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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

KEVIN D. BRYANT,  
Plaintiff,  
v.  
R. ROMERO, et al.,  
Defendants.

Case No. 1:12-cv-02074 LJO DLB PC  
FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DEFENDANT  
WADDLE’S AND CASTELLANOS’  
MOTION TO REVOKE IN FORMA  
PAUPERIS STATUS BE DENIED  
[ECF No. 29]

\_\_\_\_\_/ OBJECTION DEADLINE: THIRTY DAYS

Plaintiff Kevin D. Bryant (“Plaintiff”) is a California state prisoner proceeding pro se in this civil action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on December 26, 2012. On November 1, 2013, the Court dismissed the complaint with leave to file an amended complaint. On December 2, 2013, Plaintiff filed a First Amended Complaint (“FAC”). On December 2, 2014, the Court screened the FAC and determined that service was appropriate on Defendants Waddle and Castellanos. On January 13, 2015, the Court directed the U.S. Marshal Service to serve the FAC on Defendants Waddle and Castellanos. On March 25, 2015, Defendants Waddle and Castellanos filed an answer to the FAC.

On April 8, 2015, Defendants Waddle and Castellanos filed a motion to revoke Plaintiff’s in forma pauperis status because Plaintiff has had at least three prior federal actions dismissed on the grounds that they were frivolous, malicious, or failed to state a claim. Plaintiff filed an opposition on May 29, 2015. Defendants filed a reply to the opposition on June 4, 2015.

1 **DISCUSSION**

2 28 U.S.C. § 1915 governs proceedings in forma pauperis. Section 1915(g) provides that

3 [i]n no event shall a prisoner bring a civil action . . . under this section if the  
4 prisoner has, on 3 or more prior occasions, while incarcerated or detained in any  
5 facility, brought an action or appeal in a court of the United States that was  
6 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.

7 The language of section 1915(g) is clear: a dismissal on the ground that an action is frivolous,  
8 malicious, or fails to state a claim counts as a strike.

9 In this case, Defendants contend that Plaintiff has filed numerous lawsuits, and at least  
10 three have been dismissed as frivolous, malicious, or failing to state a claim. Defendants cite the  
11 following cases: Bryant v. Pacheco, et al., Case No. 5:09-cv-1306 (C.D. Cal. 2009); Bryant v.  
12 Briones-Colman, et al., Case No. 5:09-cv-1460 (C.D. Cal. 2009); and Bryant v. Hanks, et al., Case  
13 No. 2:10-cv-3199 (C.D. Cal. 2010). Plaintiff does not dispute that he is subject to § 1915(g) for  
14 having sustained at least three strikes. He contends, however, that he was under imminent danger  
15 of serious physical injury at the time he filed his complaint, and therefore he should be entitled to  
16 in forma pauperis status.

17 As noted above, the PLRA provides that a prisoner with three strikes cannot use IFP status  
18 to “bring a civil action . . . unless the prisoner is under imminent danger of serious physical  
19 injury.” 28 U.S.C. § 1915(g). “[T]he availability of the exception turns on the conditions a  
20 prisoner faced at the time the complaint was filed, not at some earlier or later time.” Andrews v.  
21 Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007). “[T]he exception applies if the complaint makes  
22 a plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the  
23 time of filing.” Id. at 1055. Plaintiff must allege an ongoing danger in order to meet the  
24 imminency requirement. Id. at 1056. “[A] prisoner who alleges that prison officials continue with  
25 a practice that has injured him or others similarly situated in the past will satisfy the ‘ongoing  
26 danger’ standard and meet the imminence prong of the three-strikes exception.” Id. at 1056-57.  
27 Allegations that are overly speculative or fanciful may be rejected. Id. at 1057 n.11.

28 In his complaint, Plaintiff alleges that at the time of filing he was under constant threats of

1 violence and death from Defendants, and other correctional officers which he refers to as the  
2 “green wall gang of correctional officers.” He contends that these threats were a result of  
3 complaints he had filed on these officers. Plaintiff states he had previously been assaulted on  
4 three occasions by these officers. He states he was assaulted on September 3, 2011, by  
5 Correctional Officer Mercado when he slammed Plaintiff face first into a steel door while  
6 handcuffed. He states that on November 9, 2011, he was assaulted again by an Ad Seg officer  
7 when the officer punched him in the mouth while handcuffed and busted his lip and cracked his  
8 teeth. He states that on January 29, 2013, he was assaulted by Correctional Officer Truitt who hit  
9 Plaintiff’s leg with a weapon and caused the leg to become infected. Plaintiff claims these assaults  
10 were all planned and directed by Defendants as a result of his complaints. Further, Plaintiff states  
11 he is aware of three previous separate attempts to set him up to be stabbed and killed. Plaintiff  
12 states that at the time he filed his complaint in December of 2012, Defendant Waddle was  
13 planning to have him murdered by other inmates. Plaintiff states that other inmates came to him  
14 and informed him that Defendants had asked them to assault him in an area where he could then  
15 be shot by staff.

16 The Court finds that Plaintiff has sufficiently set forth plausible allegations of threats of  
17 serious harm in his complaint to show an “ongoing danger.” Further, Plaintiff alleges that he has  
18 suffered serious injury due to Defendants having him attacked by other officers. The Court finds  
19 that Plaintiff has met “the imminence prong of the three strikes exception.” Andrews, 493 F.3d at  
20 1056-57.

### 21 **RECOMMENDATION**

22 Based on the foregoing, the Court finds that Plaintiff has set forth sufficient allegations in  
23 the complaint to meet the imminent danger prong of the three strikes exception. Accordingly, it is  
24 **HEREBY RECOMMENDED** that Defendant’s motion to revoke Plaintiff’s in forma pauperis  
25 status be **DENIED**.

26 These Findings and Recommendations will be submitted to the United States District  
27 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty  
28 (30) days after being served with these Findings and Recommendations, the parties may file

1 written objections with the Court. The document should be captioned “Objections to Magistrate  
2 Judge’s Findings and Recommendations.” The parties are advised that failure to file objections  
3 within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772  
4 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

5  
6 IT IS SO ORDERED.

7 Dated: June 9, 2015

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE

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