

JUL 05 2011

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>NOEL RAY SMITH,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>E. J. SMITH; et al.,</p> <p>Defendants - Appellees.</p>

No. 10-55980

D.C. No. 2:10-cv-01725-SJO-AN

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Submitted June 15, 2011**

Before: CANBY, O’SCANNLAIN, and FISHER, Circuit Judges.

California state prisoner Noel Ray Smith appeals pro se from the district court’s judgment dismissing his 42 U.S.C. § 1983 action alleging violations of his First and Fourteenth Amendment rights. We have jurisdiction under 28 U.S.C. § 1291. We may affirm on any ground supported by the record. *Lambert v.*

* 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).

Blodgett, 393 F.3d 943, 965 (9th Cir. 2004). We affirm in part, vacate in part, and remand.

Smith's due process claim fails to state a claim for relief because he alleges no facts that give rise to a liberty interest. *See Sandin v. Conner*, 515 U.S. 472, 487 (1995) (requiring "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" or a restraint that exceeds the prisoner's sentence in "an unexpected manner" to state a liberty interest; "The chance that a finding of misconduct will alter the balance [at a prisoner's parole hearing] is simply too attenuated to invoke the procedural guarantees of the Due Process Clause"). Accordingly, the district court properly dismissed this claim.

The district court dismissed Smith's action under Fed. R. of Civ. P. 41(b) for failure to file first amended complaint alleging only Smith's First Amendment claim in a timely manner. However, the record reflects that Smith delivered to the prison authorities a first amended complaint by the deadline set forth in the court's previous orders. *See Douglas v. Noelle*, 567 F.3d 1103, 1106-07 (9th Cir. 2009) (discussing prison mailbox rule). Accordingly, we vacate in part and remand for further proceedings on Smith's First Amendment claim.

Smith's remaining contentions, including those raised in his objections to the magistrate judge's order, are unavailing.

Smith's motion to proceed in forma pauperis is denied as moot because he has already been granted in forma pauperis status.

Smith shall bear his own costs on appeal.

AFFIRMED in part, VACATED in part, and REMANDED.