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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NERRAH BROWN, a.k.a. KEENAN
WILKINS,

Plaintiff,

v.

J. GALVIN, et al.,

Defendants.

No. 2:16-cv-2629 JAM DB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se. The instant action, filed November 3, 2016, seeks relief pursuant to 42 U.S.C. § 1983. (See ECF No. 1). This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

On December 27, 2017, plaintiff was granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. (ECF No. 7). On September 4, 2018, defendants filed a motion to revoke plaintiff's in forma pauperis status on the grounds that he is a three-strikes litigant pursuant to 28 U.S.C. § 1915(g). (See ECF No. 16). Plaintiff filed an opposition to the motion on September 28, 2018. (ECF No. 20). Defendants' reply was filed on October 3, 2018. (ECF No. 21). For the reasons stated below, the court will recommend that defendants' motion to revoke plaintiff's in forma pauperis status be granted and that plaintiff be directed to pay the appropriate filing fee or risk automatic dismissal.

1 I. RELEVANT LAW

2 A. 28 U.S.C. § 1915(g): Three Strikes Rule

3 Section 1915(g) states:

4 In no event shall a prisoner bring a civil action or appeal a judgment in a civil
5 action or proceeding under this section if the prisoner has, on 3 or more prior
6 occasions, while incarcerated or detained in any facility, brought an action or
7 appeal in a court of the United States that was dismissed on the grounds that it is
8 frivolous, malicious, or fails to state a claim upon which relief may be granted,
9 unless the prisoner is under imminent danger of serious physical injury.

10 28 U.S.C. § 1915(g).

11 “It is well-settled that, in determining a [Section] 1915(g) ‘strike,’ the reviewing court
12 looks to the dismissing court’s action and the reasons underlying it.” Knapp v. Hogan, 738 F.3d
13 1106, 1109 (9th Cir. 2013) (brackets added) (citation omitted). “[Section] 1915(g) should be used
14 to deny a prisoner’s in forma pauperis status only when, after careful evaluation of the order
15 dismissing an action, and other relevant information, the district court determines that the action
16 was dismissed because it was frivolous, malicious or failed to state a claim.” Andrews v. King,
17 398 F.3d 1113, 1121 (9th Cir. 2006) (brackets added).

18 B. Judicial Notice

19 “A court shall take judicial notice if requested by a party and supplied with the necessary
20 information.” Fed. R. Evid. 201(d). “A judicially noticed fact must be one not subject to
21 reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the
22 trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy
23 cannot reasonably be questioned.” Fed. R. Evid. 201(b)(1)-(2). A court may take judicial notice
24 of its own records in other cases. See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

25 II. DISMISSAL HISTORY OF ALLEGED “STRIKE” CASES

26 In support of the motion to revoke plaintiff’s in forma pauperis status, defendants contend
27 that the following three cases are strikes under the statute and were adjudicated prior to the filing
28 of the instant action: (1) Brown a.k.a. Wilkins v. North County Jail, No. 3:97-cv-2298 MMC
(N.D. Cal. Aug. 4, 1997) (“North County Jail”); (2) Wilkins v. County of Alameda, No. 12-16170
(9th Cir. 2012) (“Alameda I”), and (3) Wilkins v. County of Alameda, No. 13-17060 (9th Cir.

1 2014) (“Alameda II”). See ECF No. 16 at 3-4. The court takes judicial notice of these matters
2 and of the relevant documents filed by defendants herein.

3 On August 4, 1997, North County Jail, was dismissed in the Northern District of
4 California on the grounds that it failed to state a claim. (See ECF No. 16-2 at 10-11). Thus, it is
5 clear that this counts as a strike pursuant to Section 1915(g).

6 On August 6, 2012, Alameda I was dismissed by the Ninth Circuit on the grounds that
7 plaintiff was not entitled to in forma pauperis status on appeal because plaintiff’s appeal was
8 frivolous. (See id. at 16). The opinion also pointed out that the district court had certified that
9 plaintiff’s appeal was not being taken in good faith, and that as a result, the district court had
10 revoked plaintiff’s in forma pauperis status.¹ (See id.). “Under the Prison Litigation Reform Act,
11 [in forma pauperis] appeals may not be taken if the trial court ‘certifies in writing that it is not
12 taken in good faith.’” Knapp v. Hogan, 738 F.3d 1106, 1110 (9th Cir. 2013) (brackets added)
13 (quoting 28 U.S.C. § 1915(a)(3)). Thus, plaintiff’s filing of the appeal despite the fact that the
14 district court had certified that plaintiff’s appeal was not being taken in good faith constituted a
15 strike as well when the Ninth Circuit also found it to be frivolous, ordered him to pay the filing
16 fee, and ultimately dismissed it.²

17 On March 17, 2014, Alameda II was also dismissed by the Ninth Circuit for failure to pay
18 the filing fee. (See ECF No. 16-2 at 29). This also constitutes a strike under the statute because
19 prior to issuing this order, the district court had once again certified that plaintiff’s appeal was not
20 being taken in good faith, and the high court had once again found that plaintiff was not entitled
21 to in forma pauperis status on appeal because his action was frivolous. (See id. at 27-28); see
22 generally Harris v. Mangum, 863 F.3d 1133, 1142 (9th Cir. 2017) (stating style or procedural
23 posture of dismissal is immaterial when determining whether dismissal counts as strike).

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26 ¹ At that time, plaintiff was ordered to pay the filing fee or experience automatic dismissal. (See
27 ECF No. 16-2 at 16).

28 ² On its face, the case was dismissed because plaintiff “failed to perfect the appeal” when he
failed to pay the filing fee. (See ECF No. 16-2 at 18).


1 In alignment with Section 1915(g), each of these cases is a prior proceeding that was
2 dismissed on the grounds that it was either frivolous, malicious or failed to state a claim. See 28
3 U.S.C. § 1915(g). Moreover, the record neither shows, nor does plaintiff allege that he was under
4 imminent danger of serious physical injury at the time he filed this action. (See generally ECF
5 No. 1). Accordingly, IT IS HEREBY RECOMMENDED that:

6 1. Defendants’ motion to revoke plaintiff’s in forma pauperis status (ECF No. 16) be
7 GRANTED, and

8 2. Plaintiff be directed to pay the appropriate filing fee or experience dismissal of this
9 action.

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

17 Dated: October 15, 2018

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21 DEBORAH BARNES
22 UNITED STATES MAGISTRATE JUDGE

23 DLB:13
24 DB/ORDERS/ORDERS.PRISONER.CIVIL RIGHTS/brow2629.1915g.ifp
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