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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARMANDO ABREU,

Plaintiff,

v.

GAVIN NEWSOM, et al.,

Defendants.

No. 1:21-cv-00303-NONE-SKO (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, DENYING MOTION
TO PROCEED IN FORMA PAUPERIS, AND
DISMISSING ACTION WITHOUT
PREJUDICE

(Doc. Nos. 4, 8)

Plaintiff Armando Abreu is a state prisoner proceeding *pro se* in this civil rights action under 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On March 4, 2021, the assigned magistrate judge filed findings and recommendations, recommending that plaintiff’s motion to proceed *in forma pauperis* (Doc. No. 4) be denied and that this action be dismissed without prejudice on grounds that plaintiff has accrued more than three prior “strike” dismissals under 28 U.S.C. § 1915(g) and the allegations in his complaint failed to show that he is under imminent danger of serious physical injury.¹ (Doc. No. 8.) The

¹ The magistrate judge also pointed out that plaintiff had failed to exhaust administrative remedies prior to filing suit, as required by the Prison Litigation Reform Act, thereby providing an alternative ground for dismissing this action without prejudice. (Doc. No. 8 at 2.) The magistrate judge also notes that plaintiff seeks his immediate release from custody, which is relief that a prisoner may not seek in a § 1983 action. (*Id.*)

1 magistrate judge provided plaintiff fourteen (14) days to file objections to the findings and
2 recommendations. (*Id.* at 3.) Plaintiff filed timely objections on March 16, 2021. (Doc. No. 13.)

3 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this court has conducted a
4 *de novo* review of this case. Having carefully reviewed the entire file, including plaintiff's
5 objections, the court finds the findings and recommendations to be supported by the record and
6 proper analysis.

7 Although he concedes that he has incurred three prior strike dismissals, plaintiff argues in
8 his objections that the imminent danger exception applies here because he has not received a
9 COVID-19 vaccine, though he previously contracted the virus and recovered from it. (Doc. No.
10 13 at 1–2.) However, the claims in plaintiff's complaint are not based on COVID-19 but instead
11 on the allegation that he is being held “hostage under the unconstitutional, illegal custody” of the
12 California Department of Corrections and Rehabilitation. (*Compare* Doc. No. 1 at 3, *with* Doc.
13 No. 13 at 1–2.) Based on the allegations in his complaint, the court does not find that plaintiff
14 was under imminent danger of serious physical injury at the time he initiated this action. *See*
15 *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007) (imminent-danger “exception applies
16 if the danger existed at the time the prisoner filed the complaint”) (citations omitted). The
17 imminent danger exception to § 1915(g) therefore does not apply here.

18 Accordingly,

- 19 1. The findings and recommendations issued on March 4, 2021 (Doc. No. 8), are adopted
20 in full;
- 21 2. Plaintiff's motion to proceed *in forma pauperis* (Doc. No. 4) is denied;
- 22 3. This action is dismissed without prejudice to refile upon prepayment of the filing
23 fee; and
- 24 4. The Clerk of the Court is directed to assign a district judge to this case for purposes of
25 closure and to close this case.

26 IT IS SO ORDERED.

27 Dated: April 9, 2021

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UNITED STATES DISTRICT JUDGE

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