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

MAURICE P. OLIVIER,  
  
Plaintiff,  
  
v.  
  
P.D. BRAZELTON, et al.,  
  
Defendants.

**1:14-cv-00536-AWI-BAM**  
  
**FINDINGS AND RECOMMENDATIONS  
REGARDING DEFENDANT’S MOTION  
FOR AN ORDER REVOKING  
PLAINTIFF’S *IN FORMA PAUPERIS*  
STATUS**  
  
(Doc. 26)  
  
FOURTEEN-DAY OBJECTION DEADLINE

**INTRODUCTION**

Plaintiff is a prisoner proceeding *pro se* in a civil rights action pursuant to 42 U.S.C § 1983. The action, filed on April 16, 2014, proceeds on Plaintiff’s excessive force claim against Defendant Arredondo (erroneously sued as Arrendondo). (Doc. 22.) Plaintiff’s claim arises from allegations that on May 1, 2013, Defendant Arredondo grabbed Plaintiff by the back of his neck and slammed him face first against the wall in violation of the Eighth Amendment. (Doc. 20, p. 9.)

Plaintiff was granted leave to proceed *in forma pauperis* on May 15, 2014. (Doc. 10.) On May 19, 2015, Defendant filed a motion to revoke Plaintiff’s *in forma pauperis* (“IFP”) status on the ground that he had already accrued three strikes and his pleadings did not satisfy the “imminent danger” exception outlined in 28 U.S.C § 1915(g). (Doc. 26.) Plaintiff opposed the

1 motion on June 18, 2015. (Doc. 29.) Defendant replied on June 23, 2015. (Doc. 30.) The motion  
2 is deemed submitted pursuant to Local Rule 230(l).

### 3 DISCUSSION

#### 4 **A. Legal Standard**

5 The Prison Litigation Reform Act (“PLRA”) provides a limitation on prisoners filing suit  
6 through its rule, nicknamed the “three-strikes rule,” making *in forma pauperis* (“IFP”) status  
7 unavailable to prisoners who have “on 3 or more prior occasions, while incarcerated or detained  
8 in any facility, brought an action or appeal in a court of the United States that was dismissed on  
9 the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be  
10 granted, unless the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. §  
11 1915(g); *see also Andrews v. King*, 398 F.3d 1113, 1116 (9th Cir. 2005).

12 In challenging a prisoner’s IFP status, the initial production burden rests with the  
13 defendant to produce documentary evidence that allows the district court to conclude that the  
14 prisoner has filed at least three prior actions that were dismissed because they were frivolous,  
15 malicious or failed to state a claim. *Id.* at 1120. Once defendant has met this initial burden, “the  
16 burden then shifts to the prisoner, who must attempt to rebut the defendant[’s] showing by  
17 explaining why a prior dismissal should not count as a strike.” *Id.*

#### 18 **B. Discussion**

19 In moving to revoke Plaintiff’s IFP status, Defendant demonstrates that Plaintiff has  
20 suffered at least three dismissals that qualify as strikes under the terms of section 1915(g).  
21 Pursuant to Defendant’s request, the Court takes judicial notice of Plaintiff’s court records in  
22 other actions. *United States v. Howard*, 381 F.3d 873, 876 n.1 (9th Cir. 2004) (court may take  
23 judicial notice of court records in other cases). Based on these court records, Plaintiff accrued a  
24 strike on January 16, 1996, when the district court dismissed *Olivier v. Freeh*, 2:96-cv-0052-RTR  
25 (E.D. Wis.), as frivolous. (Def. Req. for Judicial Notice, Ex. 2.) Plaintiff accrued a second strike  
26 on May 9, 2007, when the district court dismissed *Olivier v. City of Los Angeles*, 07-cv-3019-JWJ  
27 (C.D. Cal.), as legally and/or factually patently frivolous. (Def. Req. for Judicial Notice, Ex. 4.)  
28 Plaintiff accrued a third strike on June 7, 2007, when the district court dismissed *Olivier v.*

1 County of Los Angeles, 07-cv-2961-JFW (JWJ) (C.D. Cal.), as frivolous. (Def. Req. for Judicial  
2 Notice Ex. 3.)<sup>1</sup>

3 As Defendant met his initial burden, the burden of persuasion shifts to Plaintiff to explain  
4 why these prior dismissals should not count as strikes. *Andrews v. King*, 398 F.3d at 1120. Here,  
5 Plaintiff does not meet his burden as he does not raise any challenge to Defendant’s assertion that  
6 he has “three-strikes.” (Doc. 29.) Rather, Plaintiff contends that his complaint contains  
7 allegations of “being in imminent danger of serious physical injury.” (*Id.* at p. 1.)

### 8 C. Imminent Danger Exception

9 As noted above, an exception to the PLRA’s “three-strikes” rule allows for filing without  
10 prepaying the filing fee when “the prisoner is under imminent danger of serious physical injury.”  
11 28 U.S.C. § 1915(g). The determination of whether Plaintiff was under imminent danger of  
12 serious physical injury is made based on the conditions at the time the complaint is filed. Thus, it  
13 is the circumstances at the time of the filing of the complaint that matter for purposes of the  
14 imminent danger exception. *Andrews v. Cervantes*, 493 F.3d 1047, 1053-55 (9th Cir. 2007). The  
15 “common definition of ‘imminent’ . . . does not refer only to events that are already taking place,  
16 but to those events ‘ready to take place’ or ‘hanging threateningly over one’s head.’” *Id.* at 1056.  
17 Thus, there must be an “ongoing danger” in order for the imminent-danger exception to apply. *Id.*  
18 at 1056-57 (finding a prisoner’s allegations met the “imminent danger” requirement when he  
19 demonstrated that the prison’s policies created an ongoing pattern of placing him in close  
20 proximity to inmates with a history of causing serious injuries); *see also Williams v. Paramo*, 775  
21 F.3d 1182, 1190 (9th Cir. 2015) (finding a prisoner’s allegations of ongoing threats to her safety  
22 by other inmates due to prison officials’ conduct met the “imminent danger” requirement).

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25 <sup>1</sup> The Court also takes judicial notice of the following actions: *Olivier v. Klee*, 13-17129 (9th Cir. 2014) (granting  
26 motion to revoke IFP status based on finding Plaintiff had three or more prior actions or appeals dismissed as  
27 frivolous, malicious or for failure to state a claim); *Olivier v. Cate*, 14-15467 (9th Cir. 2014) (denying application to  
28 proceed IFP based on finding that appeal was frivolous); *Olivier v. Dunstan*, C-13-2954-PJH-PR (N.D. Cal. 2014)  
(following revocation of IFP status, court dismissed action after Plaintiff failed to pay filing fee); *Olivier v. Gonzales*,  
14-16658 (9th Cir. 2014) (denying application to proceed IFP because district court correctly determined that  
plaintiff had three or more prior actions or appeals dismissed as frivolous, malicious or for failure to state a claim).  
(Def. Req. for Judicial Notice, Exs. 1; 5- 6; 8.)

1 To demonstrate imminent danger, Plaintiff alleges in his complaint that he was subjected  
2 to prison overcrowding, double cell practices, and correctional officers inciting violence, which  
3 posed a danger to his health and safety. Plaintiff references alleged assaults by other inmates  
4 taking place in May and August of 2013, along with an alleged use of excessive force by  
5 Defendant Arredondo in May 2013. (Doc. 1, pp. 5-7, 9-10.) Plaintiff also alleges inadequate  
6 medical treatment and interference with specialized pain medication. In so doing, Plaintiff  
7 references medical treatment in October, November and December 2012, along with treatment in  
8 February and May 2013. (Doc. 1, pp. 14, 16, 18.)

9 In his opposition to Defendant's motion, Plaintiff contends that because of prison  
10 overcrowding and double celling practices he has been previously assaulted by other inmates and  
11 therefore has always been, and always will be, in imminent danger of serious physical injury in  
12 violation of the Eighth Amendment so long as he is incarcerated. Plaintiff references an assault  
13 by another inmate in January 2015, which took place nine months after the filing of this action.  
14 (Doc. 29, p. 6.)

15 The Court finds that Plaintiff has not sufficiently alleged an ongoing danger at the time he  
16 filed his complaint in April 2014. Plaintiff's allegations of prior assaults concerned incidents  
17 taking place in 2013, well before he initiated this action. Indeed, Plaintiff filed this action almost  
18 one year after the date of the alleged incident involving Defendant Arredondo, and approximately  
19 eight months after the last purported attack. *See, e.g., Ashley v. Dilworth*, 147 F.3d 715, 717 (8th  
20 Cir. 1998) ("In short, because Ashley has properly alleged an ongoing danger, and because his  
21 complaint was filed very shortly after the last attack, we conclude that Ashley meets the imminent  
22 danger exception in § 1915(g)."). Further, Plaintiff's allegations regarding prison overcrowding  
23 and double celling necessarily apply to all prisoners and are too generalized to articulate an  
24 imminent threat to his safety. Plaintiff also does not allege that any claimed prior assaults by  
25 fellow inmates occurred because of a practice by Defendant Arredondo of exercising excessive  
26 force, nor does he allege that such a practice is ongoing. *See Andrews v. Cervantes*, 493 F.3d at  
27 1056-57 ("[A] prisoner who alleges that prison officials continue with a practice that has injured  
28

1 him or others similarly situated in the past will satisfy the ‘ongoing danger’ standard and meet the  
2 imminence prong of the three-strikes exception.”).

3 Additionally, Plaintiff appears to have abandoned any assertion that his lack of  
4 appropriate medical treatment and certain medications constituted an ongoing danger. However,  
5 even if the Court considered such allegations, they do not demonstrate imminent danger at the  
6 time Plaintiff initiated this action. As noted, the medical treatment challenged by Plaintiff  
7 occurred in 2012 and 2013, which belies any argument that he was under imminent danger of any  
8 serious physical injury in April 2014. *See Andrews v. Cervantes*, 493 F.3d at 1055 (“Instead, the  
9 exception applies if the complaint makes a plausible allegation that the prisoner faced ‘imminent  
10 danger of serious physical injury’ at the time of filing.”).

11 For these reasons, the Court finds that Plaintiff was not in imminent danger of serious  
12 physical injury at the time he filed his complaint and recommends that his IFP status be revoked.  
13 When IFP status is revoked pursuant to § 1915(g), the district court may dismiss the action  
14 without prejudice to re-filing with payment of fees at the time the action is re-filed. *See Tierney v.*  
15 *Kupers*, 128 F.3d 1310, 1311 (9th Cir. 1997) (holding that under § 1915(g), the case was properly  
16 dismissed without prejudice to re-filing upon payment of the filing fee).

17 As the Court finds that Plaintiff cannot proceed IFP, the Court need not address  
18 Defendant’s alternative request to declare Plaintiff a vexatious litigant and require Plaintiff to post  
19 security.

### 20 CONCLUSION AND RECOMMENDATION

21 Based on the above, IT IS HEREBY RECOMMENDED that:

- 22 1. Defendant’s May 19, 2015, motion to revoke plaintiff’s IFP status (Doc. 26) be granted;
- 23 2. Plaintiff’s IFP status be revoked; and
- 24 3. This action be dismissed without prejudice to Plaintiff’s re-filing it with payment of the  
25 filing fee.

26 These findings and recommendations are submitted to the United States District Judge  
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)**  
28 **days** after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge's Findings and Recommendations.” Any reply to the objections  
3 shall be served and filed within fourteen (14) days after service of the objections. The parties are  
4 advised that failure to file objections within the specified time may result in the waiver of the  
5 “right to challenge the magistrate’s factual findings on appeal. *Wilkerson v. Wheeler*, 772 F.3d  
6 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: August 17, 2015

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE