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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VESTER L. PATTERSON,
Plaintiff,
v.
SAM WONG DO, et al.,
Defendants.

No. 2:15-cv-2117 AC P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983.

I. Three Strikes Analysis

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 judgement in a civil action or proceeding under this section if the prisoner has, on 3 or more occasions, while incarcerated or 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 be granted, unless the prisoner is under imminent danger of serious physical injury.

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1 28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded
2 from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three
3 frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook,
4 169 F.3d 1176, 1178 (9th Cir. 1999). “[Section] 1915(g) should be used to deny a prisoner’s [in
5 forma pauperis] status only when, after careful evaluation of the order dismissing an action, and
6 other relevant information, the district court determines that the action was dismissed because it
7 was frivolous, malicious or failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th
8 Cir. 2005). “[W]hen a district court disposes of an in forma pauperis complaint ‘on the grounds
9 that [the claim] is frivolous, malicious, or fails to state a claim upon which relief may be granted,’
10 such a complaint is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such
11 dismissal as denial of the prisoner’s application to file the action without prepayment of the full
12 filing fee.” O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original).
13 Dismissal also counts as a strike under § 1915(g) “when (1) a district court dismisses a complaint
14 on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff
15 then fails to file an amended complaint” regardless of whether the case was dismissed with or
16 without prejudice. Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

17 By order filed April 28, 2017, the undersigned screened the original complaint and
18 granted plaintiff leave to proceed in forma pauperis. ECF No. 5. Upon screening, the court
19 dismissed all defendants except defendant Wong. Id. at 15. Plaintiff was given the option of
20 amending the complaint or proceeding on his claims against Wong. Id. He chose to amend the
21 complaint. ECF No. 8. Plaintiff proceeded to file an amended complaint that contained only an
22 abbreviated version of his original claims against defendant Wong.¹ ECF No. 12. However, the
23 court will not go forward with screening the complaint at this time because it has since come to
24 the court’s attention that at the time plaintiff initiated the instant action, he had already
25 accumulated at least three strikes under § 1915(g).

26
27 ¹ The court notes that the first amended complaint omits the facts contained in the original
28 complaint that supported an allegation of deliberate indifference rather than a mere difference of
opinion.

1 Upon inspection of the dockets in cases filed by plaintiff in the Central and Southern
2 Districts of California, this court has identified three cases brought by plaintiff that qualify as
3 strikes. The court takes judicial notice of the following lawsuits filed by plaintiff in the United
4 States District Courts for the Central and Southern Districts of California:²

- 5 1. Patterson v. Morris, C.D. Cal. No. 2:98-cv-05252 AAH RC, 1998 U.S. Dist. LEXIS 24243
6 (report and recommendation), 1998 U.S. Dist. LEXIS 24242 (November 9, 1998 order
7 adopting report and recommendation and dismissing complaint for failure to state a claim)
- 8 2. Patterson v. Lombatoz, S.D. Cal. No. 3:98-cv-01759 AJB, 1998 U.S. Dist. LEXIS 24160
9 (November 3, 1998 order dismissing complaint for failure to state a claim)³
- 10 3. Patterson v. Leslie, C.D. Cal. No. 2:12-cv-06088 UA SS, ECF No. 6 (August 9, 2012
11 order dismissing complaint for failure to state a claim)

12 All of the preceding cases were dismissed well in advance of the October 5, 2015 filing⁴
13 of the instant action and none of the strikes have been overturned. Therefore, this court finds that

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15 ² The court “may take notice of proceedings in other courts, both within and without the federal
16 judicial system, if those proceedings have a direct relation to matters at issue.” United States
17 ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)
18 (citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court
may take judicial notice of facts that are capable of accurate determination by sources whose
accuracy cannot reasonably be questioned).

19 ³ The complaint was dismissed in part for failure to state a claim because the challenge to his
20 rules violation was barred by Heck v. Humphrey, 512 U.S. 477(1994). Patterson v. Lombatoz
21 (“Lombatoz”), No. 3:98-cv-01759 AJB, 1998 U.S. Dist. LEXIS 24160, at *4-5 (S.D. Cal. Nov. 2,
22 1998). However, while plaintiff did seek injunctive relief in addition to damages, the relief he
23 sought was “[a]n injunction preventing defendant(s): from putting any inmates on ‘C’ status and
24 from retaliation.” Lombatoz ECF No. 1 at 8. This relief does not sound in habeas. Plaintiff also
25 attached a letter that he sent to the warden two weeks before he mailed the complaint, that states
26 he had tried to appeal the disciplinary finding but his appeal “has never been responded to nor
27 was the problem resolved.” Id. at 9. Plaintiff’s other claims, which were also dismissed for
28 failure to state a claim, did not implicate the legality of his sentence. Lombatoz, 1998 U.S. Dist.
LEXIS 24160, at *5-6. Accordingly, this dismissal counts as a strike. Washington v.
Los Angeles Cnty. Sheriff’s Dep’t, 833 F.3d 1048, 1055-57 (9th Cir. 2016) (Heck dismissal
counts as a failure to state a claim if it is clear on the face of the complaint that conviction has not
been overturned and the requested relief does not sound in habeas).

⁴ Since plaintiff is a prisoner proceeding pro se, he is afforded the benefit of the prison mailbox
rule. Houston v. Lack, 487 U.S. 266, 276 (1988).

1 plaintiff is precluded from proceeding in forma pauperis unless he is “under imminent danger of
2 serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must have
3 alleged facts that demonstrate that he was “under imminent danger of serious physical injury” at
4 the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007)
5 (“[I]t is the circumstances at the time of the filing of the complaint that matters for purposes of
6 the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie, 239 F.3d
7 307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999);
8 Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883, 885 (5th
9 Cir. 1998).

10 The first amended complaint alleges that in March 2014, defendant Wong, his primary
11 care provider at Mule Creek State Prison, denied plaintiff treatment for hepatitis C. ECF No. 12
12 at 1-2. However, at the time he filed the first amended complaint, it had been over three years
13 since the alleged violation of his rights and he was housed at the California Correctional
14 Institution and presumably no longer under defendant Wong’s care. Id. at 1. Even if the court
15 were to use the filing date of the original complaint to determine whether plaintiff was in
16 imminent danger at the time he filed the complaint, at the time he filed the original complaint he
17 was housed at the Substance Abuse Treatment Facility and over a year had passed since the
18 alleged denial of treatment. Accordingly, plaintiff is unable to demonstrate that he was in
19 imminent danger at the time he filed the complaint. The undersigned will therefore recommend
20 that plaintiff’s in forma pauperis status be revoked and he be required to pay the filing fee in full
21 or have the complaint dismissed.

22 II. Plain Language Summary of this Order for a Pro Se Litigant

23 You have three strikes under § 1915(g) and cannot be granted in forma pauperis status
24 unless you show the court that you were in imminent danger of serious physical injury at the time
25 you filed the complaint. Because your claims are about things that happened a year before you
26 filed the original complaint, and that happened at a prison you were no longer at, you cannot
27 show imminent danger. It is therefore being recommended that your in forma pauperis status be

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1 revoked and that you be required to pay the entire filing fee in full before you can go forward
2 with your complaint.

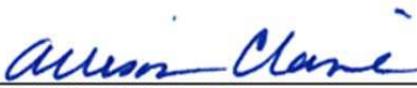
3 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court randomly assign a
4 United States District Judge to this action.

5 IT IS FURTHER RECOMMENDED that:

- 6 1. Plaintiff's in forma pauperis status be revoked.
- 7 2. That plaintiff be ordered to pay the entire \$400.00 in required fees within thirty days or
8 face dismissal of the case.

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

16 DATED: November 13, 2017.

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19 ALLISON CLAIRE
20 UNITED STATES MAGISTRATE JUDGE
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