

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

MAY 26 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DEON SHIRLEY,

Plaintiff - Appellant,

v.

J. TUGGLE; et al.,

Defendants - Appellees.

No. 07-15706

D.C. No. CV-05-02468-  
FCD/CMK

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Frank C. Damrell, Jr., District Judge, Presiding

Submitted May 12, 2009\*\*

Before: PREGERSON, CANBY, and BERZON, Circuit Judges.

Deon Shirley, a California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action for failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a). We have jurisdiction

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

pursuant to 28 U.S.C. § 1291. We review de novo, *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir. 2003), and we vacate and remand.

The district court concluded that Shirley failed to exhaust administrative remedies because appeal FSP-05-545, submitted on Shirley's and other inmates' behalf, failed to comply with certain procedural requirements for group appeals listed in California Code of Regulations section 3084.2(f). Although defendants submitted a declaration by a current Appeals Coordinator at Folsom State Prison stating that the appeal was not classified as a group appeal, the prison's Formal Level Appeal Response referred to the "inmates" and "workers" affected by the issue, granted the appeal, and gave no indication that the appeal was procedurally infirm. Under the circumstances, defendants did not meet their burden of proving non-exhaustion. *See Wyatt*, 315 F.3d at 1119 (holding that defendants have the burden of raising and proving the absence of exhaustion); *see also* Cal. Dep't of Corr. Operations Manual §§ 54100.8, 8.1, 8.2; *cf. Ngo v. Woodford*, 539 F.3d 1108, 1109-10 (9th Cir. 2008) (holding that inmate whose formal appeal was rejected as untimely had not properly exhausted administrative remedies).

Therefore, we vacate the judgment and remand for further proceedings.

Costs on appeal are awarded to Shirley.

**VACATED and REMANDED.**