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

LATHAHN MCELROY,

Plaintiff,

No. 2:12-cv-1518 JFM P

vs.

C/O GUSTAFSON, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

On October 15, 2012, defendants filed a motion to revoke plaintiff's in forma pauperis status pursuant to 28 U.S.C. § 1915(g). Plaintiff opposes the motion.

This action was filed on June 6, 2012. In support of the motion, defendants present evidence that on at least three occasions prior to the time this action was filed lawsuits filed by the plaintiff were dismissed on the grounds that they were frivolous or malicious or failed to state a claim upon which relief may be granted. See Order filed December 11, 2008 in McElroy v. Gebmeddin, No. 1:08-cv-00124 LJO GSA PC (ECF No. 11); Order filed June 3,

1 2009 in McElroy v. California Department of Corrections, No. 2:08-cv-00733 HWG (ECF No.
2 11); and Order filed April 30, 2010 in McElroy v. C/O Schultz, et al., No. 1:08-cv-00179 OWW
3 MJS PC. Plaintiff is therefore precluded from proceeding in forma pauperis in this action unless
4 plaintiff is “under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

5 In his complaint, plaintiff alleges, inter alia, that immediately upon his transfer to
6 High Desert State Prison (High Desert) he was “injuriously stripped of his medical appliances”
7 and told the appliances would not be returned. Complaint, filed June 6, 2012 (ECF No. 1) at 4.
8 The appliances include a cane, a wheelchair, a back brace and a leg brace. Id. He was also
9 deprived of necessary medication. Id. at 5. Plaintiff also alleges that he was being denied
10 necessary medical care. Id. at 6. Plaintiff seeks injunctive relief in addition to money damages.

11 These allegations are sufficient allegations of “imminent danger of serious
12 physical injury” to meet the exception to the bar to proceeding in forma pauperis that would
13 otherwise be imposed under 28 U.S.C. § 1915(g). Defendants’ contention that the exception
14 does not apply because plaintiff transferred to Wasco State Prison (Wasco) on or about June 11,
15 2012 is without merit. The gravamen of the relevant allegations is that plaintiff was without
16 necessary medical appliances and necessary medication and there is nothing in plaintiff’s notice
17 of change of address that indicates those alleged deprivations were remedied by his transfer to
18 Wasco.

19 In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the
20 Court is directed to assign this action to a United States District Judge; and

21 IT IS HEREBY RECOMMENDED that:

22 1. Defendants’ October 15, 2012 motion to revoke plaintiff’s in forma pauperis
23 status be denied; and

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1 2. Defendants be directed to answer plaintiff's complaint within ten days from
2 the date of any order by the district court adopting these findings and recommendations.

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

11 DATED: May 7, 2013.

12 
13 EDMUND F. BRENNAN
14 UNITED STATES MAGISTRATE JUDGE

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