

OCT 09 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUMAH THOMAS MOORE-ALI, aka  
Jumah Thomas Moore Abdullahi Ali,

Plaintiff - Appellant,

v.

SACRAMENTO COUNTY; et al.,

Defendants - Appellees.

No. 08-17057

D.C. No. 2:02-cv-00937-MCE-  
KJM

MEMORANDUM\*

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

Submitted September 14, 2009\*\*

Before: SILVERMAN, RAWLINSON, and CLIFTON, Circuit Judges.

Jumah Thomas Moore-Ali (“Ali”), a former pretrial detainee at Sacramento County Jail, appeals pro se from the district court’s judgment dismissing his 42

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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).

U.S.C. § 1983 action for failure to exhaust administrative remedies pursuant to the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment, *Barnett v. Centoni*, 31 F.3d 813, 815 (9th Cir. 1994) (per curiam), and its dismissal for failure to exhaust, *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir. 2003), and review for clear error its factual determinations, *id.* We vacate and remand.

Ali contends that Chief Deputy Harris's declaration stating that the County had a three-step grievance process is in error, because the Inmate Handbook referenced by, and attached to, defendants' motion to dismiss provides only two steps, which Ali completed. This calls into question whether defendants met their burden of proving non-exhaustion. *See id.* at 1112. This argument was raised for the first time in Ali's objections to the magistrate judge's Findings and Recommendations. A district court has discretion, but is not required, to consider claims or arguments raised for the first time in the objection to a magistrate judge's report. *See Brown v. Roe*, 279 F.3d 742, 745 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000). We are unable to determine whether the district court exercised its discretion to consider this argument, given that the district court's order adopts the magistrate judge's report without discussing it.

Accordingly, we vacate the judgment and remand to allow the district court the opportunity to exercise its discretion.

Ali's motion for a protective order is denied.

**VACATED and REMANDED.**

SILVERMAN, Circuit Judge, dissenting:

I would affirm the district court.