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

10 CARLOS HENDON,

11 Plaintiff,

No. 2:12-cv-01702 DAD P

12 vs.

13 WILLIAM E. KULKA, et al.,

14 Defendants.

ORDER

15 \_\_\_\_\_/  
16 Plaintiff is a state prisoner proceeding pro se with an amended complaint.  
17 Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has filed an application to proceed in  
18 forma pauperis under 28 U.S.C. § 1915. Plaintiff has consented to Magistrate Judge jurisdiction  
19 over this action pursuant to 28 U.S.C. § 636(c). See Doc. No. 4.

20 The federal in forma pauperis statute includes a limitation on the number of  
21 actions in which a prisoner can proceed in forma pauperis. Specifically, that statute provides as  
22 follows:

23 In no event shall a prisoner bring a civil action or appeal a  
24 judgment in a civil action or proceeding under [§ 1915] if the  
25 prisoner has, on 3 or more prior occasions, while incarcerated or  
26 detained in any facility, brought an action or appeal in a court of  
the United States that was dismissed on the grounds that it is  
frivolous, malicious, or fails to state a claim upon which relief may

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1 be granted, unless the prisoner is under imminent danger of  
2 serious physical injury.

3 28 U.S.C. § 1915(g). Thus, where a prisoner has submitted an application to proceed in forma  
4 pauperis under 28 U.S.C. § 1915, the court must determine whether plaintiff has, on three or  
5 more occasions prior to the filing of this new action, brought a civil action or appeal that was  
6 dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which  
7 relief could be granted. A “plaintiff has ‘brought’ an action for the purposes of § 1915(g) when  
8 he submits a complaint and request to proceed in forma pauperis to the court.” O’Neal v. Price,  
9 531 F.3d 1146, 1152 (9th Cir. 2008). Where a district court disposes of a prisoner’s complaint  
10 without prepayment of fees on the grounds that the submitted complaint is frivolous, malicious  
11 or fails to state a claim upon which relief may be granted, the complaint has been “dismissed” for  
12 purposes of § 1915(g). Id. at 1153. “[A] dismissal ripens into a strike for §1915(g) purposes on  
13 the date of the Supreme Court’s denial or dismissal of a petition for writ of certiorari, if the  
14 prisoner filed one, or from the date when the time to file a petition for writ of certiorari expires, if  
15 he did not.” Silva v. DiVittorio, 658 F.3d 1090, 1100 (9th Cir. 2011) (internal quotation marks  
16 omitted).

17 Here, court records reveal that plaintiff has accumulated at least three such  
18 “strikes” in actions he has filed in the United States District Court for the Eastern District of  
19 California. Those cases counting against plaintiff as strikes for purposes of §1915(g) have  
20 previously been identified by another judge of this court based on court records as follows:

21 In Hendon v. Rogel, Case No. 2:05-cv-01063 DFL PAN,  
22 findings and recommendations were filed recommending that the  
23 action be dismissed for failure to state a claim. (Doc. No. 10.) The  
24 findings and recommendations were adopted by the District Judge  
25 on August 28, 2006. (Doc. No. 14.) The appeal to the U.S. Court  
26 of Appeals was dismissed for lack of jurisdiction as the notice of  
27 appeal was not timely filed. (Doc. No. 20.)

28 In Hendon v. Wichter, Case No. 1:05-cv-01246 AWI DLB,  
29 findings and recommendations were filed recommending that the  
30 action be dismissed for failure to state a claim. (Doc. No. 16.) The

1 findings and recommendations were adopted by the District Judge  
2 on August 6, 2007. (Doc. No. 18.) On appeal, the U.S. Court of  
Appeals affirmed the judgment. (Doc. No. 28.)

3 In Hendon v. White, Case No. 2:07-01825 GEB CMK, findings  
4 and recommendations were filed recommending that the action be  
5 dismissed because plaintiff's Eighth Amendment medical care  
6 claim showed only negligence and a difference of opinion between  
7 plaintiff and medical providers. (Doc. No. 7.) The findings and  
8 recommendations were adopted by the District Judge on February  
5, 2008. (Doc. No. 9.) On appeal, the U.S. Court of Appeals  
considered the dismissal of plaintiff's claim for failure to allege  
deliberate indifference to his serious medical needs and affirmed  
the judgment. (Doc. No. 14.)

9 Hendon v. Baroya, Case No. 1:09-cv-00911 MJS (E.D. Cal. July 29, 2010) (Doc. No. 14 at 2).

10 Based upon the previous finding by Magistrate Judge Seng in Hendon v. Baroya and the cases  
11 cited therein, the undersigned finds that on at least three occasions prior to the filing of this  
12 pending action, plaintiff has brought civil actions that were dismissed for failure to state a claim  
13 upon which relief could be granted.

14 The court notes that there is an exception to the three-strike bar of § 1915(g)  
15 which allows a prisoner to proceed with a civil action despite three prior qualifying dismissals  
16 where the prisoner adequately alleges that he or she is under imminent danger of serious physical  
17 injury. See Andrews v. Cervantes, 493 F.3d 1047, 1056-57 (9th Cir. 2007). However, the  
18 imminent danger exception applies only "if the complaint makes a plausible allegation that the  
19 prisoner faced 'imminent danger of serious physical injury' at the time of filing." Id. at 1055  
20 (emphasis added).

21 In his original complaint, plaintiff alleged that from February 17, 2009 to June 22  
22 2012, he was forced to take the psychotropic drugs Haldol and Geodon which cause him to suffer  
23 side effects, including "stiffness, a shuffling gait, high blood pressure and cholesterol, and dry  
24 mouth." (Doc. No. 1 at 3.) Plaintiff also alleged that the medications he was required to take

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1 “increases the risk of damaging plaintiff’s liver, kidney, etc.” (Id.)<sup>1</sup> The court is unable to  
2 determine based on these bare allegations whether it is plausible that plaintiff faced an imminent  
3 danger of serious physical injury at the time he initiated this action on June 22, 2012. Therefore,  
4 if he wishes to pursue his application to proceed in forma pauperis the court will direct plaintiff  
5 to submit a supplemental statement with medical records supporting his contention that he faced  
6 an “imminent danger of serious physical injury” on June 22, 2012 when he initiated this action.  
7 See Andrews, 493 F.3d at 1055; see also Holz v. McFadden, No. ED CV 07-1410-DSF (PJW),  
8 2011 WL 2882562, at \*2 (C.D. Cal. June 27, 2011) (acknowledging that “the focus of the inquiry  
9 regarding imminent danger is the time when the action is filed” and noting that “uttering the  
10 words ‘imminent danger’ is not enough to fit within the exception”).<sup>2</sup>

11 Accordingly, IT IS HEREBY ORDERED that within thirty days from the service  
12 of this order, plaintiff shall submit a supplemental statement and medical records demonstrating  
13 that he was in imminent danger of serious physical injury at the time he filed his original  
14 complaint. Plaintiff’s failure to comply with this order will result in the dismissal of this action  
15 without prejudice.

16 DATED: April 8, 2013.

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19 DALE A. DROZD  
20 UNITED STATES MAGISTRATE JUDGE

19 DAD:4  
20 hend1702.suppl915g

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22 <sup>1</sup> In his amended complaint dated August 21, 2012 and received for filing by the court on  
23 September 11, 2012, plaintiff repeated these allegations without identifying the medications he  
was allegedly forced to take but did allege that his forced medicating continued through his filing  
of the amended complaint. (Doc. No. 5 at 3-4.)

24 <sup>2</sup> In this regard, plaintiff should consider presenting any medical evidence to which he  
25 may have access suggesting that he has suffered increased blood pressure and cholesterol levels  
26 and liver and kidney damage as a result of the medications that have allegedly been forced upon  
him. In addition, plaintiff should present any evidence he has that would suggest that these  
conditions have worsened over the past ten months since his commencement of this action.