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3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF CALIFORNIA  
5

6 SONNY BARGER II,  
7 aka GARY FRANCIS FISHER,  
8 aka GARY DALE BARGER,

9 Plaintiff,

10 v.

11 DIRECTOR OF OPS OF CDCR,  
12 et al.,

13 Defendants.  
14

1:17-cv-00438-DAD-EPG (PC)

FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT PLAINTIFF'S  
APPLICATION TO PROCEED IN  
FORMA PAUPERIS PURSUANT TO 28  
U.S.C. § 1915(g) BE DENIED AND THAT  
THIS ACTION BE DISMISSED,  
WITHOUT PREJUDICE TO PLAINTIFF  
REFILING THE ACTION WITH  
SUBMISSION OF THE FULL \$400.00  
FILING FEE  
(ECF NOS. 1 & 2)

OBJECTIONS, IF ANY, DUE WITHIN  
TWENTY-ONE DAYS

15 **I. BACKGROUND**

16 Sonny Barger II, aka Gary Francis Fisher, aka Gary Dale Barger (“Plaintiff”) is a state  
17 prisoner proceeding *pro se* with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff  
18 filed the complaint commencing this action on February 22, 2017, in the United States District  
19 Court for the Northern District of California. (ECF No. 1). On that same day, Plaintiff filed an  
20 application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. (ECF No. 2). On  
21 March 22, 2017, this case was transferred to the Fresno Division of the Eastern District of  
22 California. (ECF Nos. 3 & 4).

23 **II. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915(g)**

24 28 U.S.C. § 1915 governs proceedings *in forma pauperis*. Section 1915(g) provides  
25 that “[i]n no event shall a prisoner bring a civil action . . . under this section if the prisoner has,  
26 on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action  
27 or appeal in a court of the United States that was dismissed on the grounds that it is frivolous,  
28 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is

1 under imminent danger of serious physical injury.”

2 **III. ANALYSIS**

3 A review of the cases filed by Plaintiff reveals that Plaintiff is subject to 28 U.S.C. §  
4 1915(g) and is precluded from proceeding *in forma pauperis* unless Plaintiff was, at the time  
5 the complaint was filed, under imminent danger of serious physical injury. Court records  
6 reflect that on at least three prior occasions, Plaintiff has brought actions while incarcerated that  
7 were dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be  
8 granted: (1) Barger v. FBI, 1:13-cv-00535-DLB (E.D. Cal.) (dismissed November 21, 2013, for  
9 failure to state a claim (ECF No. 10)); (2) Fisher v. FBI, 1:13-CV-00414-LJO-SAB (E.D. Cal.)  
10 (dismissed July 26, 2013, for failure to state a claim (ECF Nos. 17 & 19)); and (3) Fisher v.  
11 Bivens, 2:14-cv-01439-UA-MAN (C.D. Cal.) (dismissed March 6, 2014, for failure to state a  
12 claim (ECF No. 2)).

13 The availability of the imminent danger exception turns on the conditions a prisoner  
14 faced at the time the complaint was filed, not at some earlier or later time. Andrews v.  
15 Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007). “[A]ssertions of imminent danger of less  
16 obviously injurious practices may be rejected as overly speculative or fanciful.” Id. at 1057  
17 n.11. “Imminent danger of serious physical injury must be a real, present threat, not merely  
18 speculative or hypothetical.” Blackman v. Mjening, No. 116CV01421LJOGSAPC, 2016 WL  
19 5815905, at \*1 (E.D. Cal. Oct. 4, 2016). To meet his burden under § 1915(g), an inmate must  
20 provide “specific fact allegations of ongoing serious physical injury, or a pattern of misconduct  
21 evidencing the likelihood of imminent serious physical injury.” Martin v. Shelton, 319 F.3d  
22 1048, 1050 (8th Cir. 2003). “[V]ague and utterly conclusory assertions” of harm are  
23 insufficient. White v. Colorado, 157 F.3d 1226, 1231–32 (10th Cir. 1998). That is, the  
24 “imminent danger” exception is available “for genuine emergencies,” where “time is pressing”  
25 and “a threat . . . is real and proximate....” Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir.  
26 2002).

27 The Court has reviewed Plaintiff’s complaint for this action and finds that Plaintiff does  
28 not meet the imminent danger exception. Plaintiff names as defendants the Director of

1 Operations at the California Department of Corrections and Rehabilitation, Kern County  
2 Superior Court, Ventura County Superior Court, and Kings County Superior Court. Plaintiff  
3 alleges that his Fourteenth Amendment due process rights were violated, apparently in relation  
4 to trials which have already occurred. There is no indication that Plaintiff was in any danger  
5 whatsoever at the time he filed the complaint.

6 **IV. CONCLUSION AND RECOMMENDATIONS**

7 The Court finds that under 28 U.S.C. § 1915(g) Plaintiff may not proceed *in forma*  
8 *pauperis* in this action.

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

- 10 1. Pursuant to 28 U.S.C. § 1915(g), Plaintiff's application to proceed in forma  
11 pauperis in this action be DENIED;
- 12 2. This action be DISMISSED, without prejudice to Plaintiff refile the action  
13 with the submission of the full \$400.00 filing fee; and
- 14 3. The Clerk of Court be directed to CLOSE this case.

15 These Findings and Recommendations will be submitted to the United States District  
16 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
17 twenty-one (21) days after being served with these Findings and Recommendations, Plaintiff  
18 may file written objections with the Court. The document should be captioned "Objections to  
19 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file  
20 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.  
21 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394  
22 (9th Cir. 1991)).

23  
24 IT IS SO ORDERED.

25 Dated: March 30, 2017

26 /s/ Eric P. Grogan  
27 UNITED STATES MAGISTRATE JUDGE  
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