

JAN 25 2012

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES W. COVERT,

Plaintiff - Appellant,

v.

D. GRAHAM, CDCR Lieutenant;
R. HARRISON, CDCR Sergeant,

Defendants - Appellees.

No. 10-16134

D.C. No. 4:06-cv-06626-SBA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Submitted January 17, 2012**

Before: LEAVY, TALLMAN, and CALLAHAN, Circuit Judges.

James W. Covert, 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 under the Prison Litigation Reform Act, 42 U.S.C.

* 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).

§ 1997e(a). We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir. 2003). We vacate and remand.

Defendants have not met their burden of proving that Covert's action should be dismissed for failure to exhaust administrative remedies. Covert stated in his sworn declaration in opposition to the motion to dismiss that he attempted to file appeals at the second level of review for his May 6, 2005 grievance, and that these appeals were never properly processed. Defendants relied on a declaration by appeals coordinator Padilla that does not explain the prison's record keeping methods or otherwise address how attempted inmate appeals are tracked or handled. *See id.* at 1116-17, 1119-20 (an incomplete record is inadequate to establish nonexhaustion). Accordingly, we vacate the judgment and remand for further proceedings.

The parties shall bear their own costs on appeal.

VACATED and REMANDED.