



1           **I.       LEGAL STANDARD**

2           The *in forma pauperis* statute, 28 U.S.C. § 1915, distinguishes incarcerated  
3 indigent people from unincarcerated ones. Unlike non-prisoner plaintiffs, who may avoid  
4 prepayment of fees entirely under § 1915(a)(1), section 1915(b) requires an indigent  
5 prisoner to submit a copy of his or her trust account statement, make an initial upfront  
6 payment, and submit subsequent monthly installments until the filing fee is paid in full.  
7  
8 28 U.S.C. § 1915(b)(1)-(2). Section 1915(g) places an additional limitation on the  
9 availability of IFP status for certain inmates, providing that “if the prisoner has, on 3 or  
10 more prior 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  
12 frivolous, malicious, or fails to state a claim upon which relief may be granted,” he will not  
13 be eligible for IFP status unless he “is under imminent danger of serious physical injury.”  
14 28 U.S.C. § 1915(g).

15  
16           The inquiry into whether an inmate is under imminent danger is not an extensive  
17 one and a prisoner’s allegations are not subjected to “overly detailed” factual review by  
18 the Court. Williams v. Paramo, 775 F.3d 1182, 1190 (9th Cir. 2015)(citing Andrews v.  
19 Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007)). The purpose of § 1915(g) is to stem  
20 the tide of lawsuits brought by prisoners, particularly those who had previously filed  
21 meritless claims, not to “spawn[] additional litigation and creat[e] mini-trials over whether  
22 a prisoner has shown an imminent danger.” Williams, 775 F.3d at 1190. Thus, “prisoners  
23 qualify for the exception based on the alleged conditions at the time the complaint was  
24 filed. And qualifying prisoners can file the entire complaint IFP; the exception does not  
25 operate on a claim-by-claim basis or apply to only certain types of relief.” Andrews, 493  
26 F.3d at 1052. “An affidavit or declaration by the prisoner that alleges an ongoing danger  
27  
28

1 at the time of the filing [of the complaint] will ordinarily suffice to end the inquiry and allow  
2 the prisoner to proceed *in forma pauperis*.” Williams, 775 F.3d at 1190.

3 Although the Second Circuit has additionally required a “nexus” between an  
4 inmate’s allegations of imminent danger and his underlying legal claims, Pettus v.  
5 Morgenthau, 554 F.3d 293 (2d Cir.2009), the Ninth Circuit has yet to consider the  
6 question, and has urged caution in creating “any extension of § 1915(g)’s provisions.”  
7 Williams, 775 F.3d at 1189. Nonetheless, the Williams court did seem to suggest that  
8 some connection was required, permitting plaintiff to proceed IFP upon finding her  
9 “allegations [of imminent danger were] clearly related to her initial complaint.” 775 F.3d  
10 at 1190.

## 12 II. ANALYSIS

### 13 A. Plaintiff has three strikes.

14 Plaintiff is a frequent filer, and the Court previously found that Plaintiff had  
15 accrued three strikes. (ECF No. 4, at 2 n.1.) Although Plaintiff disputes this, upon  
16 reexamination, the Court confirms that Plaintiff has in fact had at least three strikes.<sup>1</sup>  
17 Thus, under 28 U.S.C. § 1915(g), Plaintiff would not be entitled to IFP status unless he  
18 was “under imminent danger of serious physical injury” at the time of the filing of his  
19 complaint.  
20

### 21 B. Plaintiff made an adequate showing of imminent danger in his 22 original complaint.

23 The Court found that Plaintiff had made an adequate showing of imminent danger  
24

25 <sup>1</sup> The Court takes judicial notice of the following cases: McClellan v. Mountain, 1:09-cv-256-LJO-GSA  
26 (E.D. Cal.) (dismissed for failure to state a claim on Mar. 5, 2009); McClellan v. Fink, 1:08-cv-1326-WMW  
27 (E.D. Cal.) (dismissed for failure to state a claim on April 1, 2009); McClellan v. Carillo, 1:97-cv-05213-  
28 AWI-SMS (E.D. Cal.) (dismissed Mar. 28, 1998 for failure to state a claim); and McClellan v. Haviland,  
1:07-cv-1607-OWW-SMS (E.D. Cal.) (dismissed for failure to state a claim on Oct. 19, 2009). A strike  
accrues as soon the trial court dismisses on statutorily enumerated grounds, even if the dismissal is the  
subject of an appeal. Coleman v. Tollefson, 135 S.Ct. 1759, at \*4 (2015).

1 when it originally allowed him to proceed IFP. (ECF No. 4.) In his first complaint, Plaintiff  
2 alleged that he faced an imminent danger of contracting a communicable disease  
3 because he was placed in a crowded, dirty jail with poor ventilation and surrounded by  
4 diseased inmates who engaged in unhygienic practices, such as using his toothbrush  
5 and razor. (ECF No. 1, at 21-26) The Court concluded, under the standard set forth in  
6 Andrews, that these allegations stated “a plausible claim of ongoing harm sufficient to  
7 satisfy the imminent danger exception to § 1915(g).” (ECF No. 4, at 3 (citing Andrews,  
8 493 F.3d at 1057)). Though it has reconsidered the issue in light of Defendants’  
9 argument that Plaintiff has not shown a nexus between the danger he faced and the  
10 claims on which he sought relief, the Court again reaches the same conclusion.

12 As mentioned above, the Ninth Circuit has not addressed whether there must be  
13 a “nexus” between a prisoner’s allegations of imminent danger and the causes of action  
14 in his complaint, much less provided guidelines for identifying such a nexus. The Sixth  
15 Circuit has also expressed hesitation about imposing a nexus requirement on § 1915(g).  
16 Vandiver v. Prison Health Servs., Inc., 727 F.3d 580, 588 (6th Cir. 2013). Nevertheless,  
17 multiple unpublished opinions from district courts in California have applied the “nexus”  
18 test outlined in Pettus, which allowed three strikers to proceed IFP only if (1) the alleged  
19 imminent danger was “fairly traceable” to unlawful conduct asserted in the complaint;  
20 and (2) a favorable judicial outcome would redress that danger. 554 F.3d at 298-299;  
21 see Chappell v. Fleming, No. 2:12-CV-0234, 2013 WL 2156575, at \*5 (E.D. Cal. May 17,  
22 2013), findings and recommendations adopted by No. 2:12-CV-0234, 2013 WL 3872794  
23 (E.D. Cal. July 25, 2013); Williams v. Brennan, No. 2:12-CV-2155, 2013 WL 394871, at  
24 \*1-2 (E.D. Cal. Jan. 30, 2013), findings and recommendations adopted by No. 2:12-CV-  
25 2155, 2013 WL 1192770 (E.D. Cal. Mar. 22, 2013); Johnson v. Sonoma Cnty. Main  
26  
27  
28

1 Adult Det. Facility, No. 14-CV-05397, 2015 WL 1744281, at \*2 (N.D. Cal. Apr. 15, 2015).

2 Here, the Court need not decide whether Plaintiff must in fact have shown a  
3 nexus between his allegations of danger and the legal claims in his first complaint,  
4 because his allegations meet the low bar set in Pettus. Plaintiff's original complaint  
5 alleged that his detention in the Kern County Jail was illegal and the result of intentional  
6 and malicious conduct of the original defendants. (ECF No. 1, at 4, 9.) He alleged that  
7 the danger he faced from jail conditions was a result of being incarcerated illegally: "[t]he  
8 false arrest and illegal custody are directly linked with being exposed to the risk of  
9 contracting HIV, H1N1, hepatitis C, lice, etc." (ECF No. 1, at 22)(underlining in original).

10 The conditions giving rise to the imminent danger (exposure to diseased inmates and  
11 overcrowded, unsanitary conditions) were thus "fairly traceable" to his alleged  
12 imprisonment without probable cause. Moreover, a judicial determination that Plaintiff  
13 was in fact illegally detained would "redress" the danger, because it would result in  
14 Plaintiff's release from custody. Therefore, even if a nexus were required, the Court  
15 finds that Plaintiff's claims of imminent danger would adequately allege one.

16 The subsequent dismissal of Plaintiff's illegal detention and retaliation claims does  
17 not affect this conclusion. The danger a plaintiff faces for 1915(g) purposes is assessed  
18 at the time of the filing of the first complaint. Williams, 775 F.3d at 1188 (citing Andrews,  
19 493 F.3d at 1053). The substantive screening of an inmate's claims, meanwhile, is  
20 conducted separately and only after review of his entitlement to IFP status. See 28  
21 U.S.C. §§ 1915(e)(2)(B)(i), 1915A(b)(1); Andrews, 493 F.3d at 1055; see also Ciarpaglini  
22 v. Saini, 352 F.3d 328, 331 (7th Cir. 2003)(finding that although Plaintiff met "imminent  
23 danger" requirement, dismissal was nonetheless appropriate because he had failed to  
24 state a claim). Moreover, logically speaking, a determination that a prisoner does not  
25  
26  
27  
28

1 have a valid constitutional claim is not equivalent to a determination that he is not in  
2 imminent danger: thus, while Plaintiff may not have been incarcerated illegally, he may  
3 nonetheless have faced imminent danger from bird flu or hepatitis.

4 Accordingly, the Court will recommend that Defendants' motion to revoke  
5 Plaintiff's IFP status be denied.

6 **III. CONCLUSION & RECOMMENDATION**

7  
8 Plaintiff adequately alleged an imminent danger in his original complaint, so his  
9 IFP status should not be revoked. The Court HEREBY RECOMMENDS that  
10 Defendants' motion to revoke Plaintiff's IFP status (ECF No. 83) be DENIED.

11 These Findings and Recommendations are submitted to the United States District  
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
13 **fourteen (14) days** after being served with these Findings and Recommendations, any  
14 party may file written objections with the Court and serve a copy on all parties. Such a  
15 document should be captioned "Objections to Magistrate Judge's Findings and  
16 Recommendations." Any reply to the objections shall be served and filed within fourteen  
17 (14) days after service of the objections. The parties are advised that failure to file  
18 objections within the specified time may result in the waiver of rights on appeal.

19 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
20 F.2d 1391, 1394 (9th Cir. 1991)).  
21  
22

23  
24 IT IS SO ORDERED.

25 Dated: July 10, 2015

26 /s/ Michael J. Seng  
27 UNITED STATES MAGISTRATE JUDGE  
28