

AUG 15 2012

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL J. SMITH,

Plaintiff - Appellant,

v.

BRIAN WILLIAMS, Warden; R. TATE,

Defendants - Appellees.

No. 11-16919

D.C. No. 2:10-cv-00632-JCM-  
PAL

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
James C. Mahan, District Judge, Presiding

Submitted August 8, 2012\*\*

Before: ALARCÓN, BERZON, and IKUTA, Circuit Judges.

Former Nevada state prisoner Michael J. Smith 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.

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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 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 the district court's dismissal for failure to exhaust. *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir. 2003). We affirm.

Smith contends that he is excused from exhausting his administrative remedies because he was released from prison before he filed his amended complaint. We do not consider this argument because Smith raises it for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam).

**AFFIRMED.**