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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MATTHEW A. LAWRIE,

Plaintiff,

v.

CALIFORNIA STATE PRISON AT
CORCORAN, et al.,

Defendants.

No. 1:18-cv-01456-DAD-BAM (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS DENYING
PLAINTIFF’S APPLICATION TO PROCEED
IN FORMA PAUPERIS AND REQUIRING
PLAINTIFF TO PAY THE FILING FEE TO
PROCEED WITH THIS ACTION

(Doc. Nos. 9, 10)

Plaintiff Matthew A. Lawrie, a state prisoner, proceeds *pro se* in this civil rights action filed on October 2, 2018, in the United States District Court for the Central District of California. (Doc. No. 1.) The action was transferred to the Eastern District of California on October 19, 2018. (Doc. No. 4.) The matter was then referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On November 14, 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 \$400.00 filing fee in full to proceed with this action because (1) he is subject to the three strikes bar under 28 U.S.C. § 1915(g) and (2) the allegations in plaintiff’s complaint to do not satisfy the “imminent danger of serious physical

1 injury” exception to § 1915(g). (Doc. No. 10.) Those findings and recommendations were served
2 on plaintiff and contained notice that any objections thereto were to be filed within fourteen (14)
3 days after service. (*Id.* at 3.) Plaintiff filed objections on November 30, 2018. (Doc. No. 11.)

4 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the undersigned has
5 conducted a *de novo* review of the case. Having carefully reviewed the entire file, including
6 plaintiff’s objections, the undersigned concludes that the findings and recommendations are
7 supported by the record and proper analysis.

8 Plaintiff’s primary objection to the findings and recommendations is based upon his
9 renewed assertion that he cannot afford to pay the filing fee in this action and that he should be
10 allowed to proceed *in forma pauperis* because this action “is worthy.” (Doc. No. 11 at 1.)
11 Plaintiff has attached several inmate appeal forms to his objections, which apparently relate to
12 incidents that occurred after this action was initiated, as evidence of his ongoing difficulties in
13 attempting to litigate this action. (*See id.* at 2–15.) Plaintiff’s objections, however, fail to address
14 the magistrate judge’s finding that he is subject to the three strikes bar under 28 U.S.C. § 1915(g)
15 since five prior actions he has filed in this district have been dismissed for failure to state a claim
16 or as frivolous. The court finds no legal basis upon which to question the magistrate judge’s

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1 findings and recommendations in that regard.¹ Furthermore, the allegations set forth in plaintiff's
2 complaint are insufficient to trigger the "imminent danger of serious physical injury" exception to
3 dismissal under § 1915(g). To the extent plaintiff has attempted in his objections to raise new
4 issues and claims based upon events that occurred after this action was initiated, those claims are
5 not relevant to the court's finding that he has failed to establish he was in imminent danger at the
6 time the complaint in this action was filed.

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9 ¹ The court notes, however, that four of the dismissal orders relied upon as strikes under
10 § 1915(g) by the magistrate judge in this case were issued by magistrate judges following only
11 the consent of the plaintiff to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c).
12 Subsequent to those dismissal orders, the Ninth Circuit issued its opinion in *Williams v. King*, 875
13 F.3d 500, 504–05 (9th Cir. 2017), in which the court held that absent the consent of all parties,
14 including unserved defendants, magistrate judges lack jurisdiction to enter dispositive decisions
15 including orders of dismissal. The decision in *Williams* raises another issue not yet addressed by
16 the Ninth Circuit: May prior orders of dismissal issued by magistrate judges without the consent
17 of all parties later be counted as strikes under § 1915(g) if they otherwise qualify as such under
18 that statute? The undersigned has elected to avoid resolving this question where it was
19 unnecessary to the determination of whether a plaintiff was prohibited from proceeding *in forma*
20 *pauperis* in a particular case. See *Mitchell v. Davey*, No. 1:16-cv-01148-DAD-EPG (PC), 2018
21 WL 1586449, at *1, n.2 (E.D. Cal. Apr. 2, 2018). However, in a case where consideration of this
22 question was required, the undersigned has been persuaded, for the reasons explained by the
23 magistrate judge in findings and recommendations, that where a magistrate judge issued a pre-
24 *Williams* order dismissing a case with only the plaintiff's consent to magistrate judge jurisdiction,
25 the dismissal can still count as a "strike," so long as the order has not been declared void by way
26 of an appeal or other appropriate challenge. See *Bontemps v. Hicks*, No. 1:16-cv-01854-DAD-
27 EPG, 2018 WL 1905648, at *2–4 (E.D. Cal. Apr. 23, 2018), *findings and recommendations*
28 *adopted by* 2018 WL 5291963 (E.D. Cal. Oct. 23, 2018). While the undersigned remains
persuaded that such a conclusion is correct as a matter of law, the court also acknowledges that
the issue has not been addressed by the Ninth Circuit or any other circuit, and that a reasonable
argument can be made to the contrary. See *Allen v. Meyer*, 755 F.3d 866, 868 (9th Cir. 2014)
(Absent consent, "the magistrate judge had no jurisdiction to enter final judgment on behalf of the
district court, and any purported judgment is a nullity."); *Kofoed v. Int'l Bhd. of Elec. Workers,*
Local 48, 237 F.3d 1001, 1004 (9th Cir. 2001) ("Where the magistrate judge has not received the
full consent of the parties, he has no authority to enter judgment in the case, and any purported
judgment is a nullity."); *Reynaga v. Cammisa*, 971 F.2d 414, 417 (9th Cir. 1992) (Holding that,
absent consent of the parties, an order staying an action issued by a magistrate judge "was beyond
the magistrate's authority: it was beyond his jurisdiction and was, in essence, a legal nullity");
see also *Orff v. United States*, 358 F.3d 1137, 1149–1150 (9th Cir. 2004) (Because "the district court
never had jurisdiction to issue its rulings on the merits . . . [w]e must vacate as nullities [those]
rulings" and they are therefore not "binding in this or any other case."); *Morongo Band of*
Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380-81 (9th Cir. 1988) ("If
jurisdiction was lacking, then the court's various orders . . . were nullities.").

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Accordingly:

1. The findings and recommendations (Doc. No. 10) issued on November 14, 2018, are adopted in full;
2. In accordance with 28 U.S.C. § 1915(g), plaintiff's application to proceed *in forma pauperis* (Doc. No. 9) is denied;
3. Within **twenty-one (21) days** following service of this order, plaintiff shall pay the \$400.00 filing fee in full to proceed with this action. If plaintiff fails to pay the filing fee within the specified time, this action will be dismissed; and
4. The matter is referred back to the assigned magistrate for proceedings consistent with this order.

IT IS SO ORDERED.

Dated: March 12, 2019


UNITED STATES DISTRICT JUDGE