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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KASEY F. HOFFMAN,

 Plaintiff,

 v.

PULIDO, et al.,

 Defendants.

Case No. 1:18-cv-00209-SKO (PC)

**ORDER TO SHOW CAUSE WHY IN
FORMA PAUPERIS STATUS SHOULD
NOT DENIED**

(Docs. 1, 2)

TWENTY-ONE (21) DAY DEADLINE

Plaintiff, Kasey F. Hoffman, is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint in this action on February 9, 2018. On that same date, Plaintiff filed an application to proceed *in forma pauperis*, which is before the Court. (Doc. 2.)

A. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915

28 U.S.C. § 1915 governs proceedings *in forma pauperis*. “In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was 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.” 28 U.S.C. § 1915(g).

B. DISCUSSION

The Court may take judicial notice of court records. *United States v. Howard*, 381 F.3d 873, 876 n.1 (9th Cir. 2004). Here, judicial notice is taken of three of Plaintiff’s prior lawsuits:

1 (1) *Hoffmann v. Jones*, 2:15-cv-01735-MCE-KJN, dismissed as duplicative¹ of 2:15-cv-1729
2 CKD P on September 28, 2015; (2) *Hoffmann v. California Correctional Health Care Services et*
3 *al.*, 2:16-cv-01691-MCE-AC, dismissed for failure to state a cognizable claim on April 19, 2017;
4 and (3) *Hoffmann v. Growden et al.*, 2:15-cv-01431-EFB, dismissed for failure to state a
5 cognizable claim on May 4, 2017.

6 The Court notes that the Magistrate Judge dismissed *Hoffmann v. Growden et al.*, 2:15-cv-
7 01431-EFB, based solely on Plaintiff's consent under 28 U.S.C. §636(c)(1). The Ninth Circuit
8 recently held that magistrate judges do not have jurisdiction over a case until all parties (both
9 served and unserved) have consented to magistrate judge jurisdiction. *Williams v. King*, 875
10 F.3d. 501 (9th Cir. 2017). "An error in interpreting a statutory grant of jurisdiction is not,
11 however, equivalent to acting with total want of jurisdiction and does not render the judgment a
12 complete nullity." *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984) (citing *Chicot County*
13 *Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376-77 (1940)). The dismissal of Plaintiff's
14 prior case by the Magistrate Judge is still properly counted as a strike for purposes of the PLRA
15 since it has become final. *See Chicot*, at 376-77 (holding that decision errantly entertained under
16 jurisdiction conferred by statute that was subsequently declared invalid could "not be assailed
17 collaterally") and at 375 (holding parties who had the opportunity to raise the question of
18 invalidity of jurisdiction are bound by rulings thereunder because they failed to raise it) (citing
19 *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); *Case v. Beaugard*, 101 U.S. 688, 692
20 (1879); *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 319, 325 (1927); *Grubb v. Public*
21 *Utilities Commission*, 281 U.S. 470, 479 (1930)).

22 All of Plaintiff's actions noted above were dismissed before February 9, 2018, when
23 Plaintiff filed the present action. Thus, Plaintiff is subject to 28 U.S.C. § 1915(g) and is
24 precluded from proceeding *in forma pauperis* in this action unless at the time the Complaint was

25 ¹ Duplicative lawsuits filed by a plaintiff proceeding *in forma pauperis* are subject to dismissal as either frivolous or
26 malicious under 28 U.S.C. § 1915(e). *See e.g., Cato v. United States*, 70 F.3d 1103, 1105 n. 2 (9th Cir.1995);
27 *McWilliams v. State of Colo.*, 121 F.3d 573, 574 (10th Cir.1997); *Pittman v. Moore*, 980 F.2d 994, 994-95 (5th
28 Cir.1993); *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir.1988); *see also Denton v. Hernandez*, 504 U.S. 25, 30
(1992) (recognizing Congress's concern that "a litigant whose filing fees and court costs are assumed by the public,
unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive
lawsuits").

1 filed, he was under imminent danger of serious physical injury.

2 The Court has reviewed Plaintiff's Complaint in this action and finds that he does not
3 meet the imminent danger exception. See *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir.
4 2007). Plaintiff alleges he was denied Kosher meals, his religious rights were violated, and that
5 he was subjected to a retaliatory disciplinary hearing because he complained about the violations
6 of his religious rights. These allegations do not establish that Plaintiff was placed under
7 imminent danger of serious physical injury. Further, since Plaintiff alleges that the false
8 disciplinary hearing caused a forfeiture of good-time credits, he must comply with the favorable
9 termination rule before he may proceed on the claim regarding the retaliatory disciplinary hearing
10 in an action under § 1983. See *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520
11 U.S. 641 (1997); *Nettles v. Grounds*, 830 F.3d 922 (9th Cir. 2016) (en banc), *cert denied*, (U.S.
12 Jan. 9, 2017) (No. 16-6556).

13 Based on the foregoing, Plaintiff is precluded from proceeding *in forma pauperis* in this
14 action. *Andrews*, 493 F.3d at 1056-57.

15 C. **ORDER**

16 Accordingly, it is HEREBY ORDERD to that **within twenty-one (21) days** of the date of
17 service of this order, Plaintiff must show cause why recommendation should not issue to deny
18 Plaintiff's *in forma pauperis* application and to dismiss this action without prejudice to refiling
19 with prepayment of the full filing fee.

20 IT IS SO ORDERED.

21 Dated: **February 15, 2018**

22 /s/ Sheila K. Oberto
23 UNITED STATES MAGISTRATE JUDGE
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