

FILED

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS JOHN HEILMAN,

Plaintiff-Appellant,

v.

C. CHERNISS, Correctional Officer; et al.,

Defendants-Appellees.

No. 15-15912

D.C. No.

2:11-cv-00042-JAM-EFB

MEMORANDUM*

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

Argued and Submitted October 19, 2017
San Francisco, California

Before: IKUTA and HURWITZ, Circuit Judges, and GWIN,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

Thomas Heilman appeals the district court's order granting Cherniss's and Lesane's motion for summary judgment. We have jurisdiction under 28 U.S.C. § 1291.

Cherniss and Lesane concede that the district court: (1) erred when it disregarded material disputes of fact that bear on whether the defendants violated the Fourth and Eighth Amendments; and (2) abused its discretion by excluding the declarations of Oliver Overton, Victor Cordero, and Daniel Patillo without considering their admissibility under Rule 415 of the Federal Rules of Evidence. The district court therefore erred in granting summary judgment in favor of Cherniss and Lesane.

Heilman failed to "specifically and distinctly" argue in his opening brief on appeal that the searches that occurred prior to May 17, 2010 were unconstitutional and that the declarations of Overton, Cordero, and Patillo were admissible under Rule 404(b)(2) of the Federal Rules of Evidence. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994). These claims are therefore waived on appeal. *See id.* Issues waived on appeal, however, can be raised on remand in light of our reversal of the summary judgment. *See Kelson v. City of Springfield*, 767 F.2d 651, 657 (9th Cir. 1985).

REVERSED AND REMANDED.