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

ROBERT WILLIAM TUNSTALL, JR.,  
Plaintiff,  
v.  
JOSEPH BICK, et al.,  
Defendants.

No. 2:16-CV-2604-KJM-DMC-P

**FINDINGS AND RECOMMENDATIONS**

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the Court is Defendants’ motion to revoke Plaintiff’s in forma pauperis (IFP) status, ECF No. 116, and Plaintiff’s response to Defendant’s motion, ECF No. 123.

**I. BACKGROUND**

On November 1, 2016, Plaintiff filed his original complaint alleging failure to provide Plaintiff with treatment for neurological disorders, dementia, and post-traumatic stress disorder (PTSD). See EFC No. 1, 2. Plaintiff also alleges in his third amended complaint that Plaintiff is epileptic, forgetful, cognitively impaired, has hearing issues, and expresses bad behavior because of a brain surgery-related personality disorder. See EFC No. 57, 2. According to Plaintiff, prison officials are denying Plaintiff mental health treatment for these issues. Id. at 4.

1 Plaintiff claims that prison staff Defendants instigated Plaintiff's PTSD when  
2 assaulting Plaintiff. Id. Plaintiff alleges the assault began when Plaintiff "felt the onset to a  
3 seizure" and fell out of the wheelchair onto the floor. Id. Defendants Officer Doss and Officer  
4 Spada then turned him over on his back, and an individual that Plaintiff refers to as "Asian  
5 Nurse" (hereby referred to as "Nurse") then put his left knee in Plaintiff's right hand and  
6 "shoved" his right knee into Plaintiff's abdomen. Id. at 7-8. Defendant Nurse also threatened to  
7 push Plaintiff off his gurney. Id. at 8. As Plaintiff was still sitting up in the gurney regaining  
8 consciousness from the seizure, Defendants Officers T. Camper, S. Perez, L. Rabbon, M.  
9 Hemenez, and S. Spaulding allegedly committed a "brutal terrorist beating" in an attempt to  
10 murder Plaintiff. Id. at 8, 11. Later, another prison staff member notified Plaintiff that all  
11 Defendants involved in the assault were fired after an FBI investigation. Id. at 10.

## 12 13 **II. DISCUSSION**

14 The PLRA's "three strikes" provision, found at 28 U.S.C. § 1915(g), provides as  
15 follows:

16 In no event shall a prisoner bring a civil action . . . under this section if the  
17 prisoner has, on three or more prior occasions, while incarcerated or  
18 detained . . . , brought an action . . . in a court of the United States that was  
19 dismissed on the ground that it is frivolous, malicious, or fails to state a  
20 claim upon which relief may be granted, unless the prisoner is under  
21 imminent danger of serious physical injury.

22 Id.

23 Thus, when a prisoner plaintiff has had three or more prior actions dismissed for one of the  
24 reasons set forth in the statute, such "strikes" preclude the prisoner from proceeding in forma  
25 pauperis unless the imminent danger exception applies.

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1 In support of their motion to revoke Plaintiff's in forma pauperis status,  
2 Defendants ask the Court to judicially notice five prior cases. See ECF Nos. 116-1 (request for  
3 judicial notice), 116-2 (Exhibits A through F).<sup>1</sup> Notably, Defendants cite to the court's  
4 determination in Tunstall v. Nappi, No. 2:21-cv-0308-EFB P, 2021 U.S. Dist. LEXIS 90919  
5 (E.D. Cal. May 12, 2021), that Plaintiff had three or more strikes prior to filing the instant action  
6 in 2016.

7 Notwithstanding three or more prior strikes, Plaintiff nonetheless may proceed IFP  
8 if he was in imminent danger of serious physical injury at the time of filing suit. See Andrews v.  
9 Cervantes, 493 F.3d 1047, 1052-53 (9th Cir. 2007). A prisoner may meet the imminent danger  
10 requirement by alleging that prison officials continue with a practice that has injured him or  
11 others similarly situated in the past, or that there is a continuing effect resulting from such a  
12 practice. See Williams v. Paramo, 775 F.3d 1182, 1190 (9th Cir. 2014).

13 At the time he filed the original complaint in this action, Plaintiff was still under  
14 the authority of the guards who allegedly assaulted him. Id. at 7-8. Although Plaintiff was later  
15 informed that Defendants Officers T. Camper, S. Perez, C. Rabbon, M. Hemenez, S. Spaulding,  
16 and "Asian Nurse" were fired after the FBI investigated Plaintiff's assault, Plaintiff remains in  
17 "imminent danger" for the purposes of 28 U.S.C.S. § 1915(g) because he was still under  
18 Defendant's authority at the time of the original filing. See Andrews, 493 F.3d at 1052-53.

19 In his opposition brief, Plaintiff also claims his life is still at risk because he is  
20 suicidal and without mental health treatment. EFC No. 123, 2. Plaintiff states he attempted  
21 suicide three times already, "wants to lay down and wake up from the daily horror of the thoughts  
22 to get it over with and not wake up from sleep," and has "daily suicidal thoughts of wanting to  
23 leave this world... wishing that someone would put a gun to Plaintiff's head and pull the trigger.  
24 Id. at 2, 4. Plaintiff then alleges that Defendant Staff Officer Sahota prevented medical staff from

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26 <sup>1</sup> **Error! Main Document Only.** The Court may take judicial notice pursuant to  
27 Federal Rule of Evidence 201 of matters of public record. See U.S. v. 14.02 Acres of Land, 530  
28 F.3d 883, 894 (9th Cir. 2008). Thus, this court may take judicial notice of state court records, see  
Kasey v. Molybdenum Corp. of America, 336 F.2d 560, 563 (9th Cir. 1964), as well as its own  
records and those of other federal courts, see Chandler v. U.S., 378 F.2d 906, 909 (9th Cir. 1967).

1 attending to Plaintiff during a seizure and “threatened to spray Plaintiff with pepper spray that  
2 could have caused Plaintiff’s death or irreparable harm.” Id. at 6. Afterward, Plaintiff states his  
3 life was further threatened when the prison housed Plaintiff with unpredictably violent “Level 4”  
4 mentally ill prisoners, although Plaintiff himself is only a “Level 2” prisoner. Id. at 12.

5 Based on these considerations, this Court finds that Plaintiff fulfills the “imminent  
6 danger” exception to the PLRA’s three strikes provisions. Further, in the instant case the Plaintiff  
7 suffered from untreated PTSD at the time of the original filing. See Williams, 775 F.3d at 1190.  
8 Although living with untreated PTSD does not generally entail “imminent danger,” it is sufficient  
9 in this case because Plaintiff’s PTSD is a continued effect of the Defendant’s injurious practice of  
10 assault. Id.; See Womack v. Baughman, No. 2:17-cv-2708 TLN KJN P, 2020 U.S. Dist. LEXIS  
11 32226, at \*12 (E.D. Cal. Feb. 25, 2020).

### 12 13 **III. CONCLUSION**

14 Based on the foregoing, the undersigned recommends that Defendant’s motion to  
15 revoke Plaintiff’s in forma pauperis status, ECF No. 116, be denied.

16 These findings and recommendations are submitted to the United States District  
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
18 after being served with these findings and recommendations, any party may file written objections  
19 with the Court. Responses to objections shall be filed within 14 days after service of objections.  
20 Failure to file objections within the specified time may waive the right to appeal. See Martinez v.  
21 Ylst, 951 F.2d 1153 (9th Cir. 1991).

22  
23 Dated: July 1, 2022



24 DENNIS M. COTA  
25 UNITED STATES MAGISTRATE JUDGE  
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