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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LANCE WILLIAMS,
Plaintiff,
v.
J. ESCALANTE, et al.,
Defendants.

No. 2:17-cv-1139 KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

I. Introduction & Background

Plaintiff is a state prisoner, proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). On August 31, 2017, the undersigned found that plaintiff sustained three strikes under 28 U.S.C. § 1915(g). On September 13, 2017, plaintiff filed an opposition to the order, alleging he faced imminent danger of serious physical injury. Upon reconsideration, the court again found plaintiff has suffered three strikes and failed to demonstrate he is entitled to an exception to the § 1916(g) bar. On November 27, 2017, plaintiff filed a notice that he would not pay the filing fee, and stated that “the court is more than welcome to dismiss case without prejudice.” (ECF No. 11 at 1.) The Clerk of the Court dismissed the case on December 5, 2017, under Rule 41(a)(1) of the Federal Rules of Civil Procedure. Plaintiff filed an appeal. On March 2, 2018, the Court of Appeals for the Ninth Circuit vacated the November 8, 2017 order and

1 remanded the action for further proceedings, citing Williams v. King, 875 F.3d 500, 503-04 (9th
2 Cir. 2017) (all parties, including unserved defendants, must consent in order for jurisdiction to
3 vest with the magistrate judge pursuant to 28 U.S.C. § 636(c)(1)).

4 As discussed below, the undersigned recommends that plaintiff be required to pay the
5 court's filing fee in order to proceed with this action.

6 II. Legal Standards

7 Title 28 U.S.C. § 1915(g) is part of the Prison Litigation Reform Act ("PLRA"). The
8 PLRA was intended to eliminate frivolous lawsuits, and its main purpose was to address the
9 overwhelming number of prisoner lawsuits. Cano v. Taylor, 739 F.3d 1214, 1219 (9th Cir. 2014).
10 Title 28 U.S.C. § 1915(g) of the PLRA permits any court of the United States to authorize the
11 commencement and prosecution of any suit without prepayment of fees by a person who submits
12 an affidavit indicating that the person is unable to pay such fees; however,

13 [i]n no event shall a prisoner bring a civil action or appeal a
14 judgment in a civil action or proceeding under this section if the
15 prisoner has, on 3 or more prior occasions, while incarcerated or
16 detained in any facility, brought an action or appeal in a court of the
17 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.

18 28 U.S.C. § 1915(g). As the Supreme Court stated, this "three strikes rule" was part of "a variety
19 of reforms designed to filter out the bad claims filed by prisoners and facilitate consideration of
20 the good." Coleman v. Tollefson, 135 S. Ct. 1759, 1762 (2015) (quoting Jones v. Block, 549
21 U.S. 199, 204 (2007)). If a prisoner has "three strikes" under § 1915(g), the prisoner is barred
22 from proceeding in forma pauperis unless he meets the exception for imminent danger of serious
23 physical injury. See Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir. 2007). The Ninth
24 Circuit has held that the complaint of a "three-strikes" prisoner must plausibly allege that the
25 prisoner was faced with imminent danger of serious physical injury at the time his complaint was
26 filed. See Williams v. Paramo, 775 F.3d 1182, 1189 (9th Cir. 2014); Andrews, 493 F.3d at 1055.

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1 III. Discussion

2 A. Three Strikes Bar

3 Plaintiff requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.
4 Review of court records reveals that on at least three occasions lawsuits filed by the plaintiff have
5 been dismissed on screening as barred by the statute of limitations:

6 1. Williams v. Aparicio, No. 2:14-cv-08640 (C.D. Cal. Feb. 5, 2015). ECF No. 15-3
7 at 13-14; see also ECF No. 15-3 at 7-12 (Report and Recommendation).

8 2. Williams v. Kerkfoot, No. 2:14-cv-07583 (C.D. Cal. May 15, 2015). ECF No. 15-
9 3 at 35-36; see also ECF No. 15-3 at 23-34 (Report and Recommendation).

10 3. Williams v. Young, No. 2:14-cv-8037 (C.D. Cal. May 19, 2015). ECF No. 15-3 at
11 46-52 (Memorandum and Order).

12 On July 14, 2016, in Williams v. Sharp, No. 2:15-cv-2542 GEB KJN (E.D. Cal.), the
13 defendants' motion to revoke plaintiff's in forma pauperis status was granted, and the court
14 explained that the court is bound by Belanus v. Clark, 796 F.3d 1021 (9th Cir. 2015) (majority in
15 Belanus affirmed the decision that the action was time-barred counted as a strike under 1915(g)).
16 On November 4, 2016, plaintiff's case was dismissed after plaintiff failed to pay the filing fee.
17 Sharp, 2:15-cv-2542 GEB KJN.

18 On April 7, 2017, another magistrate judge explained to plaintiff that such dismissals
19 count as strikes under 28 U.S.C. § 1915(g) because this court is bound by Belanus, 796 F.3d at
20 1021. Williams v. Logan, Case No. 2:15-cv-2084 MCE AC P (E.D. Cal.) (ECF No. 18 at 2).
21 Moreover, on August 17, 2017, the Ninth Circuit found that the district court in Williams v.
22 Degeorges, 2:16-cv-0025 TLN CKD (E.D. Cal.), properly denied plaintiff in forma pauperis
23 status because plaintiff had sustained three § 1915(g) strikes. Williams v. Degeorges, 2017 WL
24 3530901 (9th Cir. 2017).

25 B. Imminent Danger Exception

26 Because plaintiff has filed three cases that constitute strikes under § 1915(g), he is
27 precluded from proceeding in forma pauperis in this action unless he can demonstrate he was
28 "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). "[T]he availability of

1 the [imminent danger] exception turns on the conditions a prisoner faced *at the time the complaint*
2 *was filed*, not at some earlier or later time.” Andrews, 493 F.3d at 1053 (emphasis added).

3 On August 31, 2017, the undersigned found that plaintiff failed to allege facts
4 demonstrating he was at risk of imminent danger, and ordered plaintiff to pay the court’s filing
5 fee before this action can proceed. (ECF No. 8.) On September 13, 2017, plaintiff filed an
6 opposition, claiming that he had alleged facts demonstrating he is at risk of imminent harm in
7 claims three and four of his complaint, and would not pay the filing fee in full as directed.
8 Plaintiff provided no additional factual allegations in his one page opposition.

9 In Claim III of his complaint, plaintiff alleges the following: On March 26, 2017,
10 defendant Escalante told plaintiff: “It would be smart to withdraw that bullshit 602 appeal on me
11 and if you don’t you may find yourself in a casket on [your] [way] home.” (ECF No. 1 at 30, 33.)
12 Plaintiff laughed in fear, and responded, “Is that a threat?” and “It’s too late the 602 is at third
13 level already and you shouldn’t have assaulted me twice.” (Id.) Escalante responded, “the clock
14 is ticking,” and walked away. (Id.)

15 At the time Escalante made the verbal threats,¹ plaintiff was housed at California Medical
16 Facility (“CMF”) where defendant Escalante was employed as a correctional officer. However, at
17 the time plaintiff filed the instant complaint on May 22, 2017, under the mailbox rule,² plaintiff
18 had been transferred to R.J. Donovan (“RJD”) in San Diego. Therefore, defendant Escalante
19 could not have posed an imminent threat to plaintiff on May 22, 2017, because Escalante was
20 working at CMF, and plaintiff was housed at RJD. “[T]he availability of the exception turns on
21 the conditions a prisoner faced at the time the complaint was filed, not at some earlier or later
22 time.” Andrews, 493 F.3d at 1053. Thus, plaintiff’s allegations as to defendant Escalante do not
23 warrant an exception to the § 1915(g) bar.

24 ¹ Allegations of mere verbal threats do not state cognizable claims under § 1983. See Gaut v.
25 Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (mere threat does not constitute constitutional wrong, nor
26 do allegations that naked threat was for purpose of denying access to courts compel contrary
result).

27 ² “[T]he Houston mailbox rule applies to § 1983 complaints filed by pro se prisoners.” Douglas
28 v. Noelle, 567 F.3d 1103, 1109 (9th Cir. 2009), citing Houston v. Lack, 487 U.S. 266, 275-76
(1988).

1 In his fourth claim (labeled “Claim III [sic]”), plaintiff alleges that on April 28, 2017, he
2 was taken to a classification hearing at CMF and requested a transfer to California Mens Colony
3 with no alternatives due to his alleged enemy concerns at RJD. (ECF No. 1 at 35, citing
4 classification committee chrono, ECF No. 1 at 38.) Plaintiff claims he was transferred to RJD on
5 May 5, 2017, in retaliation for the instant lawsuit. (ECF No. 1 at 35-36.) Plaintiff initially
6 refused to go, but concedes that defendant Captain Brown told plaintiff that Captain Brown
7 checked plaintiff’s file and did not see any enemies. (ECF No. 1 at 36.) However, plaintiff
8 replied that “you guys deleted it from my file.” (Id.) Plaintiff claims he was forcefully placed on
9 the bus and transferred to RJD. Plaintiff appears to claim his transfer to RJD placed him in
10 imminent danger of serious physical injury.

11 On the other hand, the chrono from the April 28, 2017 classification committee hearing
12 reflects that plaintiff wanted to be transferred to California Mens Colony (“CMC”) “due to family
13 ties and access to his attorney, and that he would prefer not to transfer to RJD.” (ECF No. 1 at
14 38.) There is no reference to purported enemy concerns at RJD, and no objection based on such
15 alleged concerns are noted in the chrono. (Id.) In addition, the chrono reflects a legitimate
16 penological reason for transferring plaintiff to RJD based on a CMF mission change closing the
17 L-1 and L-2 EOP housing units, and its future conversion to a Level II EOP facility, which
18 suggests the transfer was not retaliatory. (ECF No. 1 at 38.) Because plaintiff was classified as a
19 Level III inmate, he could only be transferred to CMC or RJD. (Id.)

20 In light of the conflicting facts surrounding the transfer, comparing plaintiff’s allegations
21 to the chrono he provided, the undersigned finds that plaintiff’s claim that he was at risk of
22 imminent physical danger due to alleged enemy concerns at RJD is too speculative to support a
23 finding that he faced imminent danger of serious physical injury at the time he filed the instant
24 action. Moreover, at the time plaintiff signed his complaint on May 22, 2017, he had already
25 been transferred to RJD and housed there for 17 days. Despite having an opportunity to do so,
26 plaintiff included no facts as to how his alleged enemy concerns were addressed once he arrived
27 at RJD. Further, in his September 13, 2017 opposition, plaintiff did not elaborate on any enemy
28 concerns at RJD. He did not state whether or not such enemy concerns materialized once he was

1 transferred, and if they did, how prison staff at RJD addressed such enemy concerns once he
2 arrived at RJD on May 5, 2017. Indeed, plaintiff offered no further information concerning his
3 current housing at RJD in any of his subsequent filings. (ECF Nos. 9, 11, 13.) On this record, the
4 undersigned cannot find that plaintiff meets the imminent danger exception.

5 IV. Conclusion

6 Because plaintiff has sustained three strikes under 28 U.S.C. § 1915(g), and failed to
7 allege facts suggesting he was in imminent danger of serious physical injury at the time he filed
8 his complaint, plaintiff should be denied leave to proceed in forma pauperis, and required to
9 submit the appropriate filing fee in order to proceed with this action. Plaintiff is cautioned that
10 failure to pay the filing fee will result in the dismissal of this action.


11 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court is directed to assign
12 a district judge to this case; and

13 IT IS RECOMMENDED that:

- 14 1. Plaintiff be denied leave to proceed in forma pauperis; and
- 15 2. Plaintiff be ordered to pay the \$400.00 filing fee within fourteen days.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, plaintiff may file written objections
19 with the court and serve a copy on all parties. Such a document should be captioned
20 “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that
21 failure to file objections within the specified time may waive the right to appeal the District
22 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 Dated: March 6, 2018

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26 KENDALL J. NEWMAN
27 UNITED STATES MAGISTRATE JUDGE

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