

MAY 22 2013

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>TONY EDWARD POWELL,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>D. SMITH, Warden; McFADDEN, Regional Director,</p> <p>Defendants - Appellees.</p>

No. 11-17551

D.C. No. 1:08-cv-01443-SMM

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Stephen M. McNamee, District Judge, Presiding

Submitted May 14, 2013**

Before: LEAVY, THOMAS, and MURGUIA, Circuit Judges.

Federal prisoner Tony Edward Powell appeals pro se from the district court's judgment dismissing his action brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that

* 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).

defendants subjected him to inhumane living conditions during a prison lockdown. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to exhaust administrative remedies, and for clear error the district court's underlying factual determinations. *Wyatt v. Terhune*, 315 F.3d 1108, 1117 (9th Cir. 2003). We affirm.

The district court properly dismissed Powell's action because Powell did not timely exhaust prison grievance procedures concerning his claim. *See Woodford v. Ngo*, 548 U.S. 81, 93-95 (2006) (exhaustion is mandatory and must be done in a timely manner consistent with prison policies); *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam) (a prisoner must exhaust available administrative remedies before filing a complaint; exhaustion during the course of litigation is not sufficient).

Powell's motion for leave to file supplemental materials, filed on March 22, 2013, is denied.

AFFIRMED.