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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GUILLERMO TRUJILLO CRUZ,

Plaintiff,

v.

B. VALDEZ,

Defendant.

No. 1:18-cv-00571-DAD-EPG

ORDER DECLINING TO ADOPT FINDINGS
AND RECOMMENDATIONS AND
GRANTING PLAINTIFF'S APPLICATION
TO PROCEED IN FORMA PAUPERIS

(Doc. Nos. 2, 9, 11)

Plaintiff Guillermo Trujillo Cruz is a state prisoner proceeding *pro se* with this civil rights action brought pursuant to 42 U.S.C. § 1983. On April 27, 2018, plaintiff commenced this action by filing a complaint (Doc. No. 1) and an application to proceed *in forma pauperis* (Doc. No. 2). The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On August 13, 2018, the assigned magistrate judge issued findings and recommendations, recommending that plaintiff's application to proceed *in forma pauperis* be denied, and that plaintiff be required to pay the \$400 filing fee. (Doc. No. 9). The findings and recommendations were served on plaintiff and contained notice that any objections thereto were to be filed within twenty-one days after service. (*Id.* at 4.) On August 27, 2018, plaintiff filed his objections to the findings and recommendations. (Doc. No. 10). On September 6, 2018, plaintiff filed a second

1 application to proceed *in forma pauperis*. (Doc. No. 11).

2 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this court has conducted a
3 *de novo* review of this case. Having carefully reviewed the entire file, the undersigned declines to
4 adopt the findings and recommendations. The findings and recommendations cited four separate
5 cases filed by plaintiff that, in the assigned magistrate judge's view, counted as strikes under 28
6 U.S.C. § 1915(g). Each is addressed in turn.

7 First, the findings and recommendations cited to the dismissal in *Trujillo v. Sherman*,
8 1:14-cv-01401-BAM (E.D. Cal. Apr. 24, 2015). A review of that case demonstrates that the
9 action was dismissed for failure to state a claim upon which relief could be granted. That case
10 accordingly counts as a strike dismissal against plaintiff under 28 U.S.C. § 1915(g).

11 Second, the findings and recommendations cited to the dismissal in *Trujillo v. Ruiz*, 1:14-
12 cv-00975-SAB (E.D. Cal. Jan 6, 2016). That case also was dismissed for failure to state a claim
13 upon which relief could be granted. That case also counts as a dismissal strike against plaintiff.

14 Third, the findings and recommendations cited to *Trujillo v. Munoz*, 1:14-cv-00976-DLB
15 (E.D. Cal. May 11, 2016). That case was previously dismissed for failure to state a claim.
16 However, on February 27, 2018, the Ninth Circuit Court of Appeals vacated that judgment and
17 remanded the case to the district court in light of the decision in *Williams v. King*, 875 F.3d 500
18 (9th Cir. 2017). Following remand, the newly-assigned magistrate judge issued findings and
19 recommendations, recommending that the action proceed on plaintiff's claim alleging
20 unreasonable searches in violation of the Fourth Amendment. On May 23, 2018, United States
21 District Judge Lawrence J. O'Neill adopted those findings and recommendations in full. Because
22 this action was not dismissed and is currently proceeding on the claim found by the court to be
23 cognizable, the court concludes that this case cannot serve as the basis of a strike for purposes of
24 28 U.S.C. § 1915(g).

25 Finally, the findings and recommendations cited to *Trujillo v. Munoz*, 1:14-cv-01215-SAB
26 (E.D. Cal. May 17, 2016). That case was previously dismissed for failure to state a claim, but
27 that ruling was also subsequently vacated and remanded by the Ninth Circuit in light of the
28 decision in *Williams*. On remand, and following the filing of an amended complaint by plaintiff,

1 the assigned magistrate judge issued findings and recommendations, recommending that the case
2 be permitted to proceed on plaintiff's claim for cruel and unusual punishment under the Eighth
3 Amendment, as well as on his claim of retaliation in violation of the First Amendment. Those
4 findings and recommendations are currently pending before United States District Judge Anthony
5 W. Ishii. Because this action has not been dismissed but remains pending before the court, it also
6 cannot constitute a strike dismissal for purposes of 28 U.S.C. § 1915(g). Thus, only two of the
7 cases identified in the findings and recommendations are appropriately categorized as strikes.

8 Accordingly,

- 9 1. The court declines to adopt the findings and recommendations issued on August
10 13, 2018 (Doc. No. 9);
- 11 2. Plaintiff's motion to proceed *in forma pauperis* (Doc. No. 2) is granted;
- 12 3. Plaintiff's second motion to proceed *in forma pauperis* (Doc. No. 11) is denied as
13 having been rendered moot by this order; and
- 14 4. This action is referred back to the assigned magistrate judge for further
15 proceedings consistent with this order.

16 IT IS SO ORDERED.

17 Dated: November 6, 2018

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20 UNITED STATES DISTRICT JUDGE