



1 I.

2 DISCUSSION

3 The Prison Litigation Reform Act of 1995 (PLRA) was enacted “to curb frivolous prisoner  
4 complaints and appeals.” Silva v. Di Vittorio, 658 F.3d 1090, 1099-1100 (9th Cir. 2011). Pursuant to  
5 the PLRA, the in forma pauperis statute was amended to include section 1915(g), a non-merits related  
6 screening device which precludes prisoners with three or more “strikes” from proceeding in forma  
7 pauperis unless they are under imminent danger of serious physical injury. 28 U.S.C. § 1915(g);  
8 Andrews v. Cervantes, 493 F.3d 1047, 1050 (9th Cir. 2007). The statute provides that “[i]n no event  
9 shall a prisoner bring a civil action ... under this section if the prisoner has, on 3 or more prior occasions,  
10 while incarcerated or detained in any facility, brought an action or appeal in a court of the United States  
11 that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which  
12 relief may be granted, unless the prisoner is under imminent danger of serious physical injury.” 28  
13 U.S.C. § 1915(g).

14 A review of the actions filed by Plaintiff reveals that he is subject to 28 U.S.C. § 1915(g) and is  
15 precluded from proceeding in forma pauperis unless Plaintiff, was, at the time the complaint was filed,  
16 under imminent danger of serious physical injury. The Court takes judicial notice of the following cases:  
17 (1) Sims v. Rios, et al., CAED No. 2:10-cv-01893-LKK-DAD, dismissed on November 1, 2020 for  
18 failure to state a cognizable claim for relief; (2) Sims v. Doe, et al., CAED No. 1:14-cv-00864-MJS,  
19 dismissed on August 29, 2014 for failure to state a cognizable claim for relief; (3) Sims v. Lesinak, et  
20 al., CAED No. 1:14-cv-01130-SKO, dismissed on June 2, 2015 for failure to state a cognizable claim  
21 for relief.<sup>2</sup>

22 The issue now becomes whether Plaintiff has met the imminent danger exception, which  
23 requires Plaintiff to show that he is under (1) imminent danger of (2) serious physical injury and which  
24 turns on the conditions he faced at the time he filed his complaint on December 1, 2020. Andrews,  
25 493 F.3d at 1053-1056. Conditions which posed imminent danger to Plaintiff at some earlier time are

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28 <sup>2</sup> A pre-Williams dismissal of an inmate suit by a magistrate judge without the consent of the defendant can count as a  
strike under 28 U.S.C. § 1915(g). Hoffmann v. Pulido, 928 F.3d 1147, 1150-51 (9th Cir. 2019).

1 immaterial, as are any subsequent conditions. Id. at 1053. While the injury is merely procedural  
2 rather than a merits-based review of the claims, the allegations of imminent danger must still be  
3 plausible. Id. at 1055.

4 Here, the Court finds that Plaintiff’s allegations fail to demonstrate imminent danger of serious  
5 physical injury at the time of filing. Plaintiff contends that prison officials have acted with deliberate  
6 indifference by holding him beyond his scheduled release date of September 23, 2020 by failing to  
7 apply extraordinary conduct credits pursuant to a memorandum dated July 9, 2020 by the Office of the  
8 Secretary of the California Department of Corrections and Rehabilitation, Division of Adult  
9 Institutions. Plaintiff seeks punitive damages for emotional distress he has suffered by being detained  
10 beyond his alleged release date. It is clear that Plaintiff’s allegations fail to demonstrate that he faced  
11 imminent danger of serious physical injury at the time of filing, and Plaintiff is therefore precluded  
12 from proceeding *in forma pauperis* in this action.

13 **II.**

14 **CONCLUSION AND RECOMMENDATIONS**

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

17 Further, it is HEREBY RECOMMENDED that, pursuant to 28 U.S.C. § 1915(g), Plaintiff’s  
18 motion to proceed *in forma pauperis* be denied and Plaintiff be directed to pay the \$402.00 filing fee in full  
19 if he wishes to proceed with this action.

20 These Findings and Recommendations will be submitted to the United States District Judge  
21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14) days**  
22 after being served with these Findings and Recommendations, Plaintiff may file written objections  
23 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and  
24 Recommendations.” Plaintiff is advised that failure to file objections within the specified time may

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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: December 18, 2020

  
UNITED STATES MAGISTRATE JUDGE