

APR 27 2011

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VERNON WAYNE MCNEAL,

Plaintiff - Appellant,

v.

FLEMING, C/O; et al.,

Defendants - Appellees.

No. 08-17301

D.C. No. 2:02-cv-02524-MCE-  
JFM

MEMORANDUM\*

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

Submitted April 5, 2011\*\*

Before: B. FLETCHER, CLIFTON, and BEA, Circuit Judges.

Vernon Wayne McNeal, a California state prisoner, appeals pro se from the district court’s judgment as a matter of law following a jury trial in his 42 U.S.C. § 1983 action alleging excessive force. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Mangum v. Action Collection Serv., Inc.*, 575 F.3d

---

\* 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).

935, 938 (9th Cir. 2009). We vacate and remand.

Before granting judgment as a matter of law, Federal Rule of Civil Procedure 50 requires district courts to apprise parties of the deficiencies in their proof, and to give them an opportunity to present further evidence on the dispositive facts. *See Waters v. Young*, 100 F.3d 1437, 1442 (9th Cir. 1996). The record indicates that the district court informed McNeal that he had not provided sufficient evidence for a reasonable jury to conclude that the force used against him was maliciously and sadistically applied. In response, McNeal stated that he was attacked while being escorted by guards back to his cell. This evidence, considered along with his previous testimony that his hands were cuffed behind his back, is sufficient for a reasonable jury to conclude that defendants used force maliciously and sadistically to cause him harm. Accordingly, we vacate and remand for a new trial.

Each party shall bear its own costs on appeal.

**VACATED and REMANDED.**