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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

FRED PRICE,

Plaintiff,

v.

S. R. CUNNINGHAM, et al.,

Defendants.

CASE NO. 1:08-cv-00425-AWI-SMS PC

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS AND REVOKING  
PLAINTIFF’S IN FORMA PAUPERIS STATUS

(ECF Nos. 27, 33)

ORDER GRANTING PLAINTIFF’S MOTION  
FOR JUDICIAL NOTICE

(ECF No. 34)

/ FORTY-FIVE DAY DEADLINE

Plaintiff Fred Price (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on the [complaint](#) filed March 24, 2008, against Defendants Cunningham and Mullins for deliberate indifference to a serious risk to Plaintiff’s safety and use of excessive force in violation of the Eighth Amendment and Defendant Cunningham for retaliation. (ECF No. 1.) The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

Defendants filed a [motion to revoke](#) Plaintiff’s in forma pauperis status on June 15, 2010, and Plaintiff filed an [opposition](#) on July 1, 2010. (ECF Nos. 19, 25.) Defendants filed a [reply](#) on July 6, 2010, and Plaintiff filed a [response](#) on July 16, 2010. (ECF Nos. 24, 26.) On March 10, 2011, the Magistrate Judge issued [findings and recommendations](#) recommending that Plaintiff’s in forma pauperis status be revoked. (ECF No. 27.) Plaintiff filed [objections](#) on April 21, 2011. (ECF No. 33.) On May 3, 2011, Plaintiff filed a [motion](#) for the Court to take judicial notice of the order

1 transferring the action. (ECF No. 34.)

2 Plaintiff argues that Price v. Parks, 2:02-cv-07724-UA-SH, should not count as a strike  
3 because it was dismissed for lack of jurisdiction and failure to state a claim. While actions that are  
4 dismissed for lack of jurisdiction are not strikes, they can count as strikes in some circumstances.  
5 O’Neal v. Price, 531 F.3d 1146, 1155 n9 (9th Cir. 2008). Here the action was dismissed for failure  
6 to state a claim, as well as lack of jurisdiction and it does constitute a strike under 28 U.S.C. 1915(g).  
7 Additionally, Plaintiff argues that the Magistrate Judge should have undertaken a de novo review  
8 of Price v. Rianda, 2:02-cv-07526-UA-SH, because he alleges that it was erroneously dismissed for  
9 failure to state a claim. The order dismissing this action clearly states that Plaintiff set forth three  
10 claims, none of which were cognizable under section 1983. If Plaintiff disagreed with the dismissal  
11 of this action his recourse was to file an appeal. This action also constitutes a strike under 28 U.S.C.  
12 1915(g).

13 Finally, Plaintiff argues that the Magistrate was incorrect in determining that he was not in  
14 imminent danger at the time that he filed his complaint. Plaintiff invokes the mailbox rule. Since  
15 Plaintiff placed the complaint in the mail and was not transferred until a later date, he argues that he  
16 was in imminent danger when the complaint was filed. Plaintiff is correct that it is the circumstances  
17 that the inmate faces at the time the complaint is filed that are considered for the purposes of  
18 determining imminent danger. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007.)

19 Generally in a civil action the filing of the complaint is simultaneous with submission of the  
20 complaint. O’Neal, 531 F.3d at 1151. However, where the plaintiff is proceeding in forma pauperis  
21 the process is different. The suit is filed when the court authorizes the commencement of the suit  
22 without prepayment of fees. Vaden v. Summerhill, 449 F.3d 1047, 1050 (9th Cir. 2006). Where an  
23 inmate submits a complaint and will be proceeding in forma pauperis the complaint would not be  
24 considered filed at the time it was placed in the prison mail. O’Neal, 531 F.3d at 1151. Plaintiff was  
25 transferred on February 4, 2008. Plaintiff’s Response 1, ECF No. 26. The Court will grant  
26 Plaintiff’s motions and takes judicial notice that this action was transferred to the Eastern District  
27 on March 24, 2008. Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), aff’d,  
28 645 F.2d 699 (9th Cir.), cert. denied, 454 U.S. 1126 (1981). The complaint was lodged on February

1 12, 2008, by the Northern District and in forma pauperis status was granted on March 11, 2008.  
2 Plaintiff was not in imminent danger at the time the complaint was filed as he had already been  
3 transferred from the institution.

4 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a  
5 de novo review of this case. Having carefully reviewed the entire file, the Court finds the findings  
6 and recommendations to be supported by the record and by proper analysis.

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. The findings and recommendations, filed March 10, 2010, is adopted in full;
- 9 2. Plaintiff's motion for judicial notice is GRANTED;
- 10 3. Defendants' motion to revoke Plaintiff's in forma pauperis status, filed June 15,  
11 2010, is GRANTED;
- 12 4. Plaintiff's in forma pauperis status is REVOKED and the order granting Plaintiff's  
13 application to proceed in forma pauper on March 11, 2008, is VACATED to the  
14 extent it permitted Plaintiff permission to pay the civil filing fee pursuant to the  
15 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1) and (2);
- 16 5. Plaintiff must, within forty five (45) days from the date this order is filed, submit the  
17 entire \$350 civil filing fee the Clerk of Court as required by 28 U.S.C. § 1914(a); and
- 18 6. If Plaintiff fails to do so, the Court will enter an Order dismissing this action.

19  
20 IT IS SO ORDERED.

21 Dated: May 24, 2011

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24 CHIEF UNITED STATES DISTRICT JUDGE  
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