

JAN 30 2015

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>HORACE THOMAS, AKA Horace Andrew Bell,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p style="text-align: center;">v.</p> <p>MERLE BRUCE, M.D.,</p> <p style="text-align: center;">Defendant - Appellee.</p>
--

No. 14-16204

D.C. No. 2:14-cv-00619-MMD-
CWH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda Du, District Judge, Presiding

Submitted January 21, 2015**

Before: CANBY, GOULD, and N.R. SMITH, Circuit Judges.

Horace Thomas, a.k.a. Horace Andrew Bell, a California state prisoner, appeals pro se from the district court’s judgment dismissing his 42 U.S.C. § 1983 action alleging an Eighth Amendment violation. We have jurisdiction under 28

* 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).

U.S.C. § 1291. We review de novo a dismissal for failure to state a claim. *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007) (dismissal under 28 U.S.C. § 1915A); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order) (dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)). We vacate and remand.

Although the district court properly dismissed Thomas’s complaint because Thomas failed to allege facts sufficient to state a deliberate indifference claim relating to his jaw surgery, the district court abused its discretion by dismissing Thomas’s action without first providing him with an opportunity to amend. *See Weilburg*, 488 F.3d at 1205 (“Dismissal of a pro se complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” (citation and internal quotation marks omitted)); *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (setting forth standard of review). Accordingly, we vacate the judgment and remand to the district court with instructions to provide Thomas with an opportunity to file an amended complaint.

VACATED and REMANDED.