

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Israel Maldonado-Ramirez v. Francisco et al.

No. 1:23-cv-00162-HBK (PC), United States District Court for the Eastern District of California (March 2, 2023)

SUMMARY

The United States District Court for the Eastern District of California recommends denying Israel Maldonado-Ramirez’s motion to proceed in forma pauperis under the Prison Litigation Reform Act’s three-strikes provision, 28 U.S.C. § 1915(g). The court identifies three qualifying prior strikes and concludes that the complaint does not plausibly allege imminent danger of serious physical injury. The document also orders random assignment of the case to a district judge and provides a fourteen-day objection period.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Helena M. Barch-Kuchta
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	March 2, 2023
DOCKET	1:23-cv-00162-HBK (PC)
DISPOSITION	other
PROCEDURAL POSTURE	A prisoner plaintiff proceeding pro se filed a 42 U.S.C. § 1983 complaint and moved to proceed in forma pauperis. The magistrate judge issued findings and recommendations recommending denial of the motion under the Prison Litigation Reform Act's three-strikes provision, and ordered assignment of a district judge.
STANDARD OF REVIEW	The complaint's facial allegations were liberally construed to determine whether Plaintiff plausibly alleged imminent danger of serious physical injury at the time of filing.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Israel Maldonado-Ramirez v. Bar Associate Francisco, Brah Cona, Madera County Police Department

TOPICS

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Plaintiff had accumulated at least three qualifying strikes under 28 U.S.C. § 1915(g).
2. Whether the complaint plausibly alleged that Plaintiff faced imminent danger of serious physical injury at the time of filing, including whether the required nexus existed between the alleged danger and the claims.
3. Whether Plaintiff's motion to proceed in forma pauperis should therefore be denied under § 1915(g).

HOLDINGS

1. Plaintiff had at least three qualifying strikes because the identified prior actions were dismissed before the present action on grounds qualifying under § 1915(g).
2. The complaint did not plausibly allege that Plaintiff faced imminent danger of serious physical injury when he filed the action, and it did not satisfy the required nexus between the alleged imminent danger and the claims asserted.
3. The magistrate judge recommended that Plaintiff's motion to proceed in forma pauperis be denied under § 1915(g) because Plaintiff had three qualifying strikes and did not meet the imminent-danger exception.

KEY QUOTATIONS

“For the reasons discussed below, the undersigned recommends the district court deny Plaintiff’s IFP motion under 28 U.S.C. § 1915(g) because Plaintiff has had at least three actions or appeals that constitute strikes, and the Complaint does not establish that Plaintiff meets the imminent danger exception.” (at 1)

“In order to avail oneself of this narrow exception, “the PLRA requires a nexus between the alleged imminent danger and the violations of law alleged in the prisoner’s complaint.”” (at 3)

“Plaintiff’s motion to proceed in forma pauperis (Doc. No. 2) be DENIED under § 1915(g) due to his three-strike status and his failure to meet the imminent danger exception.” (at 6)

FACTUAL BACKGROUND

Israel Maldonado-Ramirez, incarcerated at Madera County Jail, filed a pro se prisoner civil-rights complaint against Francisco, Cona, and the Madera County Police Department. Liberally construed, the complaint alleged wrongful taking of property, retaliation, due-process violations, denial of medical leave, and an outside legal organization's refusal to pursue a case. The court found that Plaintiff had three prior qualifying strikes and that the complaint did not allege facts showing imminent danger of serious physical injury when filed.

PROCEDURAL HISTORY

Plaintiff initiated the action on February 2, 2023, and sought leave to proceed in forma pauperis. The magistrate judge determined that Plaintiff had at least three qualifying strikes under 28 U.S.C. § 1915(g) and that the complaint did not plausibly allege imminent danger of serious physical injury. The matter was ordered assigned to a district judge, and denial of the IFP motion was recommended subject to a fourteen-day objection period.

DISPOSITION

other

CASES CITED

- Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1723 (2020)
- Andrews v. Cervantes, 493 F.3d 1047, 1051-53 (9th Cir. 2007)
- Knapp v. Hogan, 738 F.3d 1106, 1109 (9th Cir. 2013)
- Washington v. Los Angeles Cty. Sheriff's Dep't, 833 F.3d 1048 (9th Cir. 2016)
- Coleman v. Tollefson, 135 S. Ct. 1759, 1761 (2015)
- Louis Butler O'Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008)
- Williams v. Paramo, 775 F.3d 1182, 1190 (9th Cir. 2015)
- Ray v. Lara, 31 F.4th 692, 700-701 (9th Cir. Apr. 11, 2022)
- White v. Colorado, 157 F.3d 1226, 1231-32 (10th Cir. 1998)
- Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002)
- Cervantes, 493 F.3d at 1053
- Harris v. Mangum, 863 F.3d 1133, 1143 (9th Cir. 2017)
- Ray v. Lara, 31 F.4th 692, 700 (9th Cir. 2022)
- Blackman v. Mjening, No. 1:16-cv-01421-LJO-GSA-PC, 2016 WL 5815905, at *1 (E.D. Cal. Oct. 4, 2016)
- Hardney v. Hampton, No. 2:20-cv-01587-WBS-DMC-P, 2021 WL 4896034, at *4 (E.D. Cal. Oct. 20, 2021)
- Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002)
- Campbell v. Vance, No. CIV S-05-1163 RRB, 2005 WL 3288400, at *1 (E.D. Cal. Nov. 30, 2005)
- Gorby v. Internal Revenue Service, Fresno, Case No. 1:21-cv-320-NONE-HBK, 2021 WL 1339146 (E.D. Cal. Apr. 14, 2021)
- Trujillo Cruz v. White, No. 2:19-cv-1304-KJM-DMC, 2019 WL 4917192 (E.D. Cal. Oct. 4, 2019)
- Trujillo-Cruz v. White, 2020 WL 1234201 (E.D. Cal. Mar. 13, 2021)
- Hoffman v. Pulido, 928 F.3d 1147, 1148-49 (9th Cir. 2019)
- Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014)
- Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
CALIFORNIA 10 11 ISRAEL MALDONADO-RAMIREZ, Case No. 1:23-cv-00162-HBK (PC)

12 Plaintiff, ORDER TO ASSIGN DISTRICT JUDGE 13 v. FINDINGS AND
RECOMMENDATIONS TO DENY PLAINTIFF’S MOTION FOR LEAVE 14 FRANCISCO ET
AL., TO PROCEED IN FORMA PAUPERIS UNDER 28 U.S.C. § 1915 (g) 1 15 Defendants.

FOURTEEN-DAY OBJECTION PERIOD 16 (Doc. No. 2) 17 18 Plaintiff Israel Maldonado-
Ramirez, a prisoner incarcerated at Madera County Jail, 19 initiated this action by filing a pro se
prisoner civil rights complaint under 42 U.S.C. § 1983 on 20 February 2, 2023. (Doc. No. 1,
“Complaint”). Plaintiff seeks to proceed in this action in forma 21 pauperis. (Doc. No. 2).

For the reasons discussed below, the undersigned recommends the 22 district court deny Plaintiff’s
IFP motion under 28 U.S.C. § 1915(g) because Plaintiff has had at 23 least three actions or appeals
that constitute strikes, and the Complaint does not establish that 24 Plaintiff meets the imminent
danger exception. 25 /// 26 27 1 The undersigned submits these factual findings and
recommendations to the District Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302
(E.D.

Cal. 2022). 28 1 BACKGROUND AND FACTS 2 The Complaint identifies the following as
defendants: Bar Associate Francisco, Brah 3 Cona, and the Madera County Police Department.
(Doc. No. 1 at 1-2). The Complaint is difficult 4 to decipher and is disjointed.

To the extent discernable and liberally construed, Plaintiff’s 5 complaint alleges that unspecified
personal property was wrongly taken (Claims 1, 3), he suffered 6 retaliation by unspecified
individuals (Claim 2), he was denied Due Process in unspecified court 7 or grievance proceedings
(Claims 4 and 5), his request for medical leave has not been granted 8 (Claims 6 and 7), and an
outside legal organization declined to pursue a case on his behalf (Claim 9 8).

(See generally *id.*) 10 APPLICABLE THREE STRIKE LAW 11 The “Three Strikes Rule” states:
12 In no event shall a prisoner bring a civil action or proceeding under this section if the prisoner
has, on 3 or more prior occasions, while 13 incarcerated or detained in any facility, brought an
action or appeal in the United States that was dismissed on grounds that it was 14 frivolous,
malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under
imminent danger of serious 15 physical injury.

16 28 U.S.C. § 1915(g). As part of the Prison Litigation Reform Act, the Three Strikes Rule was
17 enacted to help curb non-meritorious prisoner litigation. See *Lomax v. Ortiz-Marquez*, 140 S.
Ct. 18 1721, 1723 (2020) (citations omitted)).

Under § 1915(g), prisoners who have repeatedly brought 19 unsuccessful suits may be barred from
bringing a civil action and paying the fee on a payment 20 plan once they have had on prior
occasions three or more cases dismissed as frivolous, malicious, 21 or for failure to state a claim.
Id.; see also *Andrews v. Cervantes*, 493 F.2d 1047, 1052 (9th Cir. 22 2007).

23 For a dismissal to count as a strike, the dismissal had to be on a “prior occasion,” meaning 24 the order dismissing the case must have been docketed before plaintiff initiated the current case. 25 See § 1915(g).

The reviewing court then looks to the basis of prior dismissals. *Knapp v. Hogan*, 26 738 F.3d 1106, 1109 (9th Cir. 2013). A dismissal counts as a strike when the dismissal of the 27 action was for frivolity, maliciousness, or for failure to state a claim, or an appeal was dismissed 28 for the same reasons. *Lomax*, 140 S. Ct. at 1723 (citing Section 1915(g)); see also *Washington v. 1 Los Angeles Cty.*

Sheriff’s Dep’t, 833 F.3d 1048 (9th Cir. 2016) (reviewing dismissals that count 2 as strikes); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1761 (2015) (dismissal that is on appeal counts 3 as a strike during the pendency of the appeal). It is immaterial whether the dismissal for failure to 4 state a claim to count was with or without prejudice, as both count as a strike under § 1915(g).

5 *Lomax*, 140 S. Ct. at 1727. When a district court disposes of an in forma pauperis complaint 6 requiring the full filing fee, then such a complaint is “dismissed” for purposes of §1915(g). *Louis 7 Butler O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). 8 Once a prisoner-plaintiff has accumulated three strikes, he/she may not proceed without 9 paying the full filing fee, unless “the complaint makes a plausible allegation” that the prisoner 10 “faced ‘imminent danger of serious physical injury’ at the time of filing” of the complaint.

11 *Andrews v. Caervantes*, 493 F.3d 1047, 1051-52 (9th Cir. 2007) (addressing imminent danger 12 exception for the first time in the Ninth Circuit). The court must construe the prisoner’s “facial 13 allegations” liberally to determine whether the allegations of physical injury are plausible. 14 *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015). 15 In order to avail oneself of this narrow exception, “the PLRA requires a nexus between 16 the alleged imminent danger and the violations of law alleged in the prisoner’s complaint.” *Ray 17 v. Lara*, 31 F. 4th 692, 700-701 (9th Cir.

Apr. 11, 2022) (adopting nexus test). “In deciding 18 whether such a nexus exists, we will consider (1) whether the imminent danger of serious 19 physical injury that a three-strikes litigant alleges is fairly traceable to unlawful conduct asserted 20 in the complaint and (2) whether a favorable judicial outcome would redress that injury.” *Id.* at 21 700 (adopting test as articulated by Second Circuit, citation omitted).

The three-strikes litigant 22 must meet both requirements of the nexus test to proceed. *Id.* 23 Assertions of imminent danger may be rejected as overly speculative, fanciful, or 24 “conclusory or ridiculous.” *Andrews*, 493 F.3d at 1057, fn. 11. Similarly, “vague and utterly 25 conclusory assertions” of imminent danger are insufficient. *White v. Colorado*, 157 F.3d 1226, 26 1231–32 (10th Cir.

1998). Instead, the “imminent danger” exception exists “for genuine emergencies,” where “time is pressing” and “a threat... is real and proximate.” *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002). Thus, conditions that posed imminent danger to a plaintiff at some earlier time are immaterial, as are any subsequent conditions. *Cervantes*, 493 F.3d at 1053; *Blackman v. Mjening*, 1:16-cv-01421-LJO-GSA-PC, 2016 WL 5815905, at *13 (E.D.

Cal. Oct. 4, 2016). Upon a finding that the plaintiff is barred by the three strikes provision of 28 U.S.C. § 1915(g), some courts have found that the proper procedure is to dismiss the case without prejudice to re-filing the action upon pre-payment of fees at the time the action is refiled. *Hardney v. Hampton*, No. 2:20-cv-01587-WBS-DMC-P, 2021 WL 4896034, at *4 (E.D.

Cal. Oct. 20, 2021), report and recommendation adopted, No. 2:20-cv-01587-WBS-DMC-P, 2021 WL 6051701 (E.D. Cal. Dec. 21, 2021) (citing *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 10 2002); *Campbell v. Vance*, No. CIV S-05-1163 RRB, 2005 WL 3288400, at *1 (E.D. Cal. Nov. 11 30, 2005). Other courts have first afforded the plaintiff an opportunity to pay the filing fee before dismissing the case.

See *Gorby v. Internal Revenue Service*, Fresno, Case No. 1:21-cv- 13 320-NONE-HBK, 2021 WL 1339146, report and recommendation adopted in part and rejected 14 in part, 2021 WL 2227810 (E.D. Cal. June 2, 2021)(rejected immediate dismissal, instead 15 permitting 30 days to pay filing fee, and if not, then requiring dismissal); *Trujillo Cruz v. White*, 16 No. 2:19-cv-1304-KJM-DMC, 2019 WL 4917192 (Oct.

4, 2019), report and recommendation 17 adopted in part and rejected in part, *Trujillo-Cruz v. White*, 2020 WL 1234201 (E.D. Cal. March 18 13, 2021)(rejected immediate dismissal, instead permitting 30 days to pay filing fee, and if not 19 then requiring dismissal). 20 The preceding law must be taken in the context of congressional intent when enacting the 21 Prison Litigation Reform Act.

As the United States Supreme Court noted in *Lomax*, “[t]he point 22 of the PLRA... was to cabin not only abusive but also simply meritless prisoner suits.” *Lomax*, 23 140 S.Ct. at 1726. And the three strikes provision, in particular, was aimed “to disincentivize 24 frivolous prisoner litigation.” *Hoffman v. Pulido*, 928 F.3d 1147, 1148-49 (9th Cir. 2019). 25 ANALYSIS 26 A. Plaintiff has three or more qualifying strikes 27 A review of the Pacer Database reveals that Plaintiff has filed more than 20 civil actions 28 1 or appeals in a court of the United States.2 Although not exhaustive, for purposes of these 2 findings and recommendations, each of the following cases are properly deemed qualifying 3 § 1915(g) strikes and each was entered before Plaintiff commenced the instant action: 4 5 Date of Order Case Style Disposition *Ramirez v. Khale et al.*, No. Adopting Findings and 6 November 18, 2021 1:21-cv-1213-DAD-EPG Recommendations to dismiss 7 (E.D.

Cal.) complaint as frivolous. Ramirez v. Khale, No. 1:21- Adopting Findings and October 27, 2021 8 cv-1237-NONE-GSA (E.D. Recommendations to dismiss Cal.) complaint as barred by Heck 9 v. Humphrey, 512 U.S. 477 (1994) from face of 10 complaint. 11 Ramirez v. Perez, No. 1:22- Adopting Findings and November 21, 2022 cv-564-JLT-SAB (E.D. Recommendation to dismiss 12 Cal.) complaint for failure to state a cognizable claim for relief, 13 failure to comply with a court 14 order, and failure to prosecute.

See Harris v. 15 Mangum, 863 F.3d 1133, 1143 (9th Cir. 2017) (finding 16 dismissal counts as 1915(g) strike “when (1) a district 17 court dismisses a complaint 18 on the ground that it fails to state a claim, (2) the court 19 grants leave to amend, and (3) the plaintiff then fails to 20 file an amended complaint.”). 21 As evidenced above, Plaintiff has had three or more qualifying strikes for purposes of § 22 1915(g).

23 B. The Imminent Danger Exception Does Not Apply 24 Because Plaintiff has three-qualifying strikes, he may not proceed IFP unless the 25 Complaint contains plausible allegations that Plaintiff is in imminent danger of serious physical 26 injury as of the date the complaint is filed. Andrews v. Cervantes, 493 F.3d 1047, 1052-53 (9th 27 28 2 <http://pacer.usci.uscourts.gov> 1 Cir.

2007). Liberally construing the Complaint, there are no facts that indicate Plaintiff was in 2 imminent danger of serious physical injury at the time he filed the action. Plaintiff’s Complaint, 3 to the extent discernible, centers on the wrongful taking of his property, an unspecified form of 4 retaliation, due process violations, denial of his request for medical leave, and the ACLU’s failure 5 to pursue his case.

(See generally *id.*). The nature of Plaintiff’s claims do not lend themselves to 6 imminent danger of serious physical injury, nor does Plaintiff allege any facts that articulate a risk 7 of imminent physical danger. 8 While Plaintiff uses certain words that may give the perception of physical injury such as 9 “die” (e.g., “do it for me to die forever”) (*Id.* at 4) and “kill” (e.g., “if they keep on do it ima keep 10 on killing them”) (*Id.* at 10), such phrases are insufficient to qualify as imminent danger of 11 serious physical harm.

The law requires that there be a nexus between the imminent danger that 12 Plaintiff alleges and the claims he asserts in the Complaint. Without providing more facts, simply 13 using words related to physical injury does not show imminent danger under § 1915(g). Cruz v. 14 Pfeiffer, No. 1:20-CV-01522-AWI-SAB-PC, 2021 WL 289408, at *2 (E.D. Cal. Jan. 28, 2021).

15 Accordingly, Plaintiff does not satisfy either prong of the nexus test set forth above. 16 Accordingly it is ORDERED: 17 The Clerk of the Court randomly assign this case to a District Judge. 18 It is further RECOMMENDED: 19 Plaintiff’s motion to proceed in forma pauperis (Doc. No. 2) be DENIED under § 1915(g) 20 due to his three-strike status and his failure to meet the imminent danger exception.

21 //// 22 //// 23 //// 24 NOTICE TO PARTIES 25 These findings and recommendations will be submitted to the United States district judge 26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) 27 days after being served with these findings and recommendations, a party may file written 28 objections with the Court.

The document should be captioned “Objections to Magistrate Judge’s 1 | Findings and Recommendations.” Parties are advised that failure to file objections within the 2 | specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 3 | 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)). 4 > | Dated: _ March 2, 2023 Mile. □□□ foareA Zacks 6 HELENA M. BARCH-KUCHTA 4 UNITED STATES MAGISTRATE JUDGE 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28