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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

MARCUS RUBEN ELLINGTON,

Plaintiff,

v.

CLARK, et al.,

Defendants.

CASE NO. 1:09-CV-02141-AWI-DLB PC

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DEFENDANTS’  
MOTION FOR ORDER REVOKING  
PLAINTIFF’S IN FORMA PAUPERIS  
STATUS BE GRANTED (DOC. 70)

OBJECTIONS DUE WITHIN EIGHTEEN  
(18) DAYS

**Findings And Recommendations**

**I. Background**

Plaintiff Marcus Ruben Ellington (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act, and the Rehabilitation Act of 1973. This action is proceeding on Plaintiff’s first amended complaint against Defendants Akanno and Kern Valley State Prison (“KVSP”). Pending before the Court is Defendants’ motion for an order revoking Plaintiff’s in forma pauperis status, filed October 27, 2010. Defs.’ Mot., Doc. 70. Plaintiff filed his opposition on March 28, 2011.<sup>1</sup> Pl.’s Opp’n, Doc. 79. Defendants filed their reply on March 31, 2011. Defs.’ Reply, Doc. 80.

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<sup>1</sup> Plaintiff’s opposition appears untimely. See L.R. 230(l) (oppositions to motions are due within twenty-one days from the date of service of the motion). The Court out of an abundance of caution has considered Plaintiff’s opposition.

1 On May 20, 2011, the Court ordered Defendants to supplement their motion with  
2 additional briefing.<sup>2</sup> Doc. 87. On June 17, 2011 and July 1, 2011, Defendants filed their  
3 supplemental briefs. Docs. 88, 89. On July 5, 2011, Plaintiff filed his supplemental opposition.  
4 Doc. 90. The matter is submitted pursuant to Local Rule 230(l).

5 **II. Legal Standard**

6 Title 28 of the United States Code, § 1915(g), which governs in forma pauperis  
7 proceedings in federal court, provides:

8 In no event shall a prisoner bring a civil action or appeal a judgment in a civil  
9 action or proceeding under this section if the prisoner has, on 3 or more prior  
10 occasions, while incarcerated or detained in any facility, brought an action or  
11 appeal in a court of the United States that was dismissed on the grounds that it is  
frivolous, malicious, or fails to state a claim upon which relief may be granted,  
unless the prisoner is under imminent danger of serious physical injury.

12 In making a determination as to whether a prisoner plaintiff may proceed in forma  
13 pauperis, the Court must consider all civil actions and appeals brought by the prisoner in any  
14 federal court. Section 1915(g) is commonly known as the “three strikes” provision. *Andrews v.*  
15 *King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2003). “‘Strikes’ are prior cases or appeals, brought  
16 while the plaintiff was a prisoner, which were dismissed ‘on the ground that [they were ]  
17 frivolous, malicious, or fail [] to state a claim.’” *Id.* (citing 28 U.S.C. § 1915(g)). When a  
18 defendant challenges a prisoner’s right to proceed in forma pauperis, the defendant bears the  
19 burden of producing sufficient evidence to establish that § 1915(g) bars the plaintiff’s in forma  
20 pauperis status. *Id.* Once the defendant has made a prima facie case, the burden shifts to the  
21 plaintiff to persuade the court that § 1915(g) does not apply. *Id.*

22 **III. Analysis**

23 The Court granted Plaintiff in forma pauperis pursuant to court order on December 11,  
24 2009. Doc. 6. Defendants contend that Plaintiff has accrued three or more strikes pursuant to §

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26 <sup>2</sup> The Court found that Defendants’ motion was deficient, but that Defendants would be  
27 able to cure this deficiency. May 20, 2011 Order 5:22-28, Doc. 20. The Court also provided  
28 Plaintiff an opportunity to supplement his opposition to Defendants’ motion. *Id.*; July 6, 2011  
Order, Doc. 90.

1 1915(g) and is thus ineligible to proceed in forma pauperis. Defs.’ Mem. P. & A. Mot. Dismiss  
2 4:1-6:14. Defendants also contend that Plaintiff does not qualify for in forma pauperis status  
3 under the imminent danger exception. *Id.* at 6:2-14. Defendants move for revocation of  
4 Plaintiff’s in forma pauperis status.

5 **A. Strikes Pursuant To § 1915(g)**

6 Defendants contend the following are strikes pursuant to § 1915(g):

- 7 1. *Ellington v. Lucine, et al.*, (N.D. Cal. Case No. 5:97-cv-20974-RMW) (Dismissed on  
8 October 13, 1998, for failure to state a claim.)
- 9 2. *Ellington v. Garcia, et al.*, (S.D. Cal. Case No. 3:99-cv-01193-JFS) (Motion to proceed  
10 IFP denied and case dismissed on August 2, 1999; the court further ordered that Plaintiff  
11 “may file no further civil actions or appeals pursuant to the in forma pauperis provisions  
12 of 28 U.S.C. § 1915 while incarcerated unless he is in ‘imminent danger of serious  
13 physical injury.’”)
- 14 3. *Ellington v. Small, et al.*, (S.D. Cal. Case No. 3:99-cv-01265-JFS) (Motion to proceed  
15 IFP denied and case dismissed on August 11, 1999; the court further ordered that Plaintiff  
16 “may file no further civil actions or appeals pursuant to the in forma pauperis provisions  
17 of 28 U.S.C. § 1915 while incarcerated unless he is in ‘imminent danger of serious  
18 physical injury.’”)

19 Defendants additionally contend that *Ellington v. Garcia, et al.*, refers to an additional  
20 eight cases that were dismissed within the meaning of § 1915(g):

- 21 1. *Ellington v. Lt. Schievelbein*, Civil Case No. 94-812 WBS (JFM) (E.D. Cal. Dec. 8, 1994  
22 & Jan. 23, 1995) (citing Report & Recommendation (R&R) re Motion to Dismiss and  
23 Order Adopting R&R and Dismissing Case)
- 24 2. *Ellington v. Schroeder*, Civil Case No. 94-880 DFL (JFM) (E.D. Cal. July 7, 1995 &  
25 Sept. 1, 1995) (citing R&R re Motion to Dismiss and Order Adopting R&R and  
26 Dismissing Case);
- 27 3. *Ellington v. Muler*, Civil Case No. 94-925 LKK (JFM) (E.D. Cal. Sept. 9, 1994 & Oct.  
28 31, 1994) (citing R&R re Dismissal and Order Adopting R&R and Dismissing Case);

- 1 4. *Ellington v. Henry*, Civil Case No. 94-1326 WBS (JFM) (E.D. Cal. April 12, 1995 & May  
2 24, 1995) (citing R&R Granting Motion to Dismiss & Order Adopting R&R and  
3 Dismissing Case);
- 4 5. *Ellington v. DaVilla*, Civil Case No. 94-6239 ER (AN) (C.D. Cal. July 16, 1997, Sept.  
5 22, 1997) (citing R&R re Dismissal and order Adopting R&R and Judgment Dismissing  
6 Case);
- 7 6. *Ellington v. Short*, Civil Case No. 94-7402 MRP (BQR) (C.D. Cal. July 9, 1995 & July  
8 20, 1995) (citing R&R re Dismissal and Order Adopting R&R and Judgment Dismissing  
9 Case);
- 10 7. *Ellington v. McCarger*, Civil Case No. 95-462 GEB (JFM) (E.D. Cal. March 13, 1996)  
11 (citing Order Granting Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6)); and
- 12 8. *Ellington v. Gomez*, Civil Case no. 96-1494 IEG (JAH) (S.D. Cal. Aug. 28, 1998) (citing  
13 Order Granting Motion to Dismiss).

14 The Court takes judicial notice of the above actions.

15 According to the docket entry for *Ellington v. Lucine*, the action was dismissed for failure  
16 to state a claim on October 13, 1998. This is a dismissal pursuant to 28 U.S.C. § 1915(g).

17 *Ellington v. Garcia* and *Ellington v. Small*, however, do not sufficiently demonstrate  
18 dismissal pursuant to § 1915(g). The language in both orders informed Plaintiff that he “may file  
19 no further civil actions or appeals pursuant to the in forma pauperis provisions of 28 U.S.C. §  
20 1915 while incarcerated unless he is in ‘imminent danger of serious physical injury’”. However,  
21 those orders did so because the trial court in those cases assumed that Plaintiff had already  
22 accrued three strikes, listing the above eight cases. *Ellington v. Garcia* and *Ellington v. Small*  
23 were not dismissed as frivolous, malicious, or for failure to state a claim. Thus, they do not  
24 count as strikes.

25 A review of the docket record for *Ellington v. Gomez* indicates that it was dismissed for  
26 failure to exhaust administrative remedies. There is no mention of a dismissal because the case  
27 was frivolous, malicious, or failed to state a claim. The Court cannot construe such dismissal as  
28 a § 1915(g) strike.

1 The complaint in *Ellington v. McCarger* was initially dismissed for failure to state a  
2 claim. However, Plaintiff was provided leave to file an amended complaint, which plaintiff filed  
3 on March 25, 1996. Plaintiff subsequently filed a notice of voluntary dismissal on December 3,  
4 1996, unopposed by the defendant. The case was then dismissed without prejudice on December  
5 13, 1996, without any mention that it was dismissed as frivolous, malicious, or for failure to state  
6 a claim. This case would not count as a § 1915(g) strike.

7 *Ellington v. Da Villa* was dismissed with prejudice on September 22, 1997. Pursuant to  
8 the docket entry of the judgment, the case was dismissed, to the extent that Plaintiff attempted to  
9 reassert a similar action before the underlying conviction or sentence had been reversed,  
10 expunged, or otherwise declared invalid. The Court construes such dismissal as pursuant to the  
11 favorable termination rule of *Heck v. Humphrey*, 512 U.S. 477 (1994). Such dismissal would  
12 count as a strike as Plaintiff would fail to state a claim. *See, e.g., Romero v. United States, et al.*,  
13 2011 U.S. Dist. LEXIS 39224 (D. Az. Apr. 5, 2011) (finding cases dismissed pursuant to *Heck*  
14 are dismissals for failure to state a claim); *Ransom v. Martinez, et al.*, 2011 U.S. Dist. LEXIS  
15 31370 (E.D. Cal. Mar. 10, 2011) (same); *Bell v. Dikin, et al.*, 2010 U.S. Dist. LEXIS 140221  
16 (E.D. Cal. Jan. 3, 2011) (same); *see also Hamilton, v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996);  
17 *Schafer v. Moore*, 46 F.3d 43, 45 (8th Cir. 1995).

18 A review of the docket records for *Ellington v. Lt. Schievelbein*, *Ellington v. Schroeder*,  
19 *Ellington v. Muler*, *Ellington v. Henry*, and *Ellington v. Short* provides no explanation as to why  
20 those cases were ordered dismissed. The Court ordered supplemental briefing as to whether any  
21 of the above cases were dismissed as malicious, frivolous, or for failure to state a claim. On July  
22 1, 2011, Defendants supplemented their motion by submitting a findings and recommendations  
23 and order for *Ellington v. Lt. Schievelbein*.

24 On December 7, 1994, the magistrate judge assigned to the action of *Ellington v. Lt.*  
25 *Schievelbien* issued a findings and recommendations, recommending that the defendants' motion  
26 to dismiss be granted for Plaintiff's failure to state a claim. Defs.' Suppl., Ex. A., Doc. 89. The  
27 magistrate judge found that Plaintiff could not proceed in his action because he was seeking to  
28 vacate a disciplinary proceeding. The disciplinary proceeding resulted in Plaintiff losing good

1 time credits. The magistrate judge concluded that Plaintiff could not proceed with a § 1983  
2 claim until after he had sought, and received, habeas corpus relief. Plaintiff's remedy in the §  
3 1983 action, if granted, would necessarily result in a change in the duration of his sentence,  
4 which is relief only provided through a writ of habeas corpus, citing *Preiser v. Rodriguez*, 411  
5 U.S. 475 (1973). The magistrate judge was in effect recommending dismissal because of the  
6 favorable termination rule, which this Court counts as a strike. On January 23, 1995, the district  
7 judge assigned to the action adopted the findings and recommendations in full. Defs.' Suppl.,  
8 Ex. B.

9 The Court concludes that *Ellington v. Lt. Schievelbein, et al.* counts as a strike. Plaintiff  
10 has thus accrued three strikes pursuant to 28 U.S.C. § 1915(g)<sup>3</sup>. Because Plaintiff was subject to  
11 the three strikes provision of § 1915(g) since at least October 18, 1998, he may not proceed in  
12 forma pauperis in this action unless, at the time of the filing of this action, he was under  
13 imminent danger of serious physical injury.

#### 14 **B. Imminent Danger Of Serious Physical Injury**

15 Defendants contend that Plaintiff was not under imminent danger of serious physical  
16 injury at the time he filed this action. Defendants contend that Plaintiff's amended complaint  
17 fails to allege any imminent danger of serious physical, and that Plaintiff is no longer  
18 incarcerated at KVSP. Defs.' Mem. P. & A. Support Mot. 6:2-14, Doc. 70. Defendants contend  
19 that Plaintiff's amended complaint against Defendant Akanno was for refusing to provide him  
20 with accommodations for his alleged mobility impairment. Defs.' Reply Pl.'s Opp'n 4:7-18,  
21 Doc. 89. Defendants contend that Plaintiff did not specify when Defendant Akanno's refusal  
22 occurred, and that Plaintiff named numerous other doctors and medical staff who were also  
23 involved in Plaintiff's care regarding his alleged mobility impairment. *Id.* Defendants conclude  
24 that Plaintiff has failed to demonstrate imminent danger as to Defendant Akanno.

25 With respect to Defendant KVSP, Defendants contend that Plaintiff complains of failure  
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28 <sup>3</sup> In his opposition and supplemental opposition, Plaintiff does not dispute that he has  
accrued three or more strikes pursuant to 28 U.S.C. § 1915(g) prior to filing this action.

1 to accommodate his mobility issues which prevented him from accessing showers, utilizing the  
2 sink, engaging in grooming activities, and accessing the recreational and exercise yard within the  
3 segregation unit. *Id.* at 4:19-5:4. Defendants contend that none of these allegations rise to the  
4 level of imminent danger of serious physical injury. *Id.*

5 Plaintiff contends that he was under imminent danger of serious physical injury. Plaintiff  
6 contends that he has clearly alleged that Defendants were deliberately indifferent to his serious  
7 medical needs, and that Defendants failed to accommodate his ADA needs. Pl.’s Opp’n 1-4,  
8 Doc. 79. Plaintiff lists his alleged medical conditions, including heart disease, hypertension, and  
9 degenerative disc disease. *Id.* at 2. Plaintiff complains that Defendants denied him, a  
10 wheelchair, walker, and other ambulatory devices. *Id.*

11 Prisoners qualify for the imminent danger exception based on the alleged conditions at  
12 the time the complaint was filed. *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007).  
13 The imminent danger exception requires that a prisoner allege a danger that is “ready to take  
14 place” or “hanging threateningly over one’s head.” *Id.* at 1056. The Ninth Circuit found that  
15 “requiring a prisoner to ‘allege [] an ongoing danger’ . . . is the most sensible way to interpret the  
16 imminency requirement.” *Id.* (quoting *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998)  
17 (per curiam)). “[A] plaintiff has ‘brought’ an action for the purposes of § 1915(g) when he  
18 submits a complaint and request to proceed in forma pauperis to the court.” *O’Neal v. Price*, 531  
19 F.3d 1146, 1152 (9th Cir. 2008). The proper complaint to examine is not the amended  
20 complaint, but the original complaint, for that is when Plaintiff initiated, or brought, his civil  
21 action. Thus, the Court will examine Plaintiff’s complaint, filed December 9, 2009, for the  
22 purposes of determining whether at the time he initiated this action, he was under imminent  
23 danger of serious physical injury.

24 Plaintiff’s original complaint mentions his degenerative disc disease, heart condition, and  
25 high blood pressure. Pl.’s Compl. 3, 4, Doc. 1. Plaintiff complains that because he was deprived  
26 of ambulatory devices, such as a wheelchair or walker, he is forced to crawl. *Id.* at 6; Ex. A.  
27 However, the Court does not find Plaintiff’s pre-existing medical conditions constitute imminent  
28 danger of serious physical injury. Plaintiff states that he has received medication for his high

1 blood pressure. *Id.* at 3. The denial of ambulatory devices, without more, does not rise to the  
2 level of imminent danger. Plaintiff's allegations of imminent danger of serious physical injury  
3 are speculative. *See Andrews*, 493 F.3d at 1057 n.11 ("assertions of imminent danger of less  
4 obviously injurious practices may be rejected as overly speculative or fanciful").

5 Because the Court will recommend revocation of Plaintiff's in forma pauperis status, the  
6 Court will also recommend that Plaintiff be provided the opportunity to pay the filing fee in full.

7 **IV. Conclusion And Recommendation**

8 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 9 1. Defendants' motion to revoke Plaintiff's in forma pauperis status, filed October  
10 27, 2010, should be GRANTED;
- 11 2. Plaintiff's in forma pauperis status should be REVOKED;
- 12 3. Plaintiff be ordered to pay the full \$350.00 filing fee within fourteen (14) days  
13 from the date of service of the District Judge's order adjudicating these Findings  
14 and Recommendations; and
- 15 4. Failure to timely pay the full filing fee should result in dismissal of this action  
16 without prejudice.

17 These Findings and Recommendations are submitted to the United States District Judge  
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **eighteen (18)**  
19 **days** after being served with these Findings and Recommendations, the parties may file written  
20 objections with the Court. Such a document should be captioned "Objections to Magistrate  
21 Judge's Findings and Recommendations." The parties are advised that failure to file objections  
22 within the specified time may waive the right to appeal the District Court's order. *Martinez v.*  
23 *Ylst*, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

24 IT IS SO ORDERED.

25 **Dated: August 8, 2011**

**/s/ Dennis L. Beck**  
26 UNITED STATES MAGISTRATE JUDGE