1		
2		
2		
4		
5		
6		
7		
8	UNITED STATES DISTRICT COURT	
9	EASTERN DISTRICT OF CALIFORNIA	
10		
11	EBER G. RUTH,	Case No. 1:23-cv-00747-BAM (PC)
12 13	Plaintiff,	ORDER DIRECTING CLERK OF COURT TO RANDOMLY ASSIGN DISTRICT JUDGE TO
	V.	ACTION
14 15	WARDEN, et al., Defendants.	FINDINGS AND RECOMMENDATIONS RECOMMENDING PLAINTIFF'S MOTION FOR LEAVE TO PROCEED <i>IN FORMA</i> <i>PAUPERIS</i> BE DENIED
16		(ECF No. 2)
17		FOURTEEN (14) DAY DEADLINE
18 10		
19 20	Disintiff Eber C. Duth ("Disintiff") is a	state prisoner proceeding pro sain this civil rights
20 21	Plaintiff Eber G. Ruth ("Plaintiff") is a state prisoner proceeding <i>pro se</i> in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff initiated this action on May 15, 2023, together with	
21	a motion to proceed <i>in forma pauperis</i> . (ECF Nos. 1, 2.)	
22	Plaintiff is subject to 28 U.S.C. § 1915(g), which provides that "[i]n no event shall a	
23 24	prisoner bring a civil action under this section if the prisoner has, on 3 or more prior	
25	occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of	
26	the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state	
20	a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious	
28	///	
-		1

1 physical injury."<sup>1</sup> Plaintiff has previously been notified that he is subject to § 1915(g).<sup>2</sup>

The Court has reviewed Plaintiff's complaint and finds that his allegations do not satisfy the imminent danger exception to section 1915(g).<sup>3</sup> *Andrews v. Cervantes*, 493 F.3d 1047, 1053–55 (9th Cir. 2007). In the complaint, which is disjointed and difficult to decipher, Plaintiff primarily alleges that he is being incarcerated unlawfully, should be released onto parole, and should be monetarily compensated for more than 30 years of incarceration. (ECF No. 1.)

"Imminent danger of serious physical injury must be a real, present threat, not merely
speculative or hypothetical." *Blackman v. Mjening*, 2016 WL 5815905, at \*1 (E.D. Cal. Oct. 4,
2016). To meet his burden under § 1915(g), Plaintiff must provide "specific fact allegations of
ongoing serious physical injury, or a pattern of misconduct evidencing the likelihood of imminent
serious physical injury." *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003). "[V]ague and
utterly conclusory assertions" of imminent danger or insufficient. *White v. Colorado*, 157 F.3d
1226, 1231–32 (10th Cir. 1998).

The allegations in the complaint are vague and conclusory, and fail to link any of the
named defendants to any particular alleged violation of Plaintiff's rights. Despite alleging that
Defendants' refusal to release him onto parole amounts to a life sentence and thus constitutes a
conspiracy to commit murder by refusing to release Plaintiff from prison, (ECF No. 1, pp. 8–9), at
no point does Plaintiff allege that he is at risk of suffering any physical injury.

19

///

## The Court also takes judicial notice of the following United States Court of Appeals case: *Ruth v. United States Judicial System*, Case No. 20-15230 (9th Cir.) (dismissed on June 23, 2020 as frivolous).

28 <sup>3</sup> The Court expresses no opinion on the merits of Plaintiff's claims.

<sup>20</sup> 

<sup>The Court takes judicial notice of the following United States District Court cases: (1)</sup> *Ruth v. Ransdell*,
Case No. 2:99-cv-01205-WBS-GGH (E.D. Cal.) (dismissed on October 28, 1999 as *Heck*-barred on the face of the complaint), *see Washington v. L.A. Cty. Sheriff's Dep't*, 833 F.3d 1048, 1057 (9th Cir. 2016) (dismissal of an action as *Heck*-barred, where the suit seeks purely monetary damages, constitutes a PLRA strike); (2) *Ruth v. Dubsky*, Case No. 1:00-cv-06011-OWW-LJO (E.D. Cal.) (dismissed on May 21, 2011 for failure to state a claim); (3) *Ruth v. Dysart*, Case No. 2:99-cv-02462-FCD-PAN (E.D. Cal.) (dismissed on July 2, 2001 for failure to state a claim); (4) *Ruth v. Terhune*, Case No. 1:00-cv-07065-AWI-LJO (E.D. Cal.) (dismissed on May 8, 2003 for failure to state a claim).

<sup>&</sup>lt;sup>2</sup> See, e.g., Ruth v. Warden, Case No. 1:21-cv-00040-DAD-EPG (E.D. Cal. April 12, 2021) (recognizing that plaintiff has had three or more prior actions or appeals dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted); *Ruth v. State of Cal.*, Case No. 1:22-cv-01166-JLT-EPG (E.D. Cal. Dec. 20, 2022) (same).

1	Accordingly, Plaintiff has failed to allege that he was in any imminent danger of serious		
2	physical injury at the time the complaint was filed. Plaintiff has not satisfied the exception from		
3	the three strikes bar under 28 U.S.C. § 1915(g), and Plaintiff must pay the \$402.00 filing fee if he		
4	wishes to litigate this action.		
5	Accordingly, the Court HEREBY ORDERS the Clerk of the Court to randomly assign a		
6	District Judge to this action.		
7	Further, it is HEREBY RECOMMENDED that:		
8	1. The motion to proceed in forma pauperis, (ECF No. 2), be DENIED, pursuant to 28		
9	U.S.C. § 1915(g); and		
10	2. Plaintiff be ORDERED to pay the \$402.00 initial filing fee in full to proceed with this		
11	action.		
12	* * *		
13	These Findings and Recommendations will be submitted to the United States District		
14	Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within		
15	fourteen (14) days after being served with these Findings and Recommendations, Plaintiff may		
16	file written objections with the court. The document should be captioned "Objections to		
17	Magistrate Judge's Findings and Recommendation." Plaintiff is advised that the failure to file		
18	objections within the specified time may result in the waiver of the "right to challenge the		
19	magistrate's factual findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)		
20	(citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).		
21			
22	IT IS SO ORDERED.		
23	Dated: May 23, 2023 /s/ Barbara A. McAuliffe		
24	UNITED STATES MAGISTRATE JUDGE		
25			
26			
27			
28			
	3		