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SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DAVID B. TURNER, JR., Inmate  
11 Booking No. 13719099,

Plaintiff,

12 vs.

13 GEORGE BAILEY DETENTION  
14 FACILITY; et al.,

15 Defendants.

CASE NO. 13cv2090 BEN (JLB)

**ORDER DENYING MOTION TO  
DISMISS WITHOUT PREJUDICE**

[Docket No. 16]

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17 The Second Amended Complaint (“SAC”) in this action contains allegations that  
18 Constitutional violations under 42 U.S.C. § 1983 occurred while Plaintiff was a  
19 prisoner. On February 24, 2014, Defendants filed a motion to dismiss the SAC, raising  
20 arguments under Federal Rule of Civil Procedure 12. (See Docket No. 16-2.)  
21 Specifically, in support of their motion, Defendants present evidence outside the four  
22 corners of the SAC and argue that the evidence shows Plaintiff failed to exhaust the  
23 available administrative remedies prior to filing this action.

24 On April 3, 2014, the Ninth Circuit issued a precedential opinion that holds,  
25 *inter alia*, that a failure to exhaust argument based on evidence outside the complaint  
26 should be raised pursuant to Federal Rule of Civil Procedure 56. *Albino v. Baca*, No.  
27 10-55702, 2014 WL 1317141, \*1 (9th Cir. Apr. 3, 2014). Based on this new precedent,

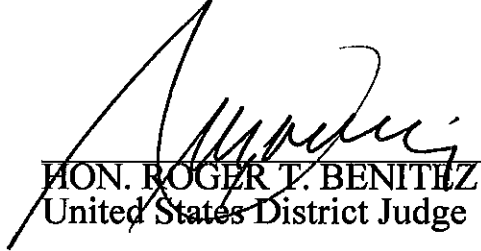
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1 the pending motion to dismiss, (Docket No. 16), is **DENIED** without prejudice to filing  
2 a motion for summary judgment on or before **April 25, 2014**.

3 **IT IS SO ORDERED.**

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5 DATED: April 10, 2014

  
HON. ROGER T. BENITEZ  
United States District Judge

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