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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID WAYNE WILSON,

 Plaintiff,

 v.

VELMA HAMPSON, et al.,

 Defendants.

Case No.: 1:22-cv-0897 JLT BAK (EPG) (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS IN FULL

ORDER DENYING PLAINTIFF’S
APPLICATIONS TO PROCEED IN FORMA
PAUPERIS AND DIRECTING PAYMENT OF
THE FILING FEE

(Docs. 2, 10, 11)

David Wayne Wilson asserts he suffered violations of his civil rights while incarcerated and seeks to proceed *in forma pauperis* in this action. (Docs. 2, 11.) This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

I. The Magistrate Judge’s Findings and Recommendations

On July 28, 2022, the assigned magistrate judge reviewed Plaintiff’s motion to proceed IFP and found he had at least three cases dismissed that qualified as a strike prior to filing his complaint. (Doc. 10 at 2-3.) Specifically, the magistrate judge took juridical notice of the following cases and the grounds for dismissal:

Four of Plaintiff’s prior lawsuits that were dismissed as frivolous or for a failure to state a claim upon which relief may be granted: (1) *Wilson v. Tilton*, Case No. 2:06-cv-01031-LKK-PAN (E.D. Cal.) (dismissed September 12, 2006, for failure to state a claim); (2) *Wilson v. Schwartz*, Case No. 2:05-cv-01649-GEB-CMK (E.D. Cal.) (dismissed October 31, 2006, for failure to state a claim); (3) *Wilson v. Dovey*, Case No. 2:06-cv- 01032-FD-EFB (E.D. Cal.) (dismissed March 8, 2007, for failure to state a claim); and (4) *Wilson v. Veal*, Case No.

1 2:06-cv-00067-FCD-KJM (E.D. Cal.) (dismissed June 4, 2007, for failure to
2 state a claim). Each of these actions was dismissed prior to the commencement
of the current action on July 20, 2022.

3 (Doc. 10 at 2.) Consequently, the magistrate judge found Plaintiff is subject to the three strikes
4 bar under 28 U.S.C. § 1915(g). (*Id.*) The magistrate judge also found the allegations in
5 Plaintiff's complaint do not satisfy the "imminent danger of serious physical injury" exception to
6 Section 1915(g), even when liberally construing Plaintiff's complaint. (*Id.* at 2-3.) Therefore, the
7 magistrate judge recommended Plaintiff's motion to proceed IFP be denied. (*Id.* at 4.)

8 **II. Plaintiff's Objections**

9 Plaintiff objected to the Findings and Recommendations on August 17, 2022, and
10 reviewed the cases identified by the magistrate judge. (Doc. 13 at 1-2.) He notes that *Wilson v.*
11 *Tilton* was "dismissed without prejudice." (*Id.* at 1, emphasis omitted.) In addition, he contends
12 *Wilson v. Schwartz* settled and should not count as a strike because it concerned a medical
13 chrono, and Plaintiff received orthopedic boots, cotton blankets, and a vitamin chrono. (*Id.* at 2.)
14 Although Plaintiff summarized his claims in *Wilson v. Dovey* and *Wilson v. Veal*, he does not
15 dispute the dismissal of the cases. (*Id.*) Furthermore, Plaintiff contends that even if he has three
16 strikes, he meets satisfies the requirements for the "imminent danger" exception of Section
17 1915(g). (*Id.* at 2-6.)

18 **III. Discussion and Analysis**¹

19 A district judge may "accept, reject or modify, in whole or in part, the findings and
20 recommendations..." 28 U.S.C. § 636(b)(1). If objections to the findings and recommendations
21 are filed, "the court shall make a de novo determination of those portions of the report or
22 specified proposed finding or recommendations to which objection is made. *Id.* A de novo
23 review requires the court to "consider[] the matter anew, as if no decision had been rendered."
24 *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009).

25 _____
26 ¹ The records of court proceedings cannot reasonably be questioned, and judicial notice may be taken of the Court's
27 record and docket. *Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); *Valerio v. Boise*
28 *Cascade Corp.*, 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff'd*, 645 F.2d 699 (9th Cir. 1981). The Court again takes
judicial notice of its records in the following cases: (1) *Wilson v. Tilton*, Case No. 2:06-cv-01031-LKK-PAN; (2)
Wilson v. Schwartz, Case No. 2:05-cv-01649-GEB-CMK; (3) *Wilson v. Dovey*, Case No. 2:06-cv- 01032-FD-EFB;
and (4) *Wilson v. Veal*, Case No. 2:06-cv-00067-FCD-KJM .

1 **A. Plaintiff’s strikes**

2 A dismissal without prejudice may count as a strike under Section 1915(g). *Lomax v.*
3 *Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020) (“The text of Section 1915(g)’s three-strike
4 provision refers to any dismissal for failure to state a claim, whether with prejudice or without”);
5 *see also O’Neal v. Price*, 531 F.3d 1146, 1153-54 (9th Cir. 2008) (also stating that a dismissal
6 without prejudice may count as a strike). In *Wilson v. Tilton*, the assigned magistrate judge
7 determined Plaintiff failed to state a claim and recommended dismissal, and the findings were
8 adopted. (*See* Case No. 2:06-cv-01031-LKK-PAN, Doc. 5 at 4 [finding “this action should be
9 dismissed for failure to state a claim upon which relief may be granted”], Doc. 8 at 1-2 [adopting
10 the recommendation that the matter be dismissed without prejudice].) Thus, the dismissal of
11 *Wilson v. Tilton* qualifies as a strike under Section 1915(g). *See Lomax*, 140 S. Ct. at 1723 (2020).

12 In addition, Plaintiff’s assertion that *Wilson v. Schwartz*, Case No. 2:05-cv-01649-GEB-
13 CMK, should not count as a strike because it settled is not supported by the Court’s records. The
14 assigned magistrate judge found Plaintiff failed to state a claim and leave to amend should not be
15 granted. (Case No. 2:05-cv-01649-GEB-CMK, Doc. 24 at 4-5.) The magistrate judge
16 recommended the “action be dismissed for failure to state a claim.” (*Id.* at 5.) These
17 recommendations were adopted—despite Plaintiff’s objections—and the action was dismissed.
18 (Case No. 2:05-cv-01649-GEB-CMK, Doc. 25 and Doc. 26 at 1-2.) Thus, the dismissal qualifies
19 as a strike under Section 1915(g).

20 Furthermore, the magistrate judge properly determined that the dismissals for failure to
21 state a claim in *Wilson v. Dovey*, Case No. 2:06-cv- 01032-FD-EFB (E.D. Cal.) and *Wilson v.*
22 *Veal*, Case No. 2:06-cv-00067-FCD-KJM (E.D. Cal.) qualified as strikes. Accordingly,
23 Plaintiff’s objections to the findings that he had at least three strikes under Section 1915(g) are
24 overruled.

25 **B. Imminent danger exception**

26 Under Section 1915(g), the imminent danger exception requires a showing that the
27 prisoner “is under imminent danger of serious *physical* injury.” 28 U.S.C. § 1915(g) (emphasis
28 added); *see also Ray v. Lara*, 31 F.4th 692, 701 (9th Cir. 2022) (“in order to qualify for the §

1 1915(g) imminent danger exception, a three-strikes prisoner must allege imminent danger of
2 serious physical injury that is both fairly traceable to unlawful conduct alleged in his complaint
3 and redressable by the court”). As the magistrate judge determined, there is no explanation as to
4 how the alleged denial of court access places Plaintiff in imminent risk of *physical* injury, as
5 required under Section 1915(g). *See, e.g., Prophet v. Clark*, 2009 WL 1765197, at *1 (E.D. Cal.
6 June 22, 2009) (finding a prisoner’s claims concerning access to the courts, interference with
7 legal mail, and retaliation were insufficient to satisfy § 1915(g) exception in cases of “imminent
8 danger of serious physical injury”); *McCall v. McGrew*, 2012 WL 5456401, at *2 (C.D. Cal. Nov.
9 5, 2012) (“Denial of access to the courts is not a sufficient claim to allege that plaintiff was in
10 imminent danger of serious physical injury at the time he filed the Complaint”). Because Plaintiff
11 has not identified an imminent risk of physical injury tied to the allegations of his complaint, he
12 fails to show the exception to Section 1915(g) is applicable.

13 **IV. Conclusion and Order**

14 Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court conducted a *de novo* review of this case.
15 Having carefully reviewed the entire matter, including Plaintiff’s objections, the Court concludes
16 the Findings and Recommendations are supported by the record and proper analysis.

17 Because Plaintiff is subject to the three-strikes provision and failed to show the imminent
18 danger exception of 1915(g) applies, his second motion to proceed *in forma pauperis*—filed the
19 same day as the magistrate judge issued the Findings and Recommendations discussed above
20 (Doc. 11)—is also denied. Accordingly, the Court **ORDERS**:

- 21 1. The Findings and Recommendations issued on July 28, 2022 (Doc. 10) are
22 **ADOPTED** in full.
- 23 2. Plaintiff’s motions to proceed in forma pauperis (Docs. 2, 11) are **DENIED**.
- 24 3. Plaintiff **SHALL** pay the \$402 filing fee within 30 days of the date of service of
25 this order.

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4. **Plaintiff is advised that failure to pay the \$402 filing fee as ordered will result in the dismissal of this action.**

IT IS SO ORDERED.

Dated: August 22, 2022


UNITED STATES DISTRICT JUDGE