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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MONTE HANEY,

 Plaintiff,

 v.

M. WOODRUFF,

 Defendant.

No. 2:17-cv-0860-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in this action under 42 U.S.C. § 1983. Plaintiff filed a written consent to have the case heard by the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c). ECF No. 4. Thereafter, the undersigned denied plaintiff’s request to proceed in forma pauperis and ordered him to pay the filing fee within 21 days. ECF No. 5. Plaintiff responded by filing a motion asking that the undersigned be disqualified from the case under 28 U.S.C. § 455(b)(1) because “plaintiff has reason to believe that the judge is prejudiced and biased concerning this case.” ECF No. 7 at 4. Plaintiff also moves to withdraw his consent to magistrate judge jurisdiction.

As discussed below, the motion for recusal is denied. However, in light of a recent Ninth Circuit decision, the order denying the application to proceed in forma pauperis is vacated and replaced with findings and recommendations recommending that the application be denied.

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1 **I. Analysis**

2 28 U.S.C. § 455(a) provides that a magistrate judge must disqualify himself from any
3 proceeding in which his impartiality might reasonably be questioned. Subsection 455(b) provides
4 additional situations warranting disqualification, including “[w]here [the judge] has a personal
5 bias or prejudice concerning a party.” 28 U.S.C. § 455(b)(1). Such bias or prejudice can almost
6 never be deduced from judicial rulings alone. *Liteky v. United States*, 510 U.S. 540, 555 (1994).
7 Absent any other evidence of bias, an adverse ruling does not warrant disqualification. *Potlatch*
8 *Corp. v. United States*, 548 F. Supp. 155, 156 (N.D. Cal. 1982).

9 It is clear from plaintiff’s motion that his sole reason for seeking disqualification is his
10 disagreement with the order denying his motion to proceed in forma pauperis. ECF No. 7 at 2-6
11 (arguing that the determination that plaintiff was not entitled to proceed in forma pauperis was
12 wrong). Plaintiff presents no evidence that this ruling was the result of bias or prejudice against
13 him. Accordingly, disqualification is not warranted.

14 Plaintiff also indicates in the motion that he wishes to withdraw his consent to have the
15 case heard by the undersigned magistrate judge. Once a party waives his right to have his case
16 heard by an Article III judge by consenting to the jurisdiction of a magistrate judge, the court
17 may, in some circumstances, permit him to withdraw such consent. *United States v. Neville*, 985
18 F.2d 992, 999-1000 (9th Cir. 1993). The court considers these factors in deciding whether to
19 allow a party to withdraw consent: (1) the timeliness of the request; (2) whether granting the
20 request would unduly interfere with or delay the proceedings; and (3) whether the party’s consent
21 was voluntary and uncoerced. *Id.*

22 Plaintiff’s request to withdraw his consent has occurred early in the case and granting the
23 request would likely not cause a great deal of delay. However, plaintiff’s consent was freely
24 given – he filled out and returned the court’s standard form asking whether he consented to or
25 declined the jurisdiction of a magistrate judge, and he does not indicate that he was under any
26 pressure to select “consent” over “decline.” ECF No. 4. It appears instead that plaintiff wishes to
27 withdraw his consent simply because the undersigned magistrate judge issued a ruling adverse to
28 him. This is not a valid basis upon which the court will allow plaintiff to withdraw his consent.

1 His remedy instead is to challenge the adverse ruling on appeal. *See Liteky*, 510 U.S. at 555
2 (stating that adverse rulings are proper grounds for appeal, not recusal). Accordingly, plaintiff’s
3 request to withdraw his consent will be denied.

4 However, defendants have not yet been served and, necessarily, have not yet consented to
5 proceed before a magistrate judge. An intervening ruling by the Ninth Circuit Court of Appeals,
6 held that a magistrate judge lacks jurisdiction to enter dispositive orders until all named parties,
7 even those unserved, have consented. *Williams v. King*, ___ F.3d ___, 2017 U.S. App. LEXIS
8 22537 (9th Cir. Nov. 8, 2017) (“28 U.S.C. § 636(c)(1) requires the consent of all plaintiffs and
9 defendants named in the complaint—irrespective of service of process—before jurisdiction may
10 vest in a magistrate judge to hear and decide a civil case that a district court would otherwise
11 hear.”). Thus, *Williams* requires that the earlier order denying plaintiff’s request to proceed in
12 forma pauperis be vacated and replaced with findings a recommendation. Nonetheless, the
13 analysis contained in that order remains valid and for the same reasons the undersigned
14 recommends that the district judge deny plaintiff’s motion to proceed in forma pauperis. That
15 analysis is restated below for the convenience of the court and parties.

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

19 [i]n no event shall a prisoner bring a civil action or appeal a
20 judgment in a civil action or proceeding under this section if the
21 prisoner has, on 3 or more prior occasions, while incarcerated or
22 detained in any facility, brought an action or appeal in a court of the
23 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.

24 28 U.S.C. § 1915(g). The court takes judicial notice¹ of the following lawsuits previously filed
25 by plaintiff:

26
27 ¹ Judicial notice may be taken of court records. *Valerio v. Boise Cascade Corp.*, 80
28 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).

1 *Haney v. Bondoc, et al.*, 1:07-cv-01222 GMS (E.D. Cal. Jul. 22,
2 2007), dismissed for failure to state a claim upon which relief may
3 be granted. *Id.*, ECF Nos. 16,17.

4 *Haney v. Hernandez, et al.*, 1:10-cv-02134 LJO BAM (E.D. Cal.
5 Nov. 6, 2012), dismissed for failure to state a claim upon which
6 relief may be granted. *Id.*, ECF No. 47.

7 *Haney v. Braswell, et al.*, 1:10-cv-01140 LJO GSA (E.D. Cal. Mar.
8 25, 2013), dismissed for failure to state a claim upon which relief
9 may be granted. *Id.*, ECF No. 10.

10 Based on the foregoing, plaintiff is precluded from proceeding in forma pauperis in this
11 action unless plaintiff is “under imminent danger of serious physical injury.” 28 U.S.C. §
12 1915(g). To meet the exception, plaintiff must allege facts that demonstrate that he was “under
13 imminent danger of serious physical injury” at the time of filing the complaint. *Andrews v.*
14 *Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007) (holding that “it is the circumstances at the time
15 of the filing of the complaint that matters for purposes of the ‘imminent danger’ exception under
16 § 1915(g).”).

17 Plaintiff alleges that defendant used excessive force against him on April 27, 2016 by
18 closing a cell door on his arm. ECF No. 1 at 4-5. This claim does not meet the imminent danger
19 exception because it occurred nearly one year before this action was filed. *See Lewis v. Sullivan*,
20 279 F.3d 526, 531 (7th Cir. 2002) (holding that the imminent danger exception applies “[w]hen a
21 threat or prison condition is real and proximate . . .”). And, crucially, plaintiff does not allege
22 that defendant has actually used excessive force against him since that date. The only other
23 concrete allegation made against defendant in the complaint is that, on November 18, 2016,
24 defendant threatened to assault plaintiff with a baton. ECF No. 1 at 6. This alleged threat
25 precedes this suit by several months and plaintiff does not allege that defendant ever made good
26 on it. Accordingly, plaintiff has not brought allegations which, taken as true, demonstrate that he
27 is in imminent danger of serious physical injury.

28 The undersigned finds that plaintiff has not made the requisite showing of “imminent
 danger” to qualify for an exception to the “three strikes” bar under 1915(g) and will therefore
 recommend that the court deny plaintiff in forma pauperis status and require him to pay the full
 filing fee in order to proceed with this action.

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II. Order and Recommendation

For the foregoing reasons, it is hereby ORDERED that:

- 1. Plaintiff’s October 23, 2017 motion for disqualification (ECF No. 7) is DENIED.
- 2. The order of October 3, 2017 (ECF No. 5) is VACATED.
- 3. The Clerk is directed to randomly assign a United States District Judge to this action.

Further, it is RECOMMENDED that plaintiff’s motion to proceed in forma pauperis (ECF No. 2) be DENIED.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the specified time may waive the right to appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 27, 2017.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE