

**OCT 07 2004**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENITO B. MORALES,

Plaintiff - Appellant,

v.

CAL A. TERHUNE, Director CA Dept. of  
Corrections; M. C. KRAMER, Warden,  
Sierra Conservation Center Level III; F. X.  
CHAVEZ, Ass. Warden, Level III Facility;  
FOX, Facility Captain; MARTIN, CCII; T. A.  
LEWIS, CCII Appeals Coordinator;  
BLOUNT; KENNETH SISK, Correctional  
Officer,

Defendants - Appellees.

No. 01-17016

D.C. No. CV-00-06226-OWW

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Oliver W. Wanger, District Judge, Presiding

Submitted October 5, 2004\*\*  
San Francisco, California

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: RYMER, TALLMAN, and BEA, Circuit Judges.

Petitioner Benito B. Morales (“Morales”) is incarcerated in the Sierra Conservation Center Prison Facility in Jamestown, California. On July 20, 2000, Morales filed a *pro se* class action complaint in the United States District Court for the Eastern District of California alleging that prison officials violated the class members’ First, Eighth, and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983 by, *inter alia*, keeping them in “lockdown” following a prison riot and restricting prisoners’ diet and exercise regimes, denying medical visits, phone use, visits and participation in work, school, library and self-help programs.

The district court dismissed petitioner’s complaint, *sua sponte*, on the ground that he failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act (“PLRA”). We reverse.

After the district court’s decision in this case, we issued a decision in *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), *cert. denied sub nom. Alameida v. Wyatt*, 124 S. Ct. 50 (2003), in which we held that a district court may not dismiss *sua sponte* a petitioner’s complaint for failure to exhaust administrative remedies. Rather, the PLRA’s exhaustion requirement is a defense that must be

raised and proved by the *defendants* and is not required to be pleaded in petitioner's complaint. *Id.*

In light of our decision in *Wyatt*, the State agrees that remand is appropriate in this case. *See* Amicus Brief of the California Office of the Attorney General at 2-3.<sup>1</sup>

Therefore, we **REVERSE** the district court's dismissal of petitioner's complaint and **REMAND** to the district court for further proceedings consistent with *Wyatt v. Terhune*.

**REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

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<sup>1</sup> The California Department of Corrections declined to file a brief in this case. Accordingly, on January 15, 2004, we ordered the California Attorney General's Office to enter an appearance in this appeal for purposes of filing an amicus brief and to appear for oral argument. *See* Order filed January 15, 2004. In its brief filed on June 7, 2004, the California Attorney General's Office suggested that "this court remand this case to the district court for proceedings in accord with *Wyatt*." *See* Amicus Brief of the California Office of the Attorney General at 4.