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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TERRENCE BROWNLEE,

Plaintiff,

No. 2:10-cv-2834 JAM KJN P

vs.

B. SULLIVAN, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

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Plaintiff is barred from proceeding in forma pauperis under the three strikes provision of 28 U.S.C. § 1915(g). Brownlee v. Swingle, Case No. 09-cv-3305 JFM (January 7, 2010 Order).<sup>1</sup> In the instant case, by an order filed November 9, 2010, plaintiff was ordered to pay the filing fee in full within twenty-eight days, and was cautioned that failure to do so would result in a recommendation that this action be dismissed. On December 2, 2010, plaintiff filed a document entitled “Response and Answer to Court Order,” in which plaintiff claims he is entitled to the “imminent danger of serious physical injury” exception to the three strikes provision of 28 U.S.C. § 1915(g). Plaintiff has not paid the \$350.00 filing fee.

As noted above, there is an exception to the three-strikes bar, which allows a

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<sup>1</sup> A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986).

1 plaintiff to proceed without prepaying the \$350.00 fee when “the prisoner is under imminent  
2 danger of serious physical injury.” 28 U.S.C. § 1915(g). Whether a prisoner qualifies for the  
3 exception is assessed based on the alleged conditions at the time the complaint was filed and  
4 based upon the allegations in the complaint, which are to be construed liberally. Andrews v.  
5 Cervantes, 493 F.3d 1047, 1052-55 (9th Cir. 2007).

6 Plaintiff is presently housed at High Desert State Prison. In his complaint,  
7 plaintiff alleges he was transported to court in Sacramento three times and the lengthy transport  
8 had “an impact on plaintiff’s medical injury.” (Dkt. No. 1 at 3.) Plaintiff states he cannot sit  
9 down for that long ride. (Id.) In his recent filing, plaintiff reiterates his claim that defendants  
10 have caused more injury to his spine and caused him to suffer more pain due to his spinal injury.  
11 (Dkt. No. 10.) Plaintiff also claims that he was seen by a doctor at High Desert State Prison  
12 during the week of November 15 and 19, and that the doctor wrote plaintiff a chrono stating  
13 plaintiff can sit down for 20 to 30 minutes. (Dkt. No. 10 at 2.) Plaintiff now alleges that his  
14 “medical issues are being covered-up, his medical injury to his spine has not changed, and to  
15 write a new chrono is a violation.” (Id.)

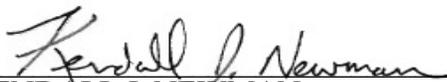
16 On November 9, 2010, this court found that plaintiff’s complaint failed to  
17 demonstrate plaintiff faced imminent danger of serious physical injury on the date he signed the  
18 complaint. (Dkt. No. 6.) This finding was based on plaintiff’s failure to demonstrate he faced  
19 transport to Sacramento in the near future, or that he had a medical chrono stating he cannot sit in  
20 a vehicle seat for a long period of time. (Id. at 2-3.) In his recent filing, plaintiff failed to rebut  
21 or address the court’s findings regarding future transport. (Dkt. No. 10.) Plaintiff states only that  
22 defendants’ actions caused plaintiff to be in more pain and caused more injuries to his spine. He  
23 does not state he is facing another long transport in the near future. Moreover, plaintiff appears  
24 to complain that he was recently written a chrono stating that he can sit down for 20 to 30  
25 minutes. However, this new medical chrono should be of benefit to plaintiff in preventing future  
26 long distant transports, and rebuts plaintiff’s claim that he faces imminent danger of serious

1 physical injury.<sup>2</sup> Finally, the fact that plaintiff seeks money damages only as a form of relief  
2 belies his representation that he might be under imminent danger.

3 In light of the above, plaintiff fails to demonstrate he is facing the imminent  
4 danger of serious physical injury. Therefore, based on plaintiff's failure to pay the filing fee in  
5 full,<sup>3</sup> IT IS HEREBY RECOMMENDED that this action be dismissed without prejudice.

6 These findings and recommendations are submitted to the United States District  
7 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
8 one days after being served with these findings and recommendations, plaintiff may file written  
9 objections with the court and serve a copy on all parties. Such a document should be captioned  
10 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that  
11 failure to file objections within the specified time may waive the right to appeal the District  
12 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

13 DATED: December 8, 2010

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17 KENDALL J. NEWMAN  
18 UNITED STATES MAGISTRATE JUDGE

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21 <sup>2</sup> Plaintiff's complaint does not include any allegations concerning lack of treatment for  
22 pain, medical treatment generally, or a "cover-up" of his medical issues. To the extent plaintiff is  
23 now attempting to raise other, newly-alleged issues, or challenging the newly-issued chrono,  
24 plaintiff must first address these issues through the administrative grievance process. Plaintiff  
25 did not have this chrono at the time he filed the instant complaint, and the administrative appeals  
26 pursued in connection with his complaint were denied, in part, based on the fact plaintiff did not  
have a medical chrono preventing his transport. (See, for example, Dkt. No. 1 at 7.) Plaintiff is  
advised that all issues must be exhausted by administrative appeals through the director's level  
prior to raising those issues in federal court. Booth v. Churner, 532 U.S. 731, 741 (2001).

<sup>3</sup> If plaintiff wishes to pursue this civil rights action, he may opt to pay the filing fee in  
full within the objection period set forth below.