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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>ANTHONY JOHNSON,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>L. GONZALEZ; A. MURRIETA,</p> <p>Defendants - Appellees.</p>

No. 12-15136

D.C. No. 1:09-cv-01264-AWI-BAM

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Submitted May 14, 2013**

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

California state prisoner Anthony Johnson appeals pro se from the district court’s summary judgment in his 42 U.S.C. § 1983 action alleging that defendants used excessive force against him. We have jurisdiction under 28 U.S.C. § 1291. We review de novo summary judgment, *Conlon v. United States*, 474 F.3d 616,

* 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).

621 (9th Cir. 2007), and for an abuse of discretion a district court's decision not to consider arguments and evidence raised for the first time as an objection to the magistrate judge's findings and recommendations, *Akhtar v. Mesa*, 698 F.3d 1202, 1208 (9th Cir. 2012). We reverse and remand.

The district court declined to consider Johnson's request under Federal Rule of Civil Procedure 36(b) to amend or withdraw his admissions, which were the basis for granting defendants' motion for summary judgment, because Johnson raised this issue for the first time in his objections to the magistrate judge's findings and recommendations. However, the district court's failure to consider this request was an abuse of discretion because Johnson is pro se and his Rule 36(b) request, if granted, would have defeated summary judgment. *See id.* at 1208-09 (district court abused its discretion by not considering an opposition to a motion to dismiss presented by a pro se prisoner for the first time in his objections to the magistrate judge's recommendation, even though the prisoner did not explain why he failed to file a timely opposition); *see also Jones v. Blanas*, 393 F.3d 918, 935 (9th Cir. 2004) (concluding that it would have been an abuse of discretion for the district court not to consider arguments raised for the first time in the objections to the magistrate's findings "given the circumstances under which this evidence was offered – a pro se plaintiff, ignorant of the law, offering crucial

facts as soon as he understood what was necessary to prevent summary judgment against him”). Accordingly, we reverse and remand for further proceedings consistent with our disposition.

Johnson’s opposed motion to request supplementary briefing, filed on August 13, 2012, is denied.

REVERSED and REMANDED.