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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>MATTHEW J. MONACO,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>T. MOBERG; et al.,</p> <p>Defendants - Appellees.</p>
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No. 08-55364

D.C. No. 2:07-cv-06536-CAS-FMO

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Submitted January 11, 2010**

Before: BEEZER, TROTT, and BYBEE, Circuit Judges.

Matthew J. Monaco, a California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging that a

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

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

prison guard attacked him. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under 28 U.S.C. § 1915(e). *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order). We affirm in part, vacate in part, and remand.

The district court properly dismissed Monaco's action without leave to amend because judgment in his favor would necessarily imply the invalidity of a previous conviction and Monaco failed to allege that the conviction had been invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *see also Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (affirming dismissal without leave to amend where the complaint's deficiencies could not be cured by further amendment). However, the dismissal should have been without prejudice. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995). Accordingly, we vacate the judgment and remand for the limited purpose of entering a dismissal without prejudice.

Monaco shall bear his own costs on appeal.

AFFIRMED in part, VACATED in part, and REMANDED.