

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

GUILLERMO CRUZ TRUJILLO,  
Plaintiff,  
v.  
GOMEZ, et al.,  
Defendants.

Case No. 1:14-cv-01370-LJO-EPG (PC)  
FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT  
BE DENIED  
(ECF NOS. 81 & 82)  
OBJECTIONS, IF ANY, DUE WITHIN  
TWENTY-ONE DAYS

**I. BACKGROUND**

Guillermo Trujillo (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983.

This action is proceeding on Plaintiff’s Third Amended Complaint (“TAC”) on Plaintiff’s claims against Gomez, Juarez, and Fernandez for excessive force in violation of the Eighth Amendment. (ECF Nos. 17, 19, & 20).<sup>1</sup>

On August 11, 2017, Defendants filed a motion for summary judgment on the grounds that Plaintiff failed to exhaust his administrative remedies. (ECF Nos. 81 & 82). On August 21, 2017, Plaintiff filed a notice stating that he filed his opposition to the motion in July of 2017. (ECF No. 83). It appears that Plaintiff was referring to the “motion to squash Defendants’ motion for summary judgment for non-exhaustion” that he filed on July 5, 2017

---

<sup>1</sup> The Court has issued findings and recommendations, recommending that all other claims and defendants be dismissed. (ECF No. 89, p. 8).

1 (ECF No. 79). On September 8, 2017, Plaintiff filed a motion for an extension of time to file  
2 an opposition to Defendants’ motion for summary judgment (ECF No. 85), which the Court  
3 granted (ECF No. 86). On September 18, 2017, Plaintiff filed an opposition to Defendants’  
4 motion for summary judgment. (ECF No. 87). On September 25, 2017, Defendants filed their  
5 reply. (ECF No. 88).

6 Defendants’ motion for summary judgment is now before the Court. After  
7 consideration of all the materials presented, as well as the applicable law, the Court will  
8 recommend denying the motion for summary judgment because there is a genuine dispute of  
9 material fact regarding whether Plaintiff properly filed grievances that prison officials  
10 improperly failed to process. The Court will also recommend giving Defendants the  
11 opportunity to request an evidentiary hearing on the disputed facts.

## 12 **II. LEGAL STANDARDS**

### 13 **A. Exhaustion**

14 “The California prison grievance system has three levels of review; an inmate exhausts  
15 administrative remedies by obtaining a decision at each level.” Reyes v. Smith, 810 F.3d 654,  
16 657 (9th Cir. 2016) (citing Cal.Code Regs. tit. 15, § 3084.1(b) (2011) & Harvey v. Jordan, 605  
17 F.3d 681, 683 (9th Cir. 2010)). See also Cal. Code Regs. tit. 15, § 3084.7(d)(3) (“The third  
18 level review constitutes the decision of the Secretary of the California Department of  
19 Corrections and Rehabilitation on an appeal, and shall be conducted by a designated  
20 representative under the supervision of the third level Appeals Chief or equivalent. The third  
21 level of review exhausts administrative remedies....”).

22 Section 1997e(a) of the Prison Litigation Reform Act of 1995 (PLRA) provides that  
23 “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any  
24 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until  
25 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

26 Prisoners are required to exhaust the available administrative remedies prior to filing  
27 suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201  
28 (9th Cir. 2002) (per curiam). “If, however, a plaintiff files an amended complaint adding new

1 claims based on conduct that occurred after the filing of the initial complaint, the plaintiff need  
2 only show that the new claims were exhausted before tendering the amended complaint to the  
3 clerk for filing.” Akhtar v. Mesa, 698 F.3d 1202, 1210 (9th Cir. 2012) (citing Rhodes v.  
4 Robinson, 621 F.3d 1002, 1007 (9th Cir. 2010).

5 The exhaustion requirement applies to all prisoner suits relating to prison life. Porter v.  
6 Nussle, 534 U.S. 516, 532 (2002). Exhaustion is required regardless of the relief sought by the  
7 prisoner and regardless of the relief offered by the process, unless “the relevant administrative  
8 procedure lacks authority to provide any relief or to take any action whatsoever in response to a  
9 complaint.” Booth v. Churner, 532 U.S. 731, 736, 741 (2001); Ross v. Blake, 136 S.Ct. 1850,  
10 1857, 1859 (June 6, 2016).

11 An untimely or otherwise procedurally defective appeal will not satisfy the exhaustion  
12 requirement. Woodford v. Ngo, 548 U.S. 81, 90-91 (2006). However, “a prisoner exhausts  
13 ‘such administrative remedies as are available,’ 42 U.S.C. § 1997e(a), under the PLRA despite  
14 failing to comply with a procedural rule if prison officials ignore [a] procedural problem and  
15 render a decision on the merits of the grievance at each available step of the administrative  
16 process.” Reyes, 810 F.3d at 658.

17 “Under the PLRA, a grievance ‘suffices if it alerts the prison to the nature of the wrong  
18 for which redress is sought.’ Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir.2010) (quoting  
19 Griffin, 557 F.3d at 1120). The grievance ‘need not include legal terminology or legal  
20 theories,’ because ‘[t]he primary purpose of a grievance is to alert the prison to a problem and  
21 facilitate its resolution, not to lay groundwork for litigation.’ Griffin, 557 F.3d at 1120. The  
22 grievance process is only required to ‘alert prison officials to a problem, not to provide personal  
23 notice to a particular official that he may be sued.’ Jones, 549 U.S. at 219, 127 S.Ct. 910  
24 (citations omitted).” Reyes, 810 F.3d at 659.

25 As discussed in Ross, 136 S.Ct. at 1862, there are no “special circumstances”  
26 exceptions to the exhaustion requirement. The one significant qualifier is that “the remedies  
27 must indeed be ‘available’ to the prisoner.” Id. at 1856. The Ross Court described this  
28 qualification as follows:

1 [A]n administrative procedure is unavailable when (despite what  
2 regulations or guidance materials may promise) it operates as a  
3 simple dead end—with officers unable or consistently unwilling  
4 to provide any relief to aggrieved inmates. See 532 U.S., at 736,  
5 738, 121 S.Ct. 1819. Suppose, for example, that a prison  
6 handbook directs inmates to submit their grievances to a  
7 particular administrative office—but in practice that office  
8 disclaims the capacity to consider those petitions. The procedure  
9 is not then “capable of use” for the pertinent purpose. In *Booth* 's  
10 words: “[S]ome redress for a wrong is presupposed by the  
11 statute's requirement” of an “available” remedy; “where the  
12 relevant administrative procedure lacks authority to provide any  
13 relief,” the inmate has “nothing to exhaust.” *Id.*, at 736, and n. 4,  
14 121 S.Ct. 1819. So too if administrative officials have apparent  
15 authority, but decline ever to exercise it. Once again: “[T]he  
16 modifier ‘available’ requires the possibility of some relief.” *Id.*, at  
17 738, 121 S.Ct. 1819. When the facts on the ground demonstrate  
18 that no such potential exists, the inmate has no obligation to  
19 exhaust the remedy.

20 Next, an administrative scheme might be so opaque that it  
21 becomes, practically speaking, incapable of use. In this situation,  
22 some mechanism exists to provide relief, but no ordinary prisoner  
23 can discern or navigate it. As the Solicitor General put the point:  
24 When rules are “so confusing that ... no reasonable prisoner can  
25 use them,” then “they're no longer available.” Tr. of Oral Arg. 23.  
26 That is a significantly higher bar than CRIPA established or the  
27 Fourth Circuit suggested: The procedures need not be sufficiently  
28 “plain” as to preclude any reasonable mistake or debate with  
respect to their meaning. See § 7(a), 94 Stat. 352; 787 F.3d, at  
698–699; *supra*, at 1855, 1857 – 1859. When an administrative  
process is susceptible of multiple reasonable interpretations,  
Congress has determined that the inmate should err on the side of  
exhaustion. But when a remedy is, in Judge Carnes's phrasing,  
essentially “unknowable”—so that no ordinary prisoner can make  
sense of what it demands—then it is also unavailable. See  
*Goebert v. Lee County*, 510 F.3d 1312, 1323 (C.A.11 2007);  
*Turner v. Burnside*, 541 F.3d 1077, 1084 (C.A.11 2008)  
 (“Remedies that rational inmates cannot be expected to use are  
not capable of accomplishing their purposes and so are not  
available”). Accordingly, exhaustion is not required.

And finally, the same is true when prison administrators thwart  
inmates from taking advantage of a grievance process through  
machination, misrepresentation, or intimidation. In *Woodford*, we  
recognized that officials might devise procedural systems

1 (including the blind alleys and quagmires just discussed) in order  
2 to “trip[ ] up all but the most skillful prisoners.” 548 U.S., at 102,  
3 126 S.Ct. 2378. And appellate courts have addressed a variety of  
4 instances in which officials misled or threatened individual  
5 inmates so as to prevent their use of otherwise proper procedures.  
As all those courts have recognized, such interference with an  
inmate's pursuit of relief renders the administrative process  
unavailable. And then, once again, § 1997e(a) poses no bar.

6 Id. at 1859–60.

7 “When prison officials improperly fail to process a prisoner's grievance, the prisoner is  
8 deemed to have exhausted available administrative remedies.” Andres v. Marshall, 867 F.3d  
9 1076, 1079 (9th Cir. 2017).

10 In a summary judgment motion for failure to exhaust, the defendants have the initial  
11 burden to prove “that there was an available administrative remedy, and that the prisoner did  
12 not exhaust that available remedy.” Albino v. Baca (“Albino II”), 747 F.3d 1162, 1172 (9th  
13 Cir. 2014) (*en banc*). If the defendants carry that burden, “the burden shifts to the prisoner to  
14 come forward with evidence showing that there is something in his particular case that made  
15 the existing and generally available administrative remedies effectively unavailable to him.”  
16 Id. However, “the ultimate burden of proof remains with the defendant.” Id. “If material facts  
17 are disputed, summary judgment should be denied, and the district judge rather than a jury  
18 should determine the facts.” Id. at 1166

19 If the Court concludes that Plaintiff has failed to exhaust as to some claims but not  
20 others, the proper remedy is dismissal of the claims barred by section 1997e(a). Jones, 549  
21 U.S. at 223–24.

## 22 **B. Summary Judgment**

23 Summary judgment is appropriate when it is demonstrated that there “is no genuine  
24 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.  
25 R. Civ. P. 56(a); Albino II, 747 F.3d at 1169 (“If there is a genuine dispute about material facts,  
26 summary judgment will not be granted”). A party asserting that a fact cannot be disputed must  
27 support the assertion by “citing to particular parts of materials in the record, including  
28 depositions, documents, electronically stored information, affidavits or declarations,

1 stipulations (including those made for purposes of the motion only), admissions, interrogatory  
2 answers, or other materials, or showing that the materials cited do not establish the absence or  
3 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to  
4 support the fact.” Fed. R. Civ. P. 56(c)(1).

5 A party moving for summary judgment “bears the initial responsibility of informing the  
6 district court of the basis for its motion, and identifying those portions of ‘the pleadings,  
7 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
8 any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex  
9 Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). If the moving party  
10 moves for summary judgment on the basis that a material fact lacks any proof, the Court must  
11 determine whether a fair-minded fact-finder could reasonably find for the non-moving party.  
12 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (“The mere existence of a scintilla  
13 of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on  
14 which the [fact-finder] could reasonably find for the plaintiff.”). “[A] complete failure of proof  
15 concerning an essential element of the nonmoving party’s case necessarily renders all other  
16 facts immaterial.” Celotex, 477 U.S. at 322. “[C]onclusory allegations unsupported by factual  
17 data” are not enough to rebut a summary judgment motion. Taylor v. List, 880 F.2d 1040,  
18 1045 (9th Cir. 1989), citing Angel v. Seattle-First Nat’l Bank, 653 F.2d 1293, 1299 (9th Cir.  
19 1981).

20 In reviewing a summary judgment motion, the Court may consider other materials in  
21 the record not cited to by the parties, but is not required to do so. Fed. R. Civ. P. 56(c)(3);  
22 Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001). In  
23 judging the evidence at the summary judgment stage, the Court “must draw all reasonable  
24 inferences in the light most favorable to the nonmoving party.” Comite de Jornaleros de  
25 Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011). It need only  
26 draw inferences, however, where there is “evidence in the record... from which a reasonable  
27 inference... may be drawn”; the court need not entertain inferences that are unsupported by  
28 fact. Celotex, 477 U.S. at 330 n. 2 (quoting In re Japanese Electronic Products Antitrust

1 Litigation, 723 F.2d 238, 258 (1983)).

2 **III. SUMMARY OF RELEVANT PORTIONS OF THIRD AMENDED COMPLAINT**

3 Plaintiff's TAC alleges that on December 23, 2013, Plaintiff was confined at Kern  
4 Valley State Prison ("KVSP") when prison officials started harassing and fomenting rumors of  
5 "getting" Plaintiff, and targeting him because Plaintiff had filed 602 grievances, which were  
6 never logged and were returned to Plaintiff.

7 On October 22, 2014, Plaintiff went to school and told Officer Gomez that Plaintiff  
8 needed to get his legal copies of a motion to file with the courts. On Plaintiff's way back to the  
9 building from class due to not feeling well, Plaintiff stopped at the law library for legal copies.  
10 On the way back from the law library, Officer Gomez approached Plaintiff from behind and  
11 asked if Plaintiff was going to school. Plaintiff responded no. Officer Gomez became very  
12 upset and slammed Plaintiff against the concrete wall next to the library outside window, face-  
13 first, and twisted his arms to place them in restraints. Plaintiff felt pain on the left side of his  
14 face and his shoulders.

15 Officer Gomez told Plaintiff to go to the facility program holding cell area for a strip  
16 search. Plaintiff complied. After the search and still naked inside the holding cage, Officers  
17 Juarez and Fernandez took out their pepper spray and sprayed Plaintiff for 4 to 5 seconds.  
18 Plaintiff believes the officers used force out of retaliation and harassment.

19 Plaintiff's TAC only named defendant Biter in the list of defendants. However, at  
20 times, when Plaintiff discussed Officer Gomez, he referred to him as "Defendant Gomez."  
21 And, while plaintiff never indicated in his complaint that Sergeant Juarez or Fernandez were  
22 meant to be included as defendants, he later clarified that Gomez, Juarez, and Fernandez were  
23 meant to be included as defendants (ECF No. 20).

24 **IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

25 Defendants move for summary judgment on two grounds. First, Defendants argue that  
26 Plaintiff could not have exhausted his administrative remedies because he filed this lawsuit  
27 nearly two months before the relevant incidents alleged in the TAC took place. (ECF No. 81-2,  
28 p. 1). Second, Defendants argue that "even if the Court were to permit Plaintiff to exhaust his

1 administrative remedies up until filing of the Third Amended Complaint (TAC), the undisputed  
2 facts reveal that Plaintiff still did not exhaust his administrative remedies as he failed to process  
3 a relevant grievance through the Third Level of Review.” (Id. at 2).

4 Defendants argue (and have submitted evidence) that Plaintiff only submitted one  
5 relevant grievance (KVSP-O-14-03684), and that the relevant grievance only mentions  
6 defendant Gomez. (ECF No. 81-2, p. 7). Defendants also provide evidence that Plaintiff never  
7 appealed this grievance to the third level of review. Defendants’ Separate Statement of  
8 Undisputed Fact 32.

9 Plaintiff alleges (under penalty of perjury) that he filed a grievance on October 22,  
10 2014, and another on November 8, 2014, but that the grievances were not processed by the  
11 appeals office until January 25, 2017. (ECF No. 87, p. 1).<sup>2</sup> Plaintiff attached a copy of the  
12 grievance he allegedly filed on October 22, 2014. (Id. at 6-8).

13 In their reply, Defendants once again argue that Plaintiff could not have exhausted his  
14 administrative remedies because he filed this lawsuit nearly two months before the relevant  
15 incidents alleged in the TAC took place. (ECF No. 88, p. 1). Defendants also argue that  
16 “Plaintiff’s proffered evidence is not credible.” (Id. at 2). Defendants allege that Plaintiff  
17 backdated the grievance he submitted. (Id.). According to Defendants, the assigned log  
18 number indicates that the appeal was not submitted until January 2017, and the grievance  
19 “bears no indicia of receipt by the institution at or near October 22, 2014.” (Id.).

## 20 V. ANALYSIS

21 To begin, the Court notes that Plaintiff failed to properly address Defendants’ statement  
22 of undisputed facts. Accordingly, the Court may consider Defendants’ assertions of fact as  
23 undisputed for purposes of this motion. Fed. R. Civ. P. 56(e)(2); Local Rule 260(b).

---

24  
25  
26 <sup>2</sup> According to Plaintiff’s first response to Defendants’ motion for summary judgment, there are four  
27 relevant grievances: KVSP-O-16-0099, KVSP-O-15-00020, KVSP-O-15-02069, and KVSP-O-15-02070 (ECF  
28 No. 79, p. 1). However, the grievances Plaintiff attached to his first response do not appear to be relevant to  
whether Plaintiff exhausted his administrative remedies in this case. For example, one of the grievance (KVSP-O-  
15-02070) relates to a canceled appeal regarding Plaintiff being placed in Administrative Segregation (ECF No.  
79, pgs. 2-11), while another (KVSP-O-15-02069) relates to an unclothed body search (ECF No. 79, pgs. 30-36).



1 As to the merits of Defendants' motion, Defendants' argument that Plaintiff could not  
2 have exhausted his administrative remedies because he filed this lawsuit two months before the  
3 relevant incidents alleged in the complaint is not persuasive. The Ninth Circuit has held that a  
4 plaintiff is allowed to include post-filing incidents in an amended complaint, so long the  
5 plaintiff exhausted his administrative remedies as to those incidents before filing the amended  
6 complaint. Akhtar, 698 F.3d 1202 (citing Rhodes 621 F.3d at 1007) ("If, however, a plaintiff  
7 files an amended complaint adding new claims based on conduct that occurred after the filing  
8 of the initial complaint, the plaintiff need only show that the new claims were exhausted before  
9 tendering the amended complaint to the clerk for filing."). See also Cano v. Taylor, 739 F.3d  
10 1214 (9th Cir. 2014) ("Not long ago, we held that a prisoner may file an amended complaint  
11 and add new claims where the additional cause of action arose after the initial filing, as long as  
12 he has exhausted administrative remedies as to those additional claims before filing the  
13 amended complaint."). Therefore, for exhaustion purposes, it does not matter that the TAC  
14 includes an incident that occurred after the original complaint was filed, so long as Plaintiff  
15 exhausted his available administrative remedies before filing the amended complaint.

16 Accordingly, the issue is whether Plaintiff exhausted his available administrative  
17 remedies before filing the amended complaint.

18 Defendants have submitted evidence that Plaintiff did submit a grievance related to the  
19 issues in the complaint, but that the grievance only referred to one of the defendants. (See ECF  
20 No. 81-2, p. 7). Moreover, it is undisputed that California's prison grievance process was  
21 generally available, and that no grievance pertaining to the events alleged in the complaint  
22 received a decision from the third level of review.

23 However, Plaintiff has alleged under penalty of perjury that he submitted a grievance on  
24 October 22, 2014, and another on November 8, 2014, but that the appeals office did not process  
25 them until January 25, 2017. (ECF No. 87, p. 1). He also attached a copy of one of the  
26 grievances that was allegedly not processed until January 25, 2017. (Id. at 6-9). The Court  
27 notes that the First Amended Complaint was received by the Clerk's Office on January 9, 2015  
28

1 (ECF Nos. 8 & 10), and that the TAC was received by the Clerk’s Office on February 16, 2016  
2 (ECF No. 17).

3 As Plaintiff has submitted evidence that prison officials improperly failed to process his  
4 grievances related to the incidents alleged in the TAC, the Court finds that there is a genuine  
5 dispute of material fact regarding whether prison officials improperly failed to process  
6 Plaintiff’s grievance. Accordingly, the Court will recommend that Defendants’ motion for  
7 summary judgment be denied. While Defendants may be correct that, in light of their evidence,  
8 Plaintiff’s evidence is “not credible,” at the summary judgment stage “[t]he evidence of the  
9 non-movant is to be believed,”<sup>3</sup> and the Court cannot make credibility determinations.  
10 Anderson, 477 U.S. at 255. If Defendants want the Court to make credibility determinations  
11 Defendants must request an evidentiary hearing.<sup>4</sup>

## 12 **VII. CONCLUSION AND RECOMMENDATIONS**

13 The Court will recommend that Defendants’ motion for summary judgment be denied  
14 because there is a genuine dispute of material fact regarding whether administrative remedies  
15 were available to Plaintiff. To the extent that Plaintiff’s opposition included a motion for  
16 summary judgment, the Court will recommend that Plaintiff’s motion for summary judgment  
17 be denied, without prejudice, for failure to follow local rules.

18 Accordingly, based on the foregoing, IT IS HEREBY RECOMMENDED that:

- 19 1. Defendants’ motion for summary judgment (ECF No. 81) be DENIED;
- 20 2. To the extent that Plaintiff moved for summary judgment (ECF No. 87, pgs. 1-3),  
21 that Plaintiff’s motion for summary judgment be DENIED without prejudice; and

---

23 <sup>3</sup> While there are some exceptions to this rule (see, e.g., Johnson v. Washington Metro. Area Transit  
24 Auth., 883 F.2d 125, 128 (D.C. Cir. 1989); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir.  
2002); Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012)), Defendants have not argued that any of the  
25 exceptions apply.

26 <sup>4</sup> The Court notes that, in his opposition to Defendants’ motion for summary judgment, Plaintiff appears  
27 to ask for summary judgment on the issue of “executive immunity” (although it appears that Plaintiff is actually  
28 referring to qualified immunity) (ECF No. 87, pgs. 1-3). However, it is not at all clear that Plaintiff was actually  
attempting to file a motion for summary judgment. Moreover, even if the Court construed Plaintiff’s opposition to  
Defendants’ motion for summary judgment as also including a motion for summary judgment, Plaintiff failed to  
follow this Court’s local rules on filing motions for summary judgment (see Local Rule 260). Accordingly, to the  
extent that Plaintiff moved for summary judgment, the Court will recommend that his motion be denied without  
prejudice for failure to follow this Court’s local rules.

1 3. If these findings and recommendations are adopted, that Defendants be given  
2 twenty-one days from the date the order adopting is entered to request an  
3 evidentiary hearing on the issue of whether Plaintiff properly submitted grievances  
4 that prison officials improperly failed to process.

5 These findings and recommendations are submitted to the United States district judge  
6 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within twenty-**  
7 **one (21) days** after being served with these findings and recommendations, any party may file  
8 written objections with the court. Such a document should be captioned “Objections to  
9 Magistrate Judge's Findings and Recommendations.” Any reply to the objections shall be  
10 served and filed within seven days after service of the objections. The parties are advised that  
11 failure to file objections within the specified time may result in the waiver of rights on appeal.  
12 Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
13 F.2d 1391, 1394 (9th Cir. 1991)).

14 IT IS SO ORDERED.

15 Dated: February 13, 2018

16 /s/ Eric P. Groj  
17 UNITED STATES MAGISTRATE JUDGE  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28