

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 15 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GREGORY McCLELLAN,

Plaintiff-Appellant,

v.

S. LOZANO, Parole Agent - CDCR; et al.,

Defendants-Appellees.

No. 16-15149

D.C. No. 1:10-cv-00386-LJO-MJS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Michael J. Seng, Magistrate Judge, Presiding**

Submitted August 9, 2017***

Before: SCHROEDER, TASHIMA, and M. SMITH, Circuit Judges.

Gregory McClellan appeals pro se from the magistrate judge's January 15, 2016 order denying McClellan in forma pauperis ("IFP") status in his 42 U.S.C.

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

** McClellan consented in writing to proceed before a magistrate judge. See 28 U.S.C. § 636(c). Defendants' consent is inferred from their conduct during litigation. See *Roell v. Withrow*, 538 U.S. 580, 590 (2003).

*** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

§ 1983 action. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Washington v. L.A. Cty. Sheriff's Dep't*, 833 F.3d 1048, 1054 (9th Cir. 2016). We affirm.

The magistrate judge properly denied IFP status because at the time McClellan brought this action, McClellan was a prisoner and had accumulated three strikes. *See* 28 U.S.C. § 1915(g); *O'Neal v. Price*, 531 F.3d 1146, 1154 (9th Cir. 2008) (“Because § 1915(g) . . . does not distinguish between dismissals with and without prejudice, . . . a dismissal without prejudice may count as a strike.” (citation omitted)).

Defendants’ request for judicial notice (Docket Entry No. 25) is denied.

Defendants’ motions to strike evidence attached to the reply brief (Docket Entry Nos. 31 and 32) are granted.

AFFIRMED.