



1 serious physical injury.

2 28 U.S.C. § 1915(g). Court records reflect that on at least three prior occasions, plaintiff has  
3 brought actions while incarcerated that were dismissed as frivolous, malicious, or for failure to  
4 state a claim upon which relief may be granted:

5 (1) Pierce v. California State, CV 12-9211 UA (CW) (C.D. Cal.), November 20, 2012  
6 (dismissed as frivolous, malicious or fails to state a claim upon which relief may be granted) (Id.,  
7 ECF No. 5);

8 (2) Pierce v. Gonzales, 1:10-cv-0285 JLT (E.D. Cal.), December 3, 2012 (dismissed for  
9 failure to state a claim) (Id., ECF No. 27);

10 (3) Pierce v. Warden of Lancaster, CV 13-1939 UA (CW), March 28, 2013 (dismissed as  
11 frivolous, malicious or fails to state a claim upon which relief may be granted) (Id., ECF No. 2);

12 (4) Pierce v. Gonzales, No. 13-15114 (9th Cir.) (March 28, 2013 order denying motion to  
13 proceed in forma pauperis on ground that appeal was frivolous, and May 7, 2013 order dismissing  
14 appeal for failure to prosecute after plaintiff failed to pay the filing fee)<sup>1</sup>;

15 (5) Pierce v. Lancaster State Prison, 2:13-cv-8126 (C.D. Cal.), December 3, 2013  
16 (dismissed as frivolous, malicious or fails to state a claim upon which relief may be granted) (Id.,  
17 ECF No. 6);

18 (6) Pierce v. Unknown, 1:15-cv-0650 DAD DLB (E.D. Cal.), December 1, 2015  
19 (dismissed for failure to state a claim) (Id., ECF No. 38); and

20 (7) Pierce v. Birotte, No. 2:15-cv-7552 VAP CW (C.D. Cal. Oct. 4, 2015) (order  
21 designating plaintiff a three-strikes litigant for purposes of § 1915(g) and listing four additional

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22 <sup>1</sup> The dismissal of this appeal, styled as one for failure to prosecute, also qualifies as a  
23 strike. See O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (complaint is “dismissed” for  
24 purposes of § 1915(g) even if dismissal is styled as denial of application to file the action without  
25 prepayment of the full filing fee); see also, e.g., Lamon v. Junious, No. 1:09-cv-00484 AWI SAB,  
26 2014 U.S. Dist. LEXIS 9778, at \*9-10 (E.D. Cal. Jan. 27, 2014) (dismissal of appeal for failure to  
27 prosecute counted as “strike” where underlying ground for dismissal was that appeal was  
28 frivolous); Thomas v. Beutler, No. 2:10-cv-01300 MCE CKD P, 2012 U.S. Dist. LEXIS 159943,  
at \*5-6 (E.D. Cal. Nov. 6, 2012) (same, and citing similar cases); Braley v. Wasco State Prison,  
No. 1:07-cv-01423 AWI BAM, 2012 U.S. Dist. LEXIS 133285 (E.D. Cal. Sept. 14, 2012)  
 (“Plaintiff became subject to section 1915(g) . . . when the appeal of the dismissal of his third  
action as frivolous was dismissed for failure to prosecute”).

1 “strikes” incurred by plaintiff).

2 The section 1915(g) exception applies if the complaint makes a plausible allegation that  
3 the prisoner faced “imminent danger of serious physical injury” at the time of filing. 28 U.S.C.  
4 § 1915(g); Andrews v. Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007). For the exception to  
5 apply, the court must look to the conditions the “prisoner faced at the time the complaint was  
6 filed, not at some earlier or later time.” Andrews, 493 F.3d at 1053, 1056 (requiring that prisoner  
7 allege “an ongoing danger” to satisfy the imminence requirement). Courts need “not make an  
8 overly detailed inquiry into whether the allegations qualify for the exception.” Id. at 1055.

9 In the complaint (ECF No. 1), plaintiff alleges no facts suggesting that he is under  
10 imminent danger of serious physical injury. In addition, plaintiff alleged no facts addressing this  
11 exception in his April 11, 2016 filing. Thus, the imminent danger exception does not apply.  
12 Plaintiff’s application for leave to proceed in forma pauperis must therefore be denied pursuant to  
13 § 1915(g).


14 Accordingly, because plaintiff has not paid the filing fee and cannot proceed in forma  
15 pauperis, IT IS HEREBY RECOMMENDED that:

- 16 1. Plaintiff’s application to proceed in forma pauperis (ECF Nos. 2, 11) be denied; and
- 17 2. This action be dismissed without prejudice to re-filing upon pre-payment of the  
18 \$400.00 filing fee.

19 These findings and recommendations are submitted to the United States District Judge  
20 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
21 after being served with these findings and recommendations, plaintiff may file written objections  
22 with the court and serve a copy on all parties. Such a document should be captioned  
23 “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that  
24 failure to file objections within the specified time may waive the right to appeal the District  
25 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

26 Dated: May 19, 2016

27 /cw/pier2694.1915g.fpf

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE