. 1964).]

Analysis in terms of "new proceeding" is traceable to *Davis v. L. L. Cohen & Co.,* 268 U.S. 638 (1925), and *Mellon v. Arkansas Land & Lumber Co.,* 275 U.S. 460 (1928), but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to "relate back". As lower courts have continued to rely on the *Davis* and *Mellon* cases despite the contrary intent of the Rules, clarification of Rule 15(c) is considered advisable.

Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period--in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5)). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the realty [sic], but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case. See the full discussion by Byse, *Suing the "Wrong" Defendant in Judicial*

Review of Federal Administrative Action: Proposals for Reform, 77 Harv.L.Rev. 40 (1963); see also Ill.Civ.P. Act § 46(4).

Much the same question arises in other types of actions against the government (see *Byse,* supra, at 45 n. 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, *Federal Practice & Procedure* § 451 (Wright ed. 1960); 1 id. § 186 (1960); 2 id. § 543 (1961); 3 *Moore's Federal Practice,* par. 15.15 (Cum.Supp.1962); Annot., *Change in Party After Statute of Limitations Has Run,* 8 A.L.R.2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct * * * set forth * * * in the original pleading," and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action--the notice need not be formal--that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule 15(c) goes on to provide specifically in the government cases that the first and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d)(4) and (5)). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers).

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

The rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense.

Paragraph (c)(1). This provision is new. It is intended to make it clear that the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law. Generally, the applicable limitations law will be state law. If federal jurisdiction is based on the citizenship of the parties, the primary reference is the law of the state in which the district court sits. *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). If federal jurisdiction is based on a federal question, the reference may be to the law of the state governing relations between the parties. *E.g., Board of Regents v. Tomanio,* 446 U.S. 478 (1980). In some circumstances, the controlling limitations law may be federal law. *E.g., West v. Conrail, Inc.,* 107 S.Ct. 1538 (1987). Cf. *Burlington Northern R. Co. v. Woods,* 480 U.S. 1 (1987); *Stewart Organization v. Ricoh,* 108 S.Ct. 2239 (1988). Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim. Accord, *Marshall v. Mulrenin,* 508 F.2d 39 (1st Cir.1974). If *Schiavone v. Fortune,* 106 S.Ct. 2379 (1986) implies the contrary, this paragraph is intended to make a material change in the rule.

Paragraph (c)(3). This paragraph has been revised to change the result in *Schiavone v. Fortune, supra,* with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) [subdivision (m) in Rule 4 was a proposed subdivision which was withdrawn by the Supreme Court] for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the Rule 4(m) [subdivision (m) in Rule 4 was a proposed subdivision which was withdrawn by the Supreme Court] period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure,* 63 Notre Dame L.Rev. 720 (1988); Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again,* 61 S.Cal.L.Rev. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision,* 86 Mich.L.Rev. 1507 (1987).

In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

This revision, together with the revision of Rule 4(i) with respect to the failure of a plaintiff in an action against the United States to effect timely service on all the appropriate officials, is intended to produce results contrary to those reached in *Gardner v. Gartman,* 880 F.2d 797 (4th Cir. 1989), *Rys v. U.S. Postal Service,* 886 F.2d 443 (1st Cir. 1989), *Martin's Food & Liquor, Inc. v. U.S. Dept. of Agriculture,* 14 F.R.D.3d 86 (N.D.Ill.1988). *But cf. Montgomery v. United States Postal*

Service, 867 F.2d 900 (5th Cir. 1989), *Warren v. Department of the Army,* 867 F.2d 1156 (8th Cir. 1989); *Miles v. Department of the Army,* 881 F.2d 777 (9th Cir. 1989), *Barsten v. Department of the Interior,* 896 F.2d 422 (9th Cir. 1990); *Brown v. Georgia Dept. of Revenue,* 881 F.2d 1018 (11th Cir. 1989).

1993 Amendment

The amendment conforms the cross reference to Rule 4 to the revision of that rule.

2007 Amendment

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

2009 Amendment

Rule 15(a)(1) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had

not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a)(1) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar, and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b). [1]

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

1 If the proposed amendment to Rule 15(a)(3) ... changing the time period is approved by the Judicial Conference, the following additional sentence will be added to the Committee Note: "Amended Rule 15(a)(3) extends from 10 to 14 days the period to respond to an amended pleading."

Notes of Decisions (5542)

Fed. Rules Civ. Proc. Rule 15, 28 U.S.C.A., FRCP Rule 15
Including Amendments Received Through 12-1-21

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Article 8. Appeals (Refs & Annos)

15 CCR § 3084.1

§ 3084.1. Right to Appeal.

The appeal process is intended to provide a remedy for inmates and parolees with identified grievances and to provide an administrative mechanism for review of departmental policies, decisions, actions, conditions, or omissions that have a material adverse effect on the welfare of inmates and parolees. All appeals shall be processed according to the provisions of Article 8, Appeals, unless exempted from its provisions pursuant to court order or superseded by law or other regulations.

(a) Any inmate or parolee under the department's jurisdiction may appeal any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare.

(b) Unless otherwise stated in these regulations, all appeals are subject to a third level of review, as described in section 3084.7, before administrative remedies are deemed exhausted. All lower level reviews are subject to modification at the third level of review. Administrative remedies shall not be considered exhausted relative to any new issue, information, or person later named by the appellant that was not included in the originally submitted CDCR Form 602 (Rev. 08/09), Inmate/ Parolee Appeal, which is incorporated by reference, and addressed through all required levels of administrative review up to and including the third level. In addition, a cancellation or rejection decision does not exhaust administrative remedies.

(c) Department staff shall ensure that inmates and parolees, including those who have difficulties communicating, are provided equal access to the appeals process and the timely assistance necessary to participate throughout the appeal process.

(d) No reprisal shall be taken against an inmate or parolee for filing an appeal. This shall not prohibit appeal restrictions against an inmate or parolee abusing the appeal process as defined in section 3084.4, nor shall it prohibit the pursuit of disciplinary sanctions for violation of department rules.

(e) The department shall ensure that its departmental appeal forms for appeal of decisions, actions, or policies within its jurisdiction are readily available to all inmates and parolees.

(f) An inmate or parolee has the right to file one appeal every 14 calendar days unless the appeal is accepted as an emergency appeal. The 14 calendar day period shall commence on the day following the appellant's last accepted appeal.

(g) An appellant shall adhere to appeal filing time constraints as defined in section 3084.8.

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code; Civil Rights of Institutionalized Persons Act; Title 42 U.S.C. Section 1997 et seq., Public Law 96-247, 94 Stat. 349; Section 35.107, Title 28, Code of Federal Regulations; and Wolff v. McDonnell (1974) 418 U.S. 539, 558-560.

HISTORY

1. New section filed 5-18-89 as an emergency; operative 5-18-89 (Register 89, No. 21). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-15-89. For prior history, see section 3003.

2. Certificate of Compliance as to 5-18-89 order including a clarifying change of subsection (b) transmitted to OAL 9-7-89 and filed 10-10-89 (Register 89, No. 41).

3. Amendment of subsection (a) filed 1-16-92; operative 2-17-92 (Register 92, No. 13).

4. Amendment of subsections (a) and (d), new subsection (e), and amendment of Note filed 12-23-96 as an emergency; operative 12-23-96 (Register 96, No. 52). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 6-2-97, or emergency language will be repealed by operation of law on the following day.

5. Amendment of subsections (a) and (d), new subsection (e), and amendment of Note refiled 5-29-97 as an emergency; operative 6-2-97 (Register 97, No. 22). A Certificate of Compliance must be transmitted to OAL by 9-30-97 or emergency language will be repealed by operation of law on the following day.

6. Editorial correction of History 5 (Register 97, No. 24).

7. Certificate of Compliance as to 5-29-97 order, including amendment of subsections (a) and (e), transmitted to OAL 9-25-97 and filed 11-7-97 (Register 97, No. 45).

8. Amendment of subsection (c) filed 9-13-2005; operative 9-13-2005 pursuant to Government Code section 11343.4 (Register 2005, No. 37).

9. Amendment of subsection (e) and amendment of Note filed 11-3-2006 as an emergency; operative 11-3-2006 (Register 2006, No. 44). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 4-12-2007 or emergency language will be repealed by operation of law on the following day.

10. Certificate of Compliance as to 11-3-2006 order transmitted to OAL 3-12-2007 and filed 4-19-2007 (Register 2007, No. 16).

11. Amendment of section and Note filed 12-13-2010 as an emergency; operative 1-28-2011 (Register 2010, No. 51). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-7-2011 or emergency language will be repealed by operation of law on the following day.

12. Certificate of Compliance as to 12-13-2010 order, including amendment of Note, transmitted to OAL 6-15-2011 and filed 7-28-2011 (Register 2011, No. 30).

This database is current through 12/28/18 Register 2018, No. 52

15 CCR § 3084.1, 15 CA ADC § 3084.1

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15 CCR § 3084.2

§ 3084.2. Appeal Preparation and Submittal.

(a) The appellant shall use a CDCR Form 602 (Rev. 08/09), Inmate/Parolee Appeal, to describe the specific issue under appeal and the relief requested. A CDCR Form 602-A (08/09), Inmate/Parolee Appeal Form Attachment, which is incorporated by reference, shall be used if additional space is needed to describe the issue under appeal or the relief requested.

(1) The inmate or parolee is limited to one issue or related set of issues per each Inmate/Parolee Appeal form submitted. The inmate or parolee shall not combine unrelated issues on a single appeal form for the purpose of circumventing appeal filing requirements. Filings of appeals combining unrelated issues shall be rejected and returned to the appellant by the appeals coordinator with an explanation that the issues are deemed unrelated and may only be submitted separately.

(2) The inmate or parolee is limited to the space provided on the Inmate/Parolee Appeal form and one Inmate/Parolee Appeal Form Attachment to describe the specific issue and action requested. The appeal content must be printed legibly in ink or typed on the lines provided on the appeal forms in no smaller than a 12-point font. There shall be only one line of text on each line provided on these forms.

(3) The inmate or parolee shall list all staff member(s) involved and shall describe their involvement in the issue. To assist in the identification of staff members, the inmate or parolee shall include the staff member's last name, first initial, title or position, if known, and the dates of the staff member's involvement in the issue under appeal. If the inmate or parolee does not have the requested identifying information about the staff member(s), he or she shall

provide any other available information that would assist the appeals coordinator in making a reasonable attempt to identify the staff member(s) in question.

(4) The inmate or parolee shall state all facts known and available to him/her regarding the issue being appealed at the time of submitting the Inmate/Parolee Appeal form, and if needed, the Inmate/Parolee Appeal Form Attachment.

(b) The inmate or parolee shall submit the signed original appeal forms and supporting documents. If originals are not available, copies may be submitted with an explanation why the originals are not available. The appeals coordinator shall have the discretion to request that any submitted copy is verified by staff.

(1) Only supporting documents, as defined in subsection 3084(h), necessary to clarify the appeal shall be attached to the appeal. Attachments shall not raise new issues, but shall only serve to clarify the present appeal issue and action(s) requested as stated in Parts A and B of the Inmate/Parolee Appeal form. New issues raised in the supporting documents shall not be addressed and any decision rendered will pertain only to the present appeal issue and requested action(s).

(2) Inmates or parolees shall submit their appeal documents in a single mailing and shall not divide their appeal documents into separate mailings.

(3) Inmates or parolees shall not deface or attach dividers or tabs to their appeal forms.

(4) Inmates or parolees shall not contaminate or attach physical/organic objects or samples to their appeal documents. Examples of these objects or samples include, but are not limited to, food, clothing, razor blades, books, magazines, tape, string, hair, blood, and/or bodily fluids/ excrement.

(c) First and second level appeals as described in section 3084.7 shall be submitted to the appeals coordinator at the institution or parole region for processing.

(d) If dissatisfied with the second level response, the appellant may submit the appeal for a third level review, as described in section 3084.7, provided that the time limits pursuant to section 3084.8

are met. The appellant shall mail the appeal and supporting documents to the third level Appeals Chief via the United States mail service utilizing his or her own funds, unless the appellant is indigent in which case the mailing of appeals to the third level of review shall be processed in accordance with indigent mail provisions pursuant to section 3138.

(e) If the appeal has been accepted and processed as an emergency appeal and the appellant wishes a third level review, the appellant must forward the appeal to the appeals coordinator who shall electronically transmit it to the third level Appeals Chief. The third level review shall be completed within five working days.

(f) An inmate or parolee or other person may assist another inmate or parolee with preparation of an appeal unless the act of providing such assistance would create an unmanageable situation including but not limited to: acting contrary to the principles set forth in sections 3163 and 3270, allowing one offender to exercise unlawful influence/assume control over another, require an offender to access unauthorized areas or areas which would require an escort, or cause avoidance or non-performance in assigned work and program activities. Inmates or parolees shall not give any form of compensation for receiving assistance or receive any form of compensation for assisting in the preparation of another's appeal. The giving or receiving of compensation is considered misconduct and is subject to disciplinary action.

(g) An inmate or parolee shall not submit an appeal on behalf of another person, unless the appeal contains an allegation of sexual violence, staff sexual misconduct, or sexual harassment.

(h) Group appeal. If a group of inmates/parolees intend to appeal a policy, decision, action, condition or omission affecting all members of the group, one CDCR Form 602, Inmate/Parolee Appeal, shall be submitted describing the appeal issue(s) and action requested, accompanied by a CDCR Form 602-G (08/09), Inmate/Parolee Group Appeal, which is incorporated by reference, with the legible name, departmental identification number, assignment, housing, and dated signature of the inmate or parolee who prepared the appeal. Each page of the CDCR Form 602-G must contain the appeal issue, action requested, and a statement that all the undersigned agree with the appeal issue/action requested.

(1) The legible names of the participating inmates/parolees, departmental identification numbers, assignments, housing, and dated signatures shall be included in the space provided on the Inmate/Parolee Group Appeal form and no other signature page shall be accepted by the appeals coordinator.

(2) The inmate or parolee submitting the appeal shall be responsible for sharing the appeal response with the inmates or parolees who signed the appeal attachment.

(3) If the inmate or parolee submitting the appeal is transferred, released, discharged, or requests to withdraw from the group appeal, responses shall be directed to the next inmate or parolee listed on the appeal attachment who remains at the facility/region, and who shall be responsible for sharing the response with the other inmates or parolees identified on the appeal.

(4) An appeal shall not be accepted or processed as a group appeal if the matter under appeal requires a response to a specific set of facts (such as disciplinary and staff complaint appeals) that are not the same for all participants in the appeal. In such case, the group appeal shall be screened out and returned to the inmate or parolee submitting the appeal with directions to advise all those who signed the appeal attachment to submit individual appeals on their separate issues.

(5) Every inmate or parolee who signs a group appeal is ineligible to submit a separate appeal on the same issue.

(6) A group appeal counts toward each appellant's allowable number of appeals filed in a 14 calendar day period.

(i) Multiple appeals of the same issue. When multiple appeals are received from more than one inmate or parolee on an identical issue, each such appeal shall be individually processed. However, if other issues in addition or extraneous to the multiple appeal issue are contained in the submitted appeal, this particular complaint shall not be processed as a multiple appeal, but will be subject to processing as a separate, individual appeal.

(1) The original inmate or parolee, and as needed for clarification of issues, one or more of the other inmates or parolees, shall be interviewed.

(2) The appellant shall be provided with an appeal response. A statement shall be included in the response indicating that the appeal has been designated as one of multiple identical appeals for processing purposes and the same response is being distributed to each appellant.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 832.5(a) and 5054, Penal Code; Civil Rights of Institutionalized Persons Act; Title 42 U.S.C. Section 1997 et seq., Public Law 96-247, 94 Stat. 349; and 28 CFR Sections 35.107 and 115.52.

HISTORY

1. New section filed 5-18-89 as an emergency; operative 5-18-89 (Register 89, No. 21). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-15-89.

2. Certificate of Compliance as to 5-18-89 order transmitted to OAL 9-7-89 and filed 10-10-89 (Register 89, No. 41).

3. New subsection (g) filed 5-6-92 as an emergency; operative 5-6-92 (Register 92, No. 19). A Certificate of Compliance must be transmitted to OAL 9-3-92 or emergency language will be repealed by operation of law on the following day.

4. Certificate of Compliance as to 5-6-92 order transmitted to OAL 8-31-92 and filed 10-7-92 (Register 92, No. 41).

5. Amendment of subsection (a) and Note filed 4-7-95 as an emergency pursuant to Penal Code section 5058; operative 4-7-95 (Register 95, No. 14). A Certificate of Compliance must be transmitted to OAL by 9-14-95 or emergency language will be repealed by operation of law on the following day.

6. Certificate of Compliance as to 4-7-95 order transmitted to OAL 6-26-95 and filed 7-25-95 (Register 95, No. 30).

7. Amendment of subsections (a)(1), (a)(2), (c) and (f)(1) filed 12-23-96 as an emergency; operative 12-23-96 (Register 96, No. 52). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 6-2-97, or emergency language will be repealed by operation of law on the following day.

8. Amendment of subsections (a)(1), (a)(2), (c) and (f)(1) refiled 5-29-97 as an emergency; operative 6-2-97 (Register 97, No. 22) A Certificate of Compliance must be transmitted to OAL by 9-30-97 or emergency language will be repealed by operation of law on the following day.

9. Editorial correction of History 8 (Register 97, No. 24).

10. Certificate of Compliance as to 5-29-97 order, including amendment of subsection (c), transmitted to OAL 9-25-97 and filed 11-7-97 (Register 97, No. 45).

11. Amendment of section heading, repealer and new section and amendment of Note filed 12-13-2010 as an emergency; operative 1-28-2011 (Register 2010, No. 51). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-7-2011 or emergency language will be repealed by operation of law on the following day.

12. Certificate of Compliance as to 12-13-2010 order, including amendment of subsections (b), (e)-(f) and (h)(6), transmitted to OAL 6-15-2011 and filed 7-28-2011 (Register 2011, No. 30).

13. Amendment of subsection (g) and Note filed 10-20-2016; operative 10-20-2016 pursuant to Government Code section 11343.4(b)(3) (Register 2016, No. 43).

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15 CCR § 3084.2, 15 CA ADC § 3084.2

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15 CCR § 3084.5

§ 3084.5. Screening and Managing Appeals.

(a) Each institution head and parole region administrator shall designate an appeals coordinator at a staff position level no less than a Correctional Counselor II or Parole Agent II.

(b) The appeals coordinator or a delegated staff member under the direct oversight of the coordinator shall screen all appeals prior to acceptance and assignment for review.

(1) When an appeal indicates the inmate or parolee has difficulty describing the problem in writing or has a primary language other than English, the appeals coordinator shall ensure that the inmate or parolee receives assistance in completing and/or clarifying the appeal.

(2) When an appeal is received as an emergency appeal that does not meet the criteria for an emergency appeal as defined in subsection 3084.9(a), the appellant shall be notified that the appeal does not meet the criteria for processing as an emergency appeal and has been either accepted for regular processing or is rejected for the specific reason(s) cited.

(3) When an appeal is not accepted, the inmate or parolee shall be notified of the specific reason(s) for the rejection or cancellation of the appeal and of the correction(s) needed for the rejected appeal to be accepted.

(4) When an appeal is received that describes staff behavior or activity in violation of a law, regulation, policy, or procedure or appears contrary to an ethical or professional standard that

could be considered misconduct as defined in subsection 3084(g), whether such misconduct is specifically alleged or not, the matter shall be referred pursuant to subsection 3084.9(i)(1) and (i)(3), to determine whether it shall be:

(A) Processed as a routine appeal but not as a staff complaint.

(B) Processed as a staff complaint appeal inquiry.

(C) Referred to Internal Affairs for an investigation/inquiry.

(5) If an appeal classified as a staff complaint includes other non-related issue(s), the provisions of 3084.9(i)(2) shall apply.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 832.5, 832.7, 832.8, 5054 and 5058.4(a), Penal Code; Americans With Disabilities Act, Public Law 101-336, July 26, 1990, 104 Stat. 328; Civil Rights of Institutionalized Persons Act; Title 42 U.S.C. Section 1997 et seq., Public Law 96-247, 94 Stat. 349; and Section 35.107, Title 28, Code of Federal Regulations.

HISTORY

1. New section filed 5-18-89 as an emergency; operative 5-18-89 (Register 89, No. 21). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-15-89. For prior history, see section 3003(a) and (b).

2. Certificate of Compliance as to 5-18-89 order including amendment of subsections (a) and (g) transmitted to OAL 9-7-89 and filed 10-10-89 (Register 89, No. 41).

3. New subsection (a)(3)(F), amendment of subsection (b), new subsections (g) and (h), and relettering of subsection (g) to (i) filed 5-6-92 as an emergency; operative 5-6-92 (Register 92, No. 19). A Certificate of Compliance must be transmitted to OAL 9-3-92 or emergency language will be repealed by operation of law on the following day.

4. Certificate of Compliance as to 5-6-92 order transmitted to OAL 8-31-92 and filed 10-7-92 (Register 92, No. 41).

5. New subsection (a)(3)(G) filed 2-1-93 as an emergency; operative 2-1-93 (Register 93, No. 6). A Certificate of Compliance must be transmitted to OAL 6-1-93 or emergency language will be repealed by operation of law on the following day.

6. Certificate of Compliance as to 2-1-93 order transmitted to OAL 5-20-93 and filed 6-8-93 (Register 93, No. 24).

7. New subsection (a)(3)(H) and amendment of Note filed 4-7-95 as an emergency pursuant to Penal Code section 5058; operative 4-7-95 (Register 95, No. 14). A Certificate of Compliance must be transmitted to OAL by 9-14-95 or emergency language will be repealed by operation of law on the following day.

8. New subsection (b)(4) filed 5-5-95; operative 6-5-95 (Register 95, No. 18).

9. Certificate of Compliance as to 4-7-95 order transmitted to OAL 6-26-95 and filed 7-25-95 (Register 95, No. 30).

10. Amendment of subsections (c), (d) and (e)(1) filed 12-23-96 as an emergency; operative 12-23-96 (Register 96, No. 52). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 6-2-97, or emergency language will be repealed by operation of law on the following day.

11. Amendment of subsections (c), (d) and (e)(1) refiled 5-29-97 as an emergency; operative 6-2-97 (Register 97, No. 22). A Certificate of Compliance must be transmitted to OAL by 9-30-97 or emergency language will be repealed by operation of law on the following day.

12. Editorial correction of History 11 (Register 97, No. 24).

13. Certificate of Compliance as to 5-29-97 order transmitted to OAL 9-25-97 and filed 11-7-97 (Register 97, No. 45).

14. Repealer and new section heading and section and amendment of Note filed 12-13-2010 as an emergency; operative 1-28-2011 (Register 2010, No. 51). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-7-2011 or emergency language will be repealed by operation of law on the following day.

15. Certificate of Compliance as to 12-13-2010 order transmitted to OAL 6-15-2011 and filed 7-28-2011 (Register 2011, No. 30).

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15 CCR § 3084.5, 15 CA ADC § 3084.5

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15 CCR § 3084.6

§ 3084.6. Rejection, Cancellation, and Withdrawal Criteria.

(a) Appeals may be rejected pursuant to subsection 3084.6(b), or cancelled pursuant to subsection 3084.6(c), as determined by the appeals coordinator.

(1) Unless the appeal is cancelled, the appeals coordinator shall provide clear and sufficient instructions regarding further actions the inmate or parolee must take to qualify the appeal for processing.

(2) An appeal that is rejected pursuant to subsection 3084.6(b) may later be accepted if the reason noted for the rejection is corrected and the appeal is returned by the inmate or parolee to the appeals coordinator within 30 calendar days of rejection.

(3) At the discretion of the appeals coordinator or third level Appeals Chief, a cancelled appeal may later be accepted if a determination is made that cancellation was made in error or new information is received which makes the appeal eligible for further review.

(4) Under exceptional circumstances any appeal may be accepted if the appeals coordinator or third level Appeals Chief conclude that the appeal should be subject to further review. Such a conclusion shall be reached on the basis of compelling evidence or receipt of new information such as documentation from health care staff that the inmate or parolee was medically or mentally incapacitated and unable to file.

(5) Erroneous acceptance of an appeal at a lower level does not preclude the next level of review from taking appropriate action, including rejection or cancellation of the appeal.

(b) An appeal may be rejected for any of the following reasons, which include, but are not limited to:

(1) The appeal concerns an anticipated action or decision.

(2) The appellant has failed to demonstrate a material adverse effect on his or her welfare as defined in subsection 3084(c).

(3) The inmate or parolee has exceeded the allowable number of appeals filed in a 14 calendar day period pursuant to the provisions of subsection 3084.1(f).

(4) The appeal contains threatening, obscene, demeaning, or abusive language.

(5) The inmate or parolee has attached more than one CDCR Form 602-A (08/09), Inmate/ Parolee Appeal Form Attachment.

(6) The appeal makes a general allegation, but fails to state facts or specify an act or decision consistent with the allegation.

(7) The appeal is missing necessary supporting documents as established in section 3084.3.

(8) The appeal involves multiple issues that do not derive from a single event, or are not directly related and cannot be reasonably addressed in a single response due to this fact.

(9) The appeal issue is obscured by pointless verbiage or voluminous unrelated documentation such that the reviewer cannot be reasonably expected to identify the issue under appeal. In such case, the appeal shall be rejected unless the appellant is identified as requiring assistance in filing the appeal as described in subsection 3084.1(c).

(10) The inmate or parolee has not submitted his/her appeal printed legibly in ink or typed on the lines provided on the appeal forms in no smaller than a 12-point font or failed to submit an original.

(11) The appeal documentation is defaced or contaminated with physical/organic objects or samples as described in subsection 3084.2(b)(4). Appeals submitted with hazardous or toxic material that present a threat to the safety and security of staff, inmates, or the institution may subject the appellant to disciplinary action and/or criminal charges commensurate with the specific act.

(12) The appellant has attached dividers or tabs to the appeal forms and/or supporting documents.

(13) The appeal is incomplete; for example, the inmate or parolee has not provided a signature and/or date on the appeal forms in the designated signature/date blocks provided.

(14) The inmate or parolee has not submitted his/her appeal on the departmentally approved appeal forms.

(15) The inmate or parolee has submitted the appeal for processing at an inappropriate level bypassing required lower level(s) of review, e.g., submitting an appeal at the third level prior to lower level review.

(16) The appeal issue or complaint emphasis has been changed at some point in the process to the extent that the issue is entirely new, and the required lower levels of review and assessment have thereby been circumvented.

(c) An appeal may be cancelled for any of the following reasons, which include, but are not limited to:

(1) The action or decision being appealed is not within the jurisdiction of the department.

(2) The appeal duplicates an inmate or parolee's previous appeal upon which a decision has been rendered or is pending.

(3) The inmate or parolee continues to submit a rejected appeal while disregarding appeal staff's previous instructions to correct the appeal including failure to submit necessary supporting documents, unless the inmate or parolee provides in Part B of the CDCR Form 602 (Rev. 08/09), Inmate/Parolee Appeal, a reasonable explanation of why the correction was not made or documents are not available.

(4) Time limits for submitting the appeal are exceeded even though the inmate or parolee had the opportunity to submit within the prescribed time constraints. In determining whether the time limit has been exceeded, the appeals coordinator shall consider whether the issue being appealed occurred on a specific date or is ongoing. If the issue is ongoing, which may include but is not limited to, continuing lockdowns, retention in segregated housing, or an ongoing program closure, the inmate or parolee may appeal any time during the duration of the event; however, the inmate or parolee is precluded from filing another appeal on the same issue unless a change in circumstances creates a new issue.

(5) The appeal is submitted on behalf of another person, unless it contains allegations of sexual violence, staff sexual misconduct, or sexual harassment of another inmate.

(6) The issue is subject to a department director level review independent of the appeal process such as a Departmental Review Board decision, which is not appealable and concludes the appellant's departmental administrative remedy pursuant to the provisions of section 3376.1.

(7) The appellant is deceased before the time limits for responding to an appeal have expired and the appeal is not a group appeal.

(8) The appellant refuses to be interviewed or to cooperate with the reviewer.

(A) The appellant's refusal to be interviewed or to cooperate with the reviewer shall be clearly articulated in the cancellation notice.

(B) If the appellant provides sufficient evidence to establish that the interviewer has a bias regarding the issue under appeal, the appeals coordinator shall assign another interviewer.

(9) The appeal is presented on behalf of a private citizen.

(10) Failure to correct and return a rejected appeal within 30 calendar days of the rejection.

(11) The issue under appeal has been resolved at a previous level.

(d) Group appeals shall not be cancelled at the request of the submitting individual unless all of the inmate signatories are released, transferred, or agree to withdraw the appeal.

(e) Once cancelled, an appeal shall not be accepted except pursuant to subsection 3084.6(a)(3); however, the application of the rules provided in subsection 3084.6(c) to the cancelled appeal may be separately appealed. If an appeal is cancelled at the third level of review, any appeal of the third level cancellation decision shall be made directly to the third level Appeals Chief.

(f) An appeal may be withdrawn by the appellant by requesting to have the processing stopped at any point up to receiving a signed response. The request for the withdrawal shall identify the reason for the withdrawal in section H of the CDCR Form 602, Inmate/Parolee Appeal and shall be signed and dated by the appellant. If there is an agreed upon relief noted in writing at the time of a withdrawal and the relief is not provided when and as promised, then the failure to provide the agreed upon relief may be appealed within 30 calendar days of the failure to grant the promised relief. The withdrawal of an appeal does not preclude further administrative action by the department regarding the issue under appeal. A withdrawn staff complaint shall be returned to the hiring authority to review for possible further administrative action.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 832.5 and 5054, Penal Code; Sections 19570, 19575.5, 19583.5 and 19635, Government Code; and 28 CFR Section 115.52.

HISTORY

1. New section filed 5-18-89 as an emergency; operative 5-18-89 (Register 89, No. 21). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-15-89.

2. Certificate of Compliance as to 5-18-89 order including amendment of subsection (b) transmitted to OAL 9-7-89 and filed 10-10-89 (Register 89, No. 41).

3. Amendment of subsections (b)(1)-(5), repealer and new subsection (b)(6)(D), amendment of subsections (b)(7) and (c), and repealer of subsections (c)(1) and (c)(2) filed 12-23-96 as an emergency; operative 12-23-96 (Register 96, No. 52). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 6-2-97, or emergency language will be repealed by operation of law on the following day.

4. Amendment of subsections (b)(1)-(5), repealer and new subsection (b)(6)(D), amendment of subsections (b)(7) and (c), and repealer of subsection (c)(1) and (c)(2) refiled 5-29-97 as an emergency; operative 6-2-97 (Register 97, No. 22). A Certificate of Compliance must be transmitted to OAL by 9-30-97 or emergency language will be repealed by operation of law on the following day.

5. Editorial correction of History 4 (Register 97, No. 24).

6. Certificate of Compliance as to 5-29-97 order, including amendment, transmitted to OAL 9-25-97 and filed 11-7-97 (Register 97, No. 45).

7. Repealer and new section heading and section and amendment of Note filed 12-13-2010 as an emergency; operative 1-28-2011 (Register 2010, No. 51). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-7-2011 or emergency language will be repealed by operation of law on the following day.

8. Certificate of Compliance as to 12-13-2010 order transmitted to OAL 6-15-2011 and filed 7-28-2011 (Register 2011, No. 30).

9. Amendment of subsection (c)(5) and Note filed 10-20-2016; operative 10-20-2016 pursuant to Government Code section 11343.4(b)(3) (Register 2016, No. 43).

This database is current through 12/28/18 Register 2018, No. 52

15 CCR § 3084.6, 15 CA ADC § 3084.6

California Administrative Code - 2018

Barclays Official California Code of Regulations Currentness
Title 15. Crime Prevention and Corrections
Division 3. Adult Institutions, Programs and Parole
Chapter 1. Rules and Regulations of Adult Operations and Programs
Article 8. Appeals (Refs & Annos)

15 CCR § 3084.7

§ 3084.7. Levels of Appeal Review and Disposition.

(a) All appeals shall be initially submitted and screened at the first level unless the first level is exempted. The appeals coordinator may bypass the first level for appeal of:

(1) A policy, procedure or regulation implemented by the department.

(2) A policy or procedure implemented by the institution head.

(3) An issue that cannot be resolved at the division head level such as Associate Warden, Associate Regional Parole Administrator, CALPIA manager or equivalent.

(4) Serious disciplinary infractions.

(b) The second level is for review of appeals denied or not otherwise resolved to the appellant's satisfaction at the first level, or for which the first level is otherwise waived by these regulations. The second level shall be completed prior to the appellant filing at the third level as described in subsection 3084.7(c).

(1) A second level of review shall constitute the department's final action on appeals of disciplinary actions classified as “administrative” as described in section 3314, or of minor

disciplinary infractions documented on the Counseling Only Rules Violation Report, pursuant to section 3312(a)(2), and shall exhaust administrative remedy on these matters.

(2) Movies/videos that have been given a rating of other than “G”, “PG”, or “PG-13” by the Motion Picture Association of America are not approved for either general inmate viewing pursuant to section 3220.4 or for viewing within the classroom, and will not be accepted for appeal at any level. The first level shall be waived for appeals related to the selection or exclusion of a “G”, “PG”, or “PG-13” rated or non-rated movie/video for viewing and the second level response shall constitute the department's final response on appeals of this nature.

(c) The third level is for review of appeals not resolved at the second level, or:

(1) When the inmate or parolee appeals alleged third level staff misconduct or appeals a third level cancellation decision or action.

(2) In the event of involuntary psychiatric transfers as provided in subsection 3084.9(b).

(d) Level of staff member conducting review.

(1) Appeal responses shall not be reviewed and approved by a staff person who:

(A) Participated in the event or decision being appealed. This does not preclude the involvement of staff who may have participated in the event or decision being appealed, so long as their involvement with the appeal response is necessary in order to determine the facts or to provide administrative remedy, and the staff person is not the reviewing authority and/or their involvement in the process will not compromise the integrity or outcome of the process.

(B) Is of a lower administrative rank than any participating staff. This does not preclude the use of staff, at a lower level than the staff whose actions or decisions are being appealed, to research the appeal issue.

(C) Participated in the review of a lower level appeal refiled at a higher level.

(2) Second level review shall be conducted by the hiring authority or designee at a level no lower than Chief Deputy Warden, Deputy Regional Parole Administrator, or the equivalent.

(3) The third level review constitutes the decision of the Secretary of the California Department of Corrections and Rehabilitation on an appeal, and shall be conducted by a designated representative under the supervision of the third level Appeals Chief or equivalent. The third level of review exhausts administrative remedies; however, this does not preclude amending a finding previously made at the third level.

(e) At least one face-to-face interview shall be conducted with the appellant at the first level of review, or the second level if the first level of review is bypassed, unless:

(1) The appellant waives the interview by initialing the appropriate box on the CDCR Form 602 (Rev. 08/09), Inmate/Parolee Appeal. An appellant's waiver of the interview shall not preclude staff from conducting an interview in the event of staff determination that an interview is necessary.

(2) The reviewer has decided to grant the appeal in its entirety.

(3) The appeal is a request for a Computation Review Hearing, in which case the initial interview shall occur at the second level of review.

(4) The appellant is not present at the institution or parole region where the appeal was filed.

(A) In such case, a telephone interview with the appellant shall meet the requirement of a personal interview. If the appeal concerns a disciplinary action, the telephone interview may be waived if the appeals coordinator determines an interview would not provide additional facts.

(B) The response must note that the interview was conducted by telephone, explain the extraordinary circumstances that required it, and state why a face-to-face interview was not possible under the circumstances.

(C) If the appellant is not available for a telephone interview, the reviewer may request that a suitable employee in the jurisdiction where the appellant is located complete the interview and provide a report.

(f) An interview may be conducted at any subsequent level of review when staff determine that the issue under appeal requires further clarification.

(g) When a group or multiple appeal is received, one or more of the participating inmates/parolees shall be interviewed to clarify the issue(s).

(h) At the first and second level of review, the original appeal, within the time limits provided in section 3084.8, shall be returned to the appellant with a written response to the appeal issue providing the reason(s) for each decision. Each response shall accurately describe the matter under appeal and fully address the relief requested. If the decision is a partial grant, the response shall clarify for each requested action whether it is granted, granted in part, or denied, and shall also state the action taken.

(i) Modification orders issued by the institution, parole region, or by the third level of review shall be completed within 60 calendar days of the appeal decision which determined the need for a modification order. Reasonable documented proof of completion of the modification order shall accompany the completed order, or a statement shall be added by the responder clarifying the action taken and why documentation is not available.

(1) If it is not possible to comply with the modification order within 60 calendar days, staff responsible for complying with the modification order shall advise the local appeals coordinator every 30 calendar days of the reason for the delay and provide a projected date of completion. If the modification order was imposed by the third level of review, the local appeals coordinator shall notify the third level Appeals Chief every 30 calendar days of the reason for the delay and provide a projected date of completion.

(2) When it is clear that the modification order cannot be completed in the allotted time, the appeals coordinator shall advise the appellant of the reason for the delay and the anticipated date of completion. This process shall occur every 30 calendar days until the modification order is completed. All time constraints for an appellant to submit an appeal to the next level

are considered postponed up to 120 days until the completion of a previous level modification order. Thereafter, the appellant must submit his/her appeal to the next level within 30 calendar days of receiving the modification order response.

(3) If the modification order is not completed after 120 calendar days of the issuance, the appellant may submit the appeal to the next level for administrative review within 30 calendar days.

(4) If the appellant transfers prior to the completion of the modification order, the originally assigned institution or parole region shall retain responsibility for completion of the modification order as specified in subsection 3084.7(i), including cases where the receiving institution or parole region provides the actual relief.

(5) In cases where a modification order is issued on an emergency appeal, the order shall specify the timeframe for the completion of the action granted. The appeals coordinator, if granted at the second level of review, and the third level Appeals Chief or designee, if granted at the third level of review, shall notify the hiring authority by electronic transmission of the emergency timeframe for completion of the granted action.

Note: Authority cited: Sections 5058 and 10006(b), Penal Code. Reference: Sections 5054 and 10006(b), Penal Code; Americans With Disabilities Act, Public Law 101-336, July 26, 1990, 104 Stat. 328; Civil Rights of Institutionalized Persons Act; Title 42 U.S.C. Section 1997 *et seq.*, Public Law 96-247, 94 Stat. 349; and Section 35.107, Title 28, Code of Federal Regulations.

HISTORY

1. New section filed 5-18-89 as an emergency; operative 5-18-89 (Register 89, No. 21). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-15-89. For prior history, see section 3325(c).

2. Certificate of Compliance as to 5-18-89 order including amendment of subsections (a) and (d) transmitted to OAL 9-7-89 and filed 10-10-89 (Register 89, No. 41).

3. Editorial correction of printing errors in subsections (f)(1)(B) and (g)(2) (Register 92, No. 5).

4. Amendment of subsection (e)(4) and new subsections (h)(3), (i)(2)(c)1. and 2., and (k) filed 5-6-92 as an emergency; operative 5-6-92 (Register 92, No. 19). A Certificate of Compliance must

be transmitted to OAL 9-3-92 or emergency language will be repealed by operation of law on the following day.

5. Certificate of Compliance as to 5-6-92 order including amendment of subsections (e)(4) and (i)(2)(C)1. transmitted to OAL 8-31-92 and filed 10-7-92 (Register 92, No. 41).

6. New subsection (*l*) and amendment of Note filed 4-7-95 as an emergency pursuant to Penal Code section 5058; operative 4-7-95 (Register 95, No. 14). A Certificate of Compliance must be transmitted to OAL by 9-14-95 or emergency language will be repealed by operation of law on the following day.

7. Certificate of Compliance as to 4-7-95 order transmitted to OAL 6-26-95 and filed 7-25-95 (Register 95, No. 30).

8. New subsections (m)-(m)(3) and amendment of Note filed 6-28-96 as an emergency; operative 6-28-96 (Register 96, No. 26). A Certificate of Compliance must be transmitted to OAL by 1-6-97 or emergency language will be repealed by operation of law on the following day.

9. Editorial correction of subsection (m)(3) (Register 96, No. 51).

10. New subsections (m)-(m)(3) and amendment of Note refiled 12-19-96 as an emergency; operative 12-19-96 (Register 96, No. 51). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 5-28-97 or emergency language will be repealed by operation of law on the following day.

11. Repealer of subsection (a)(1)(D), amendment of subsections (a)(2)(A), (b)(2), (d)(4), (d)(4)(A) and (e)(1), repealer of subsections (h) and (h)(1), renumbering of old subsections 3084.7(h)(2) and (h)(3) to new subsections 3391(b) and (c), subsection relettering, and amendment of newly designated subsection (k) filed 12-23-96 as an emergency; operative 12-23-96 (Register 96, No. 52). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 6-2-97, or emergency language will be repealed by operation of law on the following day.

12. Certificate of Compliance as to 12-19-96 order, incorporating relettering from 12-23-96 order and further amending section and Note, transmitted to OAL 4-14-97 and filed 5-23-97 (Register 97, No. 21).

13. Repealer of subsection (a)(1)(D), amendment of subsections (a)(2)(A), (b)(2), (d)(4), (d)(4)(A) and (e)(1), repealer of subsections (h) and (h)(1), renumbering of old subsections 3084.7(h)(2) and (h)(3) to new subsections 3391(b) and (c), subsection relettering, and amendment of newly designated subsection (k) refiled 5-29-97 as an emergency; operative 6-2-97 (Register 97, No. 22).

A Certificate of Compliance must be transmitted to OAL by 9-30-97 or emergency language will be repealed by operation of law on the following day.

14. Editorial correction of subsection (j)(1) and History 13 (Register 97, No. 24).

15. Certificate of Compliance as to 5-29-97 order, including amendment of subsections (b)(2) and (k), transmitted to OAL 9-25-97 and filed 11-7-97 (Register 97, No. 45).

16. New subsections (m)-(m)(4) and amendment of Note filed 9-13-2005; operative 9-13-2005 pursuant to Government Code section 11343.4 (Register 2005, No. 37).

17. Repealer and new section heading and section and amendment of Note filed 12-13-2010 as an emergency; operative 1-28-2011 (Register 2010, No. 51). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-7-2011 or emergency language will be repealed by operation of law on the following day.

18. Certificate of Compliance as to 12-13-2010 order transmitted to OAL 6-15-2011 and filed 7-28-2011 (Register 2011, No. 30).

19. Change without regulatory effect amending subsection (a)(3) filed 1-8-2014 pursuant to section 100, title 1, California Code of Regulations (Register 2014, No. 2).

20. Change without regulatory effect repealing subsection (b)(3) filed 4-22-2015 pursuant to section 100, title 1, California Code of Regulations (Register 2015, No. 17).

21. Amendment of subsection (b)(1) filed 6-2-2016 as an emergency; operative 6-2-2016 (Register 2016, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2016 or emergency language will be repealed by operation of law on the following day.

22. Certificate of Compliance as to 6-2-2016 order, including amendment of subsection (b)(1), transmitted to OAL 11-7-2016 and filed 12-22-2016; amendments effective 12-22-2016 pursuant to Government Code section 11343.4(b)(3) (Register 2016, No. 52).

This database is current through 12/28/18 Register 2018, No. 52

15 CCR § 3084.7, 15 CA ADC § 3084.7

End of Document

California Administrative Code - 2018

Barclays Official California Code of Regulations Currentness
Title 15. Crime Prevention and Corrections
Division 3. Adult Institutions, Programs and Parole
Chapter 1. Rules and Regulations of Adult Operations and Programs
Article 8. Appeals (Refs & Annos)

15 CCR § 3084.8

§ 3084.8. Appeal Time Limits.

(a) Time limits for reviewing appeals shall commence upon the date of receipt of the appeal form by the appeals coordinator.

(b) Except as described in subsection 3084.8(b)(4), an inmate or parolee must submit the appeal within 30 calendar days of:

(1) The occurrence of the event or decision being appealed, or;

(2) Upon first having knowledge of the action or decision being appealed, or;

(3) Upon receiving an unsatisfactory departmental response to an appeal filed.

(4) There shall be no time limits for allegations of sexual violence or staff sexual misconduct.

(c) All appeals shall be responded to and returned to the inmate or parolee by staff within the following time limits, unless exempted pursuant to the provisions of subsections 3084.8(f) and (g):

(1) First level responses shall be completed within 30 working days from date of receipt by the appeals coordinator.

(2) Second level responses shall be completed within 30 working days from date of receipt by the appeals coordinator.

(3) Third level responses shall be completed within 60 working days from date of receipt by the third level Appeals Chief.

(d) Exception to the time limits provided in subsection 3084.8(c) is authorized only in the event of:

(1) Unavailability of the inmate or parolee, or staff, or witnesses.

(2) The complexity of the decision, action, or policy requiring additional research.

(3) Necessary involvement of other agencies or jurisdictions.

(4) State of emergency pursuant to subsection 3383(c) requiring the postponement of nonessential administrative decisions and actions, including normal time requirements for such decisions and actions.

(e) Except for the third level, if an exceptional delay prevents completion of the review within specified time limits, the appellant, within the time limits provided in subsection 3084.8(c), shall be provided an explanation of the reasons for the delay and the estimated completion date.

(f) An appeal accepted as an emergency appeal shall be processed within the time frames set forth in subsections 3084.9(a)(4) and (a)(5).

(g) An appeal of the involuntary psychiatric transfer of an inmate or parolee shall be made directly to the third level pursuant to subsection 3084.9(b), within 30 calendar days of receipt of the hearing decision on the need for involuntary transfer.

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code; Civil Rights of Institutionalized Persons Act; Title 42 U.S.C. Section 1997 et seq., Public Law 96-247, 94 Stat. 349; and 28 CFR Sections 35.107 and 115.52.

HISTORY

1. New section filed 12-13-2010 as an emergency; operative 1-28-2011 (Register 2010, No. 51). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-7-2011 or emergency language will be repealed by operation of law on the following day.

2. Certificate of Compliance as to 12-13-2010 order transmitted to OAL 6-15-2011 and filed 7-28-2011 (Register 2011, No. 30).

3. Amendment of subsection (b), new subsection (b)(4) and amendment of Note filed 10-20-2016; operative 10-20-2016 pursuant to Government Code section 11343.4(b)(3) (Register 2016, No. 43).

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15 CCR § 3084.8, 15 CA ADC § 3084.8

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CERTIFICATE OF SERVICE

Case Name: **Saddozai v. Davis, et al.** No. **20-17519**

I hereby certify that on December 10, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

ANSWERING BRIEF

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 10, 2021, at San Francisco, California.

L. Santos	*s/ L. Santos*
Declarant	Signature

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