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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT ELLIS,  
Plaintiff,  
v.  
F. FOULK, Warden, et al.,  
Defendants.

No. 2:14-cv-0802 AC P

ORDER

I. IN FORMA PAUPERIS

The court’s prior order in this case revoked plaintiff’s in forma pauperis status, on the grounds that he was barred from proceeding under the “three strikes” rules of 28 U.S.C. § 1915(g), based upon four cited cases.

The court sua sponte reconsiders that decision, and finds that only two of the cited cases are strikes under the statute. See Ellis v. Runnels, 2:06-cv-0040-FCD-EFB, ECF No. 22 (E.D. Cal. May 16, 2007) (failure to state a claim: challenge to prison regulation that prohibited prisoners from having images depicting female frontal nudity); Ellis v. Reddy (Doctor), 2:11-cv-0363-GEB-CKD, ECF No. 27 (E.D. Cal. Dec. 16, 2011) (failure to state a claim: asserting inadequate medical treatment and failure to refer to outside doctor).

“[A] dismissal must be final before it counts as a ‘strike’ for § 1915(g) purposes.” Silva v. Di Vittorio, 658 F.3d 1090, 1098-99 (9th Cir. 2011). The dismissal is not final until plaintiff has

1 exhausted or waived his appeals, including review by the Supreme Court. Id., at 1100-01 (“The  
2 district court’s dismissal in Bush therefore ripened into a ‘strike’ once the time for filing a  
3 certiorari petition expired”).

4 The time for appeal, or for filing a petition for writ of certiorari, had not expired for the  
5 other two cited cases, at the time plaintiff filed them. Ellis v. Bergsen, 2:14-cv-0705-EFB, ECF  
6 No. 8 (E.D. Cal. Jul. 25, 2014) (failure to state a claim: challenge to prison guard’s confiscation  
7 of plaintiff’s adult magazine; plaintiff filed Foulk on March 31, 2014, while Bergsen was still  
8 pending in the district court); Ellis v. Faulk, 2:13-cv-2197 CKD, ECF No. 11 (E.D. Cal. Feb. 18,  
9 2014) (frivolous and failure to state a claim: challenge to prison policy banning hair trimmers,  
10 nail clippers, and cream-filled pastries and cookies; plaintiff filed Foulk on March 31, 2014, while  
11 the appeal was pending in Faulk). Therefore, the cited cases do not support a finding that plaintiff  
12 is barred by the three-strikes rule.

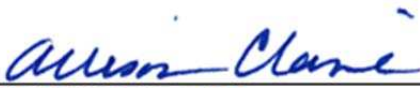
### 13 III. CONCLUSION

14 Accordingly, IT IS HEREBY ORDERED that:

15 1. The court’s prior order revoking plaintiff’s IFP application (ECF No. 12), is  
16 VACATED.

17 2. Plaintiff’s in forma pauperis status is REINSTATED. The court will screen  
18 plaintiff’s Second Amended Complaint (ECF No. 11), in due course.

19 DATED: January 8, 2015

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21 ALLISON CLAIRE  
22 UNITED STATES MAGISTRATE JUDGE  
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