

DEC 08 2014

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY ALLEN FRANKLIN,

Plaintiff - Appellant,

v.

J. JIMENEZ, Lieutenant; et al.,

Defendants - Appellees.

No. 13-56576

D.C. No. 3:11-cv-01240-JAH-
BGS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Submitted November 18, 2014**

Before: LEAVY, FISHER, and N.R. SMITH, Circuit Judges.

Gregory Allen Franklin, a California state prisoner, appeals pro se from the district court's order dismissing his 42 U.S.C. § 1983 action alleging constitutional violations. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258 (9th Cir.

* 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).

2010). We reverse and remand.

Franklin's motion, filed in the district court on February, 21, 2013, is most properly treated as a motion for an extension of time to file a Second Amended Complaint. The district court abused its discretion by denying Franklin's motion, because Franklin's assertion that he had not received the district court's order dismissing his First Amended Complaint with leave to amend demonstrated that his failure to file a Second Amended Complaint within 45 days was excusable. *See* Fed. R. Civ. P. 6(b)(1)(B) ("When an act may or must be done within a specified time, the court may, for good cause, extend the time on motion made after the time has expired if the party failed to act because of excusable neglect."); *In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 973 (9th Cir. 2007) (setting forth factors a district court must consider to determine whether neglect is excusable); *see also Ahanchian*, 624 F.3d at 1258-59 (noting that Rule 6(b), like all the Federal Rules of Civil Procedure, is to be "liberally construed to effectuate the general purpose of seeing that cases are tried on the merits" (citation and internal quotation marks omitted)).

Accordingly, we remand for the district court to give Franklin an opportunity to file a Second Amended Complaint.

REVERSED and REMANDED.