

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Driver v. Jacinto

No. 2:24-cv-3800-DAD-JDP (P), Findings and Recommendations (E.D. Cal. May 22, 2025) · No. 2:24-cv-3800-DAD-JDP (P) · Decided May 22, 2025

SUMMARY

The document contains findings and recommendations by a United States Magistrate Judge concerning Billy Driver’s amended prisoner civil-rights complaint and application to proceed in forma pauperis. The court recommends denying in forma pauperis status under 28 U.S.C. § 1915(g) because Driver is a three-striker and has not shown that he faced imminent physical danger when he filed the action. It further recommends that Driver be required to pay the filing fee to proceed.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Jeremy D. Peterson
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	May 22, 2025
DOCKET	2:24-cv-3800-DAD-JDP (P)
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff filed an amended prisoner civil-rights complaint and an application to proceed in forma pauperis. A magistrate judge issued findings and recommendations that the application be denied under the three-strikes provision of 28 U.S.C. § 1915(g) and that plaintiff be required to pay the filing fee.
STANDARD OF REVIEW	The court assessed whether plaintiff satisfied the imminent-danger exception to the three-strikes bar in 28 U.S.C. § 1915(g), considering the allegations as of the time the complaint was filed.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Billy Driver, Jr. v. Jacinto, et al.

TOPICS

- prisoners rights
- civil rights
- civil procedure

PRACTICE AREAS

prisoner civil rights

in forma pauperis procedure

federal civil procedure

QUESTIONS PRESENTED

1. Whether plaintiff, who had previously brought at least three actions dismissed for failure to state a claim, demonstrated that he was in imminent danger of serious physical injury when he filed the action and therefore qualified for the exception to the three-strikes bar under 28 U.S.C. § 1915(g).
2. Whether plaintiff's amended complaint alleged a specific and non-generalized threat of imminent physical harm sufficient to proceed in forma pauperis.

HOLDINGS

1. For purposes of the imminent-danger exception to the three-strikes bar, the relevant circumstances are those existing when the complaint is filed.
2. Plaintiff's allegations of safety concerns, an alleged hostile statement, and a generalized fear of unidentified harm were insufficient to demonstrate imminent danger of serious physical injury under § 1915(g).

KEY QUOTATIONS

"We are in agreement with all of these cases in holding that it is the circumstances at the time of the filing of the complaint that matters for purposes of the 'imminent danger' exception to §1915(g)." (at 2)

FACTUAL BACKGROUND

Plaintiff alleged that he had safety concerns involving prison personnel, including Captain Konrad, and that defendant Jacinto made statements concerning plaintiff's transfer and criminal conviction. He also alleged that another inmate had previously been stabbed to death, but did not connect that event to his alleged safety concerns. The court found that plaintiff alleged no physical harm or specific, imminent threat of serious physical injury at the time he filed the complaint.

PROCEDURAL HISTORY

Plaintiff's initial complaint and application to proceed in forma pauperis were previously considered, and the complaint was dismissed with leave to amend because the allegations did not clearly establish imminent danger. Plaintiff filed an amended complaint, but the magistrate judge concluded that it still failed to demonstrate imminent physical danger at the time of filing. The court recommended denial of in forma pauperis status and directed that plaintiff be required to tender the filing fee within twenty-one days of any order adopting the recommendations.

DISPOSITION

other

CASES CITED

- Andrews v. Cervantes, 493 F.3d 1047, 1053, 1055-56 (9th Cir. 2007)
- Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998)
- Martinez v. Yist, 951 F.2d 1153 (9th Cir. 1991)
- Driver v. Martel, No. 08-cv-1910-GEB-EFB (E.D. Cal. Sept. 15, 2009)
- Driver v. Kelso, No. 2:11-cv-2397-EFB-P (E.D. Cal. Aug. 9, 2012)
- Driver v. Epp, No. 2:12-cv-0589-EFB (E.D. Cal. Sept. 5, 2012)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
CALIFORNIA 10 11 BILLY DRIVER, JR., Case No. 2:24-cv-3800-DAD-JDP (P) 12 Plaintiff, 13
v. FINDINGS AND RECOMMENDATIONS 14 JACINTO, et al., 15 Defendants. 16 17 Plaintiff
has filed an amended complaint, ECF No. 11, and a request to proceed in forma 18 pauperis, ECF
No. 4.

As I found in my previous order, plaintiff is a “three-striker” within the 19 meaning of Title 28
U.S.C. § 1915(g). He has filed at least three cases that were dismissed for 20 failure to state a
claim upon which relief can be granted: (1) Driver v. Martel, No. 08-cv-1910- 21 GEB-EFB (E.D.
Cal. Sept. 15, 2009) at ECF Nos. 28 & 32; (2) Driver v. Kelso, No. 2:11-cv- 22 2397-EFB-P (E.D.
Cal. Aug. 9, 2012) at ECF Nos. 17 & 20; (3) Driver v. Epp, No. 2:12-cv-0589- 23 EFB (E.D. Cal.
Sept. 5, 2012) at ECF Nos. 7 & 8. 24 When a prisoner-plaintiff is a three-striker and files an
application to proceed in forma 25 pauperis, a court will generally only grant such an application if
the complaint demonstrates that 26 the plaintiff was in imminent physical danger at the time of
filing.

In plaintiff’s case, the 27 allegations in the initial complaint did not seem to demonstrate that he
was in imminent physical 28 harm, but the allegations were difficult to understand. Plaintiff
alleged that he had safety 1 concerns with some number of unidentified officers in December
2024. ECF No. 1 at 1. 2 Defendant Jacinto allegedly told him that a certain prison yard at was
safe.

Id. He disagreed 3 based on events that occurred more than two years prior but did not allege that
any harm befell 4 him or was realistically imminent. Id. at 1-2. Plaintiff did allege that another
inmate in his cell 5 was stabbed to death at some unspecified earlier time, but he did not connect
this vague claim to 6 his fears about yard safety. Id. 7 Absent additional context and more detailed
allegations, I determined that it was unclear 8 whether plaintiff could realistically claim that he
was in imminent danger on or around December 9 30, 2024, when he filed his complaint.

See Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 10 2007) (“We are in agreement with all
of these cases in holding that it is the circumstances at the 11 time of the filing of the complaint

that matters for purposes of the ‘imminent danger’ exception to 12 §1915(g).”). I dismissed the complaint with leave to amend and informed plaintiff that should 13 his amended complaint fail to show that he was in imminent danger at the time of filing, I would 14 recommend that plaintiff’s application to proceed in forma pauperis be denied.

15 Plaintiff has filed an amended complaint, but it does not demonstrate that plaintiff was in 16 imminent physical danger at the time of filing—in December 2024. ECF No. 11. In his amended 17 complaint, plaintiff alleges that he informed defendant Jacinto of his safety concern with Captain 18 Konrad and that Jacinto told him that he should not have been transferred back to California State 19 Prison, Sacramento.

Id. at 3. Jacinto also said in a loud voice that plaintiff should have been 20 killed a long time ago because of his criminal conviction. Id. Plaintiff alleges that he informed 21 defendant Dr. Wallace and defendant officer Alvarado that he had a safety concern with Captain 22 Konrad. Id. 23 Plaintiff’s allegations are insufficient to demonstrate that he faced imminent danger of 24 physical injury at the time he filed the initial complaint.

Plaintiff has not alleged any facts 25 demonstrating he was subjected to any physical harm, either at the time of filing or now, much 26 less a “serious physical injury.” See *Cervantes*, 493 F.3d at 1055-56. Additionally, his alleged 27 harm—defendants’ failure to protect him from an unidentified harm—is a generalized fear of 28 potential harm, which is insufficient.

Id. at 1053. 1 Plaintiff’s application for leave to proceed in forma pauperis should therefore be denied 2 | pursuant to § 1915(g). Plaintiff should be required to submit the appropriate filing fee in order to 3 | proceed with this action. 4 Accordingly, it is RECOMMENDED that plaintiff’s application to proceed in forma 5 || pauperis, ECF No. 4, be DENIED and plaintiff be directed to tender the filing fee within twenty- 6 | one days of any order adopting these recommendations.

7 These findings and recommendations are submitted to the United States District Judge 8 | assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(). Within fourteen days of 9 | service of these findings and recommendations, any party may file written objections with the 10 | court and serve a copy on all parties. Any such document should be captioned “Objections to 11 | Magistrate Judge’s Findings and Recommendations,” and any response shall be served and filed 12 | within fourteen days of service of the objections.

The parties are advised that failure to file 13 | objections within the specified time may waive the right to appeal the District Court’s order. See 14 | *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Yist*, 951 F.2d 1153 (9th Cir. 15 1991). 16 7 IT IS SO ORDERED. 18 (1 Oy — Dated: _ May 22, 2025 q—— 19 JEREMY D. PETERSON UNITED STATES MAGISTRATE JUDGE 21 22 23 24 25 26 27 28

