NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LANCE WILLIAMS, Plaintiff-Appellant, v. BUENOSTROME, Correctional Officer; et al., Defendants-Appellees.	No. 18-55191 D.C. No. 3:17-cv-02345-MMA-JLB MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Submitted March 12, 2019**

Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

California state prisoner Lance Williams appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action for failure to pay the filing fee after denying Williams' motion to proceed in forma pauperis ("IFP"). We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district

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

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

court's interpretation and application of 28 U.S.C. § 1915(g). *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007). We reverse and remand.

The district court denied Williams' motion to proceed IFP on the basis that Williams had filed at least three prior actions in federal court that were dismissed for being frivolous or malicious, or for failing to state a claim, and that he did not establish that he was in imminent danger of serious physical injury at the time he brought the present action. *See* 28 U.S.C. § 1915(g). However, Williams alleged that defendant Buenostrome repeatedly assaulted him without justification, encouraged other inmates to attack him, and threatened his life. Williams further alleged that even after he was moved to a different building, Buenstrome continued to have access to him and threaten him with physical harm. These allegations are sufficient to plausibly allege imminent danger of serious physical injury. *See Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015) (court should liberally construe a prisoner's "facial allegations" and determine if the complaint "makes a plausible allegation" of imminent danger); *Andrews*, 493 F.3d at 1056-57 (discussing the imminent danger exception to 28 U.S.C. § 1915(g)).

The district court determined that even if Williams were entitled to proceed IFP, the action is nevertheless subject to dismissal for Williams' failure to exhaust his administrative remedies. The district court correctly points out that Williams' failure to exhaust is clear from the face of the complaint; however, it is not clear at

this early stage of the proceedings, before defendants have appeared, that administrative remedies were in fact available to Williams. *See Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc) ("[O]nly in rare cases will a district court be able to conclude from the face of the complaint that a prisoner has not exhausted his administrative remedies and that he is without a valid excuse." (citation and internal quotation marks omitted)); *see also Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (failure to exhaust is an affirmative defense on which defendants bear the ultimate burden of proof); *Sapp v. Kimbrell*, 623 F.3d 813, 821-22 (9th Cir. 2010) (setting forth review standards and holding exhaustion is not required where administrative remedies are "effectively unavailable"). On remand, the parties may litigate whether administrative remedies were available to Williams.

REVERSED and REMANDED.

Williams v. Buenostrome, et al., No. 18-55191
BEA, Circuit Judge, dissenting:

I respectfully dissent.