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

MARVIN HARRIS,

Plaintiff,

No. 2:13-cv-0932 GEB AC P

vs.

TIM V. VIRGA, Warden,

Defendant.

FINDINGS AND RECOMMENDATIONS

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

The Prison Litigation Reform Act of 1995 (PLRA) permits any court of the United States to authorize the commencement and prosecution of any suit without prepayment of fees by a person who submits an affidavit indicating that the person is unable to pay such fees; however,

[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or

1 detained in any facility, brought an action or appeal in a court of  
2 the United States that was dismissed on the grounds that it is  
3 frivolous, malicious, or fails to state a claim upon which relief may  
be granted, unless the prisoner is under imminent danger of serious  
physical injury.

4 28 U.S.C. § 1915(g). The court takes judicial notice<sup>1</sup> of the national pro se “three strikes”  
5 database,<sup>2</sup> which indicates that plaintiff has been barred under § 1915(g) from proceeding in this  
6 court in forma pauperis since July 28, 1997. Among those cases identified in the database as  
7 strikes by plaintiff:

- 8 • Harris v. Hickey No. 1:96-cv-5770 GEB HGB PC  
(Dismissed as frivolous by Order filed on April 7, 1997);
- 9 • Harris v. Hickey No. 1:97-cv-5186 REC HGB PC  
10 (Dismissed as frivolous by Order filed on July 28, 1997);
- 11 • Harris v. Coyle No. 1:97-cv-5508 AWI-DLB PC  
12 (Dismissed as frivolous, malicious and for failure to state a  
claim by Order filed on January 21, 1999).

13 The court takes further judicial notice of Harris v. Brooks, Case No. 09-cv-1818 DAD P, in  
14 which Magistrate Judge Drozd determined on March 22, 2010 that plaintiff had, on three or  
15 more occasions, brought an action that was dismissed for failure to state a claim upon which  
16 relief may be granted. In that Order, the following cases were identified:

- 17 • Harris v. Edmonds No. 1:00-cv-5857 WWW LJO (Order dismissing  
18 action for failure to state a claim upon which relief may be granted, filed  
on November 27, 2000);
- 19 • Harris v. Edmonds No. 1:00-cv-7160 REC SMS (Order dismissing action  
20 [with prejudice] for failure to state a claim [and for failure to comply with  
a court order], filed on [May 24, 2002 judgment entered on] May 28,  
21 2002);

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23 <sup>1</sup> Judicial notice may be taken of court records. Valerio v. Boise Cascade Corp., 80  
24 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir.), cert. denied, 454 U.S. 1126  
(1981).

25 <sup>2</sup> A Ninth Circuit committee has directed this court to access this database for PLRA  
26 three-strikes screening purposes.

- 1 • Harris v. Piler No. 2:01-cv-1125 WBS DAD (Order dismissing action for  
2 failure to state a claim, filed on March 15, 2002).

3 All of the preceding cases were dismissed well in advance of the filing of the  
4 instant action on May 10, 2013. Therefore, this court finds that plaintiff is precluded from  
5 proceeding in forma pauperis unless he is “under imminent danger of serious physical injury.” 28  
6 U.S.C. § 1915(g). To satisfy the exception, plaintiff must have alleged facts that demonstrate  
7 that he was “under imminent danger of serious physical injury” at the time of filing the  
8 complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007) (“it is the circumstances  
9 at the time of the filing of the complaint that matters for purposes of the ‘imminent danger’  
10 exception under § 1915(g)”; see also, Abdul-Akbar v. McKelvie, 239 F.3d 307, 312-14 (3rd Cir.  
11 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999); Ashley v. Dilworth, 147  
12 F.3d 715, 717 (8th Cir.1998); Banos v. O’Guin, 144 F.3d 883, 884 (5th Cir.1998).

13 In his putative “complaint,” plaintiff names only defendant Virga, the warden of  
14 New Folsom Prison, as a defendant. Plaintiff’s statement of claim consists in whole of the  
15 following: “uneducate [sic] correctional officers.” As relief he seeks as follows: “I this court to  
16 command CDCR correctional officer [sic] to get a [sic] educate [sic] and stop hate talk inmates  
17 CDCR EOP/PSU.” Complaint at 2-3. Far from making the requisite showing of “imminent  
18 danger” to qualify for an exception to the “three strikes” bar under § 1915 (g), plaintiff’s  
19 deficient complaint is subject to summary dismissal with prejudice as wholly frivolous.  
20 Accordingly, the undersigned will recommend that plaintiff be denied in forma pauperis status  
21 and will separately recommend that this action be summarily dismissed with prejudice as  
22 frivolous.

23 “Under Ninth Circuit case law, district courts are only required to grant leave to  
24 amend if a complaint can possibly be saved. Courts are not required to grant leave to amend if a  
25 complaint lacks merit entirely.” Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000). See also,  
26 Smith v. Pacific Properties and Development Corp., 358 F.3d 1097, 1106 (9th Cir. 2004), citing

1 Doe v. United States, 58 F.3d 494, 497(9th Cir.1995) (“a district court should grant leave to  
2 amend even if no request to amend the pleading was made, unless it determines that the pleading  
3 could not be cured by the allegation of other facts.”). “[A] district court retains its discretion over  
4 the terms of a dismissal for failure to state a claim, including whether to make the dismissal with  
5 or without leave to amend.” Lopez v. Smith, 203 F.3d at 1124.

6 Accordingly, IT IS RECOMMENDED that:

7 1. Plaintiff be barred from proceeding in this action in forma pauperis by the  
8 three-strikes provision of 28 U.S.C. § 1915(g) and his request to proceed in forma pauperis be  
9 denied;

10 2. This complaint be summarily dismissed with prejudice as wholly frivolous and  
11 this case be closed.

12 These findings and recommendations are submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
14 one days after being served with these findings and recommendations, plaintiff may file written  
15 objections with the court. Such a document should be captioned “Objections to Magistrate  
16 Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections  
17 within the specified time may waive the right to appeal the District Courts order. Martinez v.  
18 Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: June 18, 2013

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21   
22 ALLISON CLAIRE  
23 UNITED STATES MAGISTRATE JUDGE

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