



1 while incarcerated or detained in any facility, brought an action or appeal in a court of the United States  
2 that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which  
3 relief may be granted, unless the prisoner is under imminent danger of serious physical injury.” 28  
4 U.S.C. § 1915(g).

5 The Court finds that Plaintiff has incurred three or more strikes under section 1915(g) prior to  
6 filing this lawsuit. The Court takes judicial notice of the following cases: (1) Trujillo v. Sherman, Case  
7 No. 1:14-cv-01401-BAM (E.D. Cal.) (dismissed on April 24, 2015 for failure to state a claim); aff’d  
8 Case No. 15-15952 (9th Cir. May 6, 2016); (2) Trujillo v. Ruiz, No. 1:14-cv-00975-SAB (E.D. Cal.)  
9 (dismissed on January 6, 2016 for failure to state a claim), aff’d, Case No. 16-15101 (9th Cir. December  
10 15, 2017); (3) Cruz v. Gomez, Case No. 1:15-cv-00859-EPG (E.D. Cal.) (dismissed on February 3, 2017  
11 for failure to state a claim), aff’d, Case No. 17-15358 (9th Cir. October 25, 2017); Trujillo v. Gonzalez-  
12 Moran, Case No. 17-15200 (9th Cir.) (dismissed on August 21, 2017 as frivolous).

13 The issue now becomes whether Plaintiff has met the imminent danger exception, which requires  
14 Plaintiff to show that he is under (1) imminent danger of (2) serious physical injury and which turns on  
15 the conditions he faced at the time he filed his complaint on November 29, 2018. Andrews, 493 F.3d at  
16 1053-1056. Conditions which posed imminent danger to Plaintiff at some earlier time are immaterial,  
17 as are any subsequent conditions. Id. at 1053. While the injury is merely procedural rather than a merits-  
18 based review of the claims, the allegations of imminent danger must still be plausible. Id. at 1055.

19 The Court further finds that Plaintiff’s complaint allegations do not meet the imminent danger  
20 exception. Andrews, 493 F.3d at 1053. Plaintiff has not shown that he is at risk of any serious physical  
21 injury. Rather, in seeking monetary damages, Plaintiff contends that on March 29, 2018, while housed  
22 at Kern Valley State Prison officer B. Baker retaliated and used excessive force on him. Plaintiff is now  
23 housed at Pelican Bay State Prison, and there are no allegations that he is in imminent danger of physical  
24 harm based on allegations of excessive force that took place approximately eight months ago at a  
25 different prison. In addition, Plaintiff’s allegations set forth in his motion seeking leave to file a new  
26 complain and motion to declare him in imminent danger do not support a finding that he is in imminent  
27 danger of serious physical harm. Accordingly, Plaintiff is ineligible to proceed in forma pauperis in this  
28 action, and he should be required to pre-pay the \$400 filing fee to proceed in this case.

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**IV.**

**CONCLUSION AND RECOMMENDATIONS**

Accordingly, the Clerk of the Court is HEREBY DIRECTED to randomly assign a District Judge to this action.

Further, for the reasons explained above, it is HEREBY RECOMMENDED that:

1. Plaintiff's application to proceed in forma pauperis (ECF No. 2), motion to file this new complaint (ECF No. 3), and motion to declare him in imminent danger of physical harm (ECF No. 4) be denied; and

2. Plaintiff be required to pay the \$400.00 filing fee within thirty (30) 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 28 U.S.C. § 636(b)(1). Within **twenty-one (21) 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: November 30, 2018

  
UNITED STATES MAGISTRATE JUDGE