

1 screening device which precludes prisoners with three or more “strikes” from proceeding in forma
2 pauperis unless they are under imminent danger of serious physical injury. Andrews, 493 F.3d at
3 1050. The statute provides that “[i]n no event shall a prisoner bring a civil action ... under this section
4 if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought
5 an action or appeal in a court of the United States that was dismissed on the grounds that it is
6 frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is
7 under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

8 III.

9 DISCUSSION

10 There is no dispute that Plaintiff is subject to section 1915(g).¹ The issue is whether Plaintiff
11 has met the imminent danger exception, which requires Plaintiff to show that he is under (1) imminent
12 danger of (2) serious physical injury and which turns on the conditions he faced at the time he filed
13 suit on March 3, 2016. Andrews, 493 F.3d at 1053-1056. Conditions which posed imminent danger
14 to Plaintiff at some earlier time are immaterial, as are any subsequent conditions. Id. at 1053. While
15 the injury is merely procedural rather than a merits-based review of the claims, the allegations of
16 imminent danger must still be plausible. Id. at 1055.

17 The Court has reviewed Plaintiff’s complaint and finds that Plaintiff does not meet the
18 imminent danger exception. Andrews, 493 F.3d at 1053. Plaintiff’s allegations stem from events of
19 which Plaintiff has previously relied on in other actions to avoid the three-strikes bar.² As in the prior
20 action, Plaintiff contends that he participated in an investigation relating to misconduct by a
21 correctional officer and was thereafter subjected to retaliation.

22 Plaintiff presently claims he is subject to imminent danger of serious physical injury relating to
23 actions dating back to January 7, 2014, in failing to protect him. Plaintiff contends that he was
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25 ¹ The Court takes judicial notice of case numbers 3:90-cv-20256-MHP Manago v. Myers (N.D. Cal.) (dismissed Oct. 9,
26 1991 for failure to state a claim); 3:94-cv-01528-MHP Manago v. Marshall (N.D. Cal.) (dismissed Mar. 25, 1998 for
27 failure to state a claim), *affirmed on appeal*, 10 Fed.Appx 540 (9th Cir. 2001); and 1:99-cv-05525-REC-SMS Manago v.
Gulare (E.D. Cal.) (dismissed Mar. 7, 2000 for failure to state a claim).

28 ² See, e.g., Manago v. Cate, et al., case numbers 2:13-cv-00081 GEB AC P; Manago v. Cate, 2:11-cv-2891 AC P; Manago
v. Holland, et al., 13-cv-01523 AWI GSA PC, Manago v. Walsh, et al., 13-cv-01848 AWI BAM PC

1 improperly classified as a member of the Black Guerrilla Family prison gang and was improperly
2 subjected to double cell occupancy.³ Plaintiff also claims he has been labeled by certain officers as a
3 “snitch.” Plaintiff further contends that certain legal property was confiscated and he has been denied
4 adequate access to legal property in storage. Plaintiff also vaguely alludes to the denial of mental
5 health treatment, but provides no factual support for such claim. All of these events took place in
6 2014.

7 While a threat to Plaintiff’s physical safety is certainly a serious allegation, the complaint does
8 not demonstrate that Plaintiff is presently in imminent danger of serious physical injury. Plaintiff’s
9 allegations involve speculative claims of threats to his physical safety based on his fear that at some
10 future time he will be subjected to harm by a correctional officer or another inmate. Indeed, Plaintiff
11 alleges that certain defendants “acted with deliberate indifference to the known and obvious posed
12 [sic] by plaintiff, if they ever placed a documented enemy in plaintiff’s cell.” (ECF No. 1 at ¶ 33.)
13 Plaintiff’s complaint demonstrates that he is and was housed in the security housing unit and any claim
14 that he will be housed with a rival gang member is speculative, at best. Such speculative allegations
15 fall short of establishing “imminent danger of serious physical injury.” Andrews, 493 F.3d at 1053
16 (“the availability of the exception turns on the conditions a prisoner faced at the time the complaint
17 was filed, not at some earlier or later time.”)

18 In sum, Plaintiff’s claims of failure to protect are vague and conclusory and devoid of
19 sufficient factual support. There are no allegations that Plaintiff is presently in imminent danger of
20 physical harm, and Plaintiff makes no request for relief from imminent danger and requests only
21 monetary damages. Accordingly, Plaintiff is ineligible to proceed in forma pauperis in this action.

22 IV.

23 RECOMMENDATIONS

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

- 25 1. Plaintiff’s application to proceed in forma pauperis be DENIED; and

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28 ³ Plaintiff has previously made similar allegations in Manago v. Cate, et al., Case No. 2:13-cv-00081 GEB AC P (denial of
in forma pauperis status and dismissed for failure to pay the filing fee on May 1, 2013.)

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2. Plaintiff be required to pay the \$400.00 filing fee within thirty days of service of the Court's order adopting these Findings and Recommendations.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: March 8, 2016


UNITED STATES MAGISTRATE JUDGE