

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

E.J. McElroy v. Guzman

No. 1:25-cv-00748 GSA (PC) · No. No. 1:25-cv-00748 GSA (PC) · Decided June 26, 2025

OPINION

(PC) McElroy v. Guzman

PER CURIAM.

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8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 E.J. MCELROY, No. 1:25-cv-00748 GSA (PC) 12 Plaintiff, ORDER AND FINDINGS
AND

RECOMMENDATIONS

13 v. ORDER RECOMMENDING: 14 ,

(1) PLAINTIFF'S APPLICATION TO

15 Defendants. PROCEED IN FORMA PAUPERIS BE

DENIED CONSISTENT WITH 28 U.S.C. §

16 1915(G)

17 (ECF No. 2), AND

18 (2) PLAINTIFF BE REQUIRED TO PAY THE

FILING FEE IN FULL PRIOR TO

19 PROCEEDING ANY FURTHER WITH THIS

ACTION

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PLAINTIFF'S OBJECTIONS DUE IN

21 FOURTEEN DAYS

22 23 Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983 and
24 has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. ECF Nos.
1, 25 2, 6. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 26
636(b)(1)(B) and Local Rule 302. 27 For the reasons stated below, the undersigned will
recommend that Plaintiff's application 28 to proceed in forma pauperis be denied, consistent with
28 U.S.C. § 1915(g), and that he be 1 required to pay the filing fee in full prior to proceeding any
further with this action. Plaintiff will 2 be given fourteen days to file objections to this order.

3 I. RELEVANT FACTS

4 On June 20, 2025, Plaintiff's complaint and his application to proceed in forma pauperis 5 were

docketed. ECF Nos. 1, 2. Shortly thereafter, on June 24, 2025, Plaintiff's six-month prison 6 trust fund account statement was docketed. ECF No. 6. Thus, Plaintiff's application to proceed 7 in forma pauperis is complete.

8 II. IN FORMA PAUPERIS STATUS

9 "[In forma pauperis] status is not a constitutional right." *Rodriguez v. Cook*, 169 F.3d 10 1176, 1180 (9th Cir. 1999) (brackets added); *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir. 1965) 11 ("To proceed in forma pauperis is a privilege not a right."). An inmate's in forma pauperis status 12 may be revoked at any time if the court, either sua sponte or on a motion, determines that the 13 status was improvidently granted. *Keeton v. Marshall*, No. CV 17-01213 FMO (KS), 2018 WL 14 4381543, at *6 (C.D. Cal. June 8, 2018) (citation omitted) (italics added); *Owens v. Matthews*, 15 No. CV 16-07755 JFW (KS), 2017 WL 603183, at *2 (C.D. Cal. Jan. 6, 2017) (stating same). 16 The grant or refusal of permission to proceed in forma pauperis is left to the sound discretion of 17 the district court. *Smart*, 347 F.2d 114, 116 (9th Cir. 1963) (citing *Weller v. Dickson*, 314 F.2d 18 598 (9th Cir. 1963)). The latitude given a district court in such matters is especially broad in civil 19 actions by prisoners against their wardens and other officials. *Smart*, 347 F.2d at 116 (footnote 20 citation omitted); *Shobe v. People of State of California*, 362 F.2d 545, 546 (9th Cir. 1966) (citing 21 *Smart*).

22 III. THREE STRIKES RULE: 28 U.S.C. § 1915(g)

23 28 U.S.C. § 1915(g) states: 24 In no event shall a prisoner bring a civil action or appeal a judgment in a civil action 25 or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court 26 of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is 27 under imminent danger of serious physical injury. 28 1 28 U.S.C. § 1915(g). 2 "It is well-settled that, in determining a [Section] 1915(g) 'strike,' the reviewing court 3 looks to the dismissing court's action and the reasons underlying it." *Knapp v. Hogan*, 738 F.3d 4 1106, 1109 (9th Cir. 2013) (brackets added) (emphasis added) (citation omitted). "[Section] 5 1915(g) should be used to deny a prisoner's in forma pauperis status only when, after careful 6 evaluation of the order dismissing an action, and other relevant information, the district court 7 determines that the action was dismissed because it was frivolous, malicious or failed to state a 8 claim." *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2006) (brackets added). "[W]hen a 9 district court disposes of an in forma pauperis complaint 'on the grounds that [the claim] is 10 frivolous, malicious, or fails to state a claim upon which relief may be granted,' such a complaint 11 is 'dismissed' for purposes of § 1915(g) even if the district court styles such dismissal as denial of 12 the prisoner's application to file the action without prepayment of the full filing fee." *O'Neal v. 13 Price*, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original). Dismissal also counts 14 as a strike under § 1915(g) "when (1) a district court dismisses a complaint on the ground that it 15 fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an 16 amended

complaint” regardless of whether the case was dismissed with or without prejudice. 17 *Harris v. Mangum*, 863 F.3d 1133, 1142-43 (9th Cir. 2017). 18 An inmate who has accrued three strikes is precluded from proceeding in forma pauperis 19 unless he is “under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). To satisfy 20 the exception, the plaintiff must have alleged facts that demonstrate that he was “under imminent 21 danger of serious physical injury” at the time of filing the complaint. *Andrews v. Cervantes*, 493 22 F.3d 1047, 1053 (9th Cir. 2007) (“[I]t is the circumstances at the time of the filing of the 23 complaint that matters for purposes of the ‘imminent danger’ exception to § 1915(g).”); see also 24 *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 312-14 (3rd Cir. 2001); *Medberry v. Butler*, 185 F.3d 25 1189, 1192-93 (11th Cir. 1999); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998); *Banos v. 26 O’Guin*, 144 F.3d 883, 885 (5th Cir. 1998); *Lipsey v. Allison*, No. 1:21-cv-00912 GSA, 2021 WL 27 2390424, at *3 (E.D. Cal. June 11, 2021) (“The availability of the imminent danger exception 28 //// 1 turns on the conditions a prisoner faced at the time the complaint was filed, not at some earlier or 2 later time.”). 3 The danger faced by a prisoner at the time of filing must be imminent or ongoing. See, 4 e.g., *Medberry*, 185 F.3d at 1193 (finding plaintiff was not in either imminent or ongoing danger 5 and denying him ability to proceed in forma pauperis as three strikes litigant). “Imminent danger 6 of serious physical injury must be a real and present threat, not merely speculative or 7 hypothetical.” *Lipsey*, 2021 WL 2390424, at *3; *Blackman v. Mjening*, No. 1:16-cv-01421 LJO 8 GSA, 2016 WL 5815905, at *1 (E.D. Cal. Oct. 4, 2016). In addition, “the imminent danger 9 exception to the [Prison Litigation Reform Act’s] three strikes provision requires a nexus between 10 the alleged imminent danger and the violations of law alleged in the complaint.” *Ray v. Lara*, 31 11 F.4th 692, 695 (9th Cir. 2022) (brackets added).

12 IV. DISCUSSION

13 A. Plaintiff Is a Three Strikes Litigant1 14 The Court takes judicial notice of the fact that as early as June of 2012, Plaintiff was 15 determined to be a three strikes litigant within the meaning of 28 U.S.C. § 1915(g). See *McElroy 16 v. Turner*, No. 2:12-cv-01182 CMK (“Turner”). In *Turner*, the Court found that the following 17 cases that Plaintiff had filed in the Eastern District of California constituted strikes: 18 • *McElroy v. Gebbmedin*, No. 1:08-cv-00124 LJO GSA (E.D. Cal. Dec. 11, 2008) 19 (dismissed for failure to state a claim); 20 • *McElroy v. Schultz*, No. 1:08-cv-00179 OWW MJS (E.D. Cal. Apr. 30, 2010) 21 (dismissed for failure to state a claim), and 22 • *McElroy v. California Dep’t of Corr.*, No. 2:08-cv-00733 HWG (E.D. Cal. June 3, 23 2009) (dismissed for failure to state a claim). 24 See *Turner*, ECF No. 6 at 2 (order identifying Plaintiff as three strikes litigant). As a result, 25 *Turner* was dismissed after Plaintiff failed to pay the filing fee in full within the period he was 26 27 1 The Court takes judicial notice of the fact that Plaintiff has previously been identified as a three strikes litigant. See *Kelly v. Sao*, 1:19-cv-00681 LJO BAM (E.D. Cal. July 25, 2019), ECF Nos. 28 6 n.9 and 9) (findings and recommendations; order adopting, respectively), 1 ordered to do so. See *Turner*, ECF No. 7 (order dismissing and closing case for failure to pay 2 filing fee in full). 3 Most recently, in May of 2023, Plaintiff was again

identified as a three strikes litigant in 4 *McElroy v. Castro*, No. 1:23-cv-00559 SKO (“Castro,”). See *Castro*, ECF Nos. 6, 8 (three strikes 5 findings and recommendation order; order adopting same). In addition to identifying the three 6 above referenced matters as strikes, the *Castro* Court also identified four others: 7 • *McElroy v. City of Inglewood*, No. 2:02-cv-04301 MMM MLG (C.D. Cal. Nov. 20, 8 2002) (failure to state a claim); 9 • *McElroy v. City of Inglewood*, No. 2:03-cv-05034 UA MLG (C.D. Cal. July 25, 2003) 10 (dismissed as frivolous); 11 • *McElroy v. Institutional Head Ground*, No. 1:13-cv-00483-MJS (E.D. Cal. Nov. 1, 12 2013) (dismissed for failure to state a claim), and 13 • *McElroy v. Gomez*, No. 1:20-cv-00658 DADSAB (E.D. Cal. Dec. 10, 2020) 14 (dismissed for failure to state a claim; failure to comply with court order, and for failure to 15 prosecute). 16 *Castro*, ECF No. 6 at 2. 17 Thus, it is clear that Plaintiff has been a three strikes litigant for quite some time, and that 18 he is well aware of this status. As a result, absent the existence of exigent circumstances at the 19 time that he filed the instant matter, Plaintiff is required to pay the filing fee in full prior to 20 proceeding any further with it. See 28 U.S.C. § 1915(g). 21 B. Plaintiff Has Not Shown He Was in Imminent Danger of Serious Physical Harm 22 A review of Plaintiff’s complaint fails to sufficiently establish that he was in imminent 23 danger of serious physical harm when he filed it. The complaint is convoluted and rambling, 24 making it difficult to quickly identify defendants and claims alleged. It appears to allege 25 violations of right related to the failure to address disabilities that he has. See generally ECF No. 26 1 at 3-20. However, nothing in the complaint alleges that Plaintiff was in imminent danger of 27 serious physical harm at the time he filed the complaint. See *id.* 28 1 For these reasons, as a three strikes litigant who was not in imminent danger of serious 2 physical harm when he filed the instant complaint, Plaintiff is required under Section 1915(g) to 3 pay the filing fee in full before proceeding any further with this action. 4 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court shall randomly assign a 5 District Judge to this matter. 6 IT IS FURTHER RECOMMENDED that Plaintiff’s application to proceed in forma 7 pauperis (ECF No. 2) be DENIED and that he be required to pay the filing fee in full prior to 8 proceeding any further with this matter. 9 These findings and recommendations are submitted to the United States District Judge 10 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days 11 after being served with these findings and recommendations, Plaintiff may file written objections 12 with the Court. Such a document should be captioned “Objections to Magistrate Judge’s Findings 13 and Recommendations,” and it shall not exceed fifteen pages. 14 The Court will not consider exhibits attached to the objections. To the extent that Plaintiff 15 wishes to refer to any exhibit, when possible, Plaintiff must reference the exhibit in the record by 16 its CM/ECF document and page number or reference the exhibit with specificity. Any pages filed 17 in excess of the fifteen-page limit may be disregarded by the District Judge when conducting the 18 28 U.S.C. § 636(b)(1)(C) review of the findings and recommendations. Plaintiff’s failure to file 19 objections within the specified time may result in the waiver of certain rights on appeal. See 20 *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014); *Martinez v.*

Ylst, 951 F.2d 1153 (9th

21 Cir. 1991).

22 IT IS SO ORDERED. 23

24 Dated: June 25, 2025 /s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE

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