

1 Reform Act of 1996. Andrews v. King, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005).

2 **II. ANALYSIS**

3 **A. Plaintiff's Strikes**

4 Defendants contend that Plaintiff has at least six “strikes” and is therefore ineligible
5 to proceed in forma pauperis. The Court will review each alleged strike in turn below.

6 **1. Rider v. Hernandez, 1:07-cv-1862-LJO-SMS (E.D. Cal., filed Dec. 20,**
7 **2007)**

8 The Court finds that Hernandez does not count as a strike for purposes of §
9 1915(g).

10 Plaintiff commenced the present action on September 12, 2007. (ECF No. 1.)
11 Pursuant to section 1915(g), a prisoner is precluded from proceeding in forma pauperis in
12 an action if the prisoner has had three prior dismissals. See 28 U.S.C. § 1915(g). Thus,
13 for purposes of determining whether Plaintiff should be permitted to proceed in forma
14 pauperis in this case, only dismissals that occurred prior to September 12, 2007 can count
15 as “strikes”.

16 The order dismissing Plaintiff’s Complaint in Hernandez was not entered until
17 February 22, 2008. It cannot, therefore, count as a strike against Plaintiff in the instant
18 action.

19 **2. Rider v. Carter, 3:09-cv-2316-L-WMC PC (S.D. Cal., filed Oct. 15, 2009)**

20 For the reasons stated above, this action does not count as a strike.

21 **3. Rider v. Storey, 3:09-cv-1979-JM-POR (S.D. Cal., filed Sept. 8, 2009)**

22 For the reasons stated above, this action does not count as a strike.

23 **4. Rider v. Rider, 3:03-cv-472-RLM-CAN (N.D. Ind., filed June 30, 2003)**

24 In Rider v. Rider, Plaintiff brought a 42 U.S.C. § 1983 claim against his uncle for
25 alleged physical and sexual abuse. The Northern District of Indiana screened Plaintiff’s
26 Complaint pursuant to 28 U.S.C. § 1915e(2)(B)(ii) which provides that a court shall dismiss
27 a case at any time if it determines that the action fails to state a claim upon which relief
28 could be granted. Upon finding that the named defendant in that case—Plaintiff’s

1 uncle—was not a state actor, and that the applicable statute of limitations had run on
2 Plaintiff's claims, the Court dismissed Plaintiff's action for failure to state a claim. The
3 dismissal order was entered on July 16, 2003.

4 Plaintiff argues that this case should not count as a strike because it was not
5 dismissed under § 1915(g). However, the Ninth Circuit has held an action is "dismissed"
6 for purposes of § 1915(g) when it is disposed of for having failed to state a claim,
7 regardless of the phrasing used by the court. O'Neal v. Price, 531 F.3d 1146, 1153 (9th
8 Cir. 2008) (noting that § 1915(g) does not distinguish between dismissals "on the merits"
9 and actions dismissed pursuant to a court's screening power). Plaintiff also argues that
10 in all but one of his prior cases, only his complaints—and not the "actions"—were
11 dismissed. Plaintiff's argument in this regard is foreclosed by O'Neal which eliminated any
12 distinction between the two phrases. See id. O'Neal instructs that the Court should look
13 at the actual order dismissing the case to determine whether it was dismissed for failure
14 to state a claim regardless of the phrasing used by the Court or the procedural posture of
15 the prior case. Id.

16 Having reviewed the Northern District of Indiana's dismissal order in Rider, the Court
17 finds that Plaintiff's claims against his uncle were dismissed for failure to state a claim
18 because Plaintiff's uncle was not a state actor. Accordingly, this dismissal counts as
19 Plaintiff's first strike for purposes of § 1915(g).

20 **5. Rider v. Vanater, 3:03-cv-473-RM (N.D. Ind., filed June 30, 2003)**
21 **("Vanater")**

22 In Vanater, Plaintiff brought suit pursuant to 42 U.S.C. § 1983 against his cousin
23 alleging that she sexually abused him when he was six years old. The Court screened his
24 complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and found that it failed to state a claim
25 because his cousin was not a state actor. On July 8, 2003, Plaintiff's complaint was
26 dismissed on this ground.

27 For the reasons stated above, the Court finds that the dismissal of Vanater is a
28 strike for purposes of § 1915(g). Accordingly, Vanater counts as Plaintiff's second strike.

1 **6. Rider v. Kelley, 3:03-cv-474-AS (S.D. Ind., filed July 2, 2003) (“Kelley”)**

2 In Kelley, Plaintiff brought suit under 42 U.S.C. § 1983 against his biological brother
3 alleging that he sexually abused Plaintiff on a number of occasions between 1979 and
4 1984. The Northern District of Indiana screened Plaintiff’s complaint pursuant to 28 U.S.C.
5 § 1915(e)(2)(B)(ii) and found that it failed to state a claim because Plaintiff’s brother was
6 not a state actor. The court also found that the statute of limitations had run on his claims.
7 Plaintiff’s complaint was dismissed on these grounds on July 7, 2003.

8 For the reasons stated above, the Court finds that the dismissal of Kelley is a strike
9 for purposes of § 1915(g). Accordingly, Kelley counts as Plaintiff’s third strike.

10 **B. Exceptions**

11 Because Plaintiff had accumulated three strikes before bringing the instant action,
12 he is barred from proceeding in forma pauperis unless his Complaint alleges that he was
13 in imminent danger of serious physical injury at the time the Complaint was filed. See
14 Andrews v. Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007). To satisfy the imminent
15 danger exception, a prisoner must “make[] a plausible allegation that [he] faced ‘imminent
16 danger of serious physical injury’ at the time of the filing” and that such danger is ongoing
17 Id. at 1055-56.

18 Plaintiff alleges that his First Amendment rights were violated when Defendants
19 searched his cell and destroyed his religious material, including an altar, an altar cloth, and
20 Book of Shadows. (Am. Compl., ECF No. 22, p. 3.) There is no allegation of serious
21 physical harm, much less imminent danger of such harm. Accordingly, Plaintiff cannot
22 proceed IFP based on the imminent danger exception to the three strikes rule.

23 **C. Remedy**

24 Defendants ask the Court to dismiss this action because Plaintiff should never have
25 been allowed to proceed in forma pauperis. In the alternative, Plaintiff asks the Court to
26 revoke Plaintiff’s IFP status and require that Plaintiff pay the full filing fee before this action
27 can proceed. Defendants cite no authority in support of their argument that the case
28 should be dismissed. The Court believes that the proper course of action is to revoke

1 Plaintiff's IFP status and grant him a short period of time to pay the full filing fee. See
2 Patton v. Jefferson Corr. Center, 136 F.3d 458, 461 (5th Cir. 1998); Taylor v. U.S. Court
3 of Appeals, 2010 WL 2903073, *2 (N.D. Cal. July 23, 2010).

4 **III. CONCLUSION**

5 For the reasons stated above, the Court RECOMMENDS the following:

- 6 1. Defendant's Motion to Dismiss be GRANTED in part and DENIED in part.
- 7 2. Plaintiff's in forma pauperis status be REVOKED;
- 8 3. Plaintiff be required to pay the \$ 350.00 filing fee in full within thirty days from
9 entry of the order adjudicating Defendant's Motion to Dismiss.

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11 These Findings and Recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).
13 Within thirty days after being served with these Findings and Recommendations, any party
14 may file written objections with the court and serve a copy on all parties. Such a document
15 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."
16 Any reply to the objections shall be served and filed within ten days after service of the
17 objections. The parties are advised that failure to file objections within the specified time
18 may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
19 (9th Cir. 1991).

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24 IT IS SO ORDERED.

25 Dated: January 13, 2011

1st Michael J. Seng
26 UNITED STATES MAGISTRATE JUDGE