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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL DEWAYNE ALLEN,

Plaintiff,

v.

R. PEREZ,

Defendant.

No. 2:17-cv-1384-TLN-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. The court previously recommended that this action be dismissed for failure to either pay the filing fee or submit an application to proceed in forma pauperis. ECF No. 6. Plaintiff filed objections to those recommendations (ECF No. 7) and, on September 12, 2017, the court directed him to file an in forma pauperis within thirty days (ECF No. 9). Plaintiff has now done so. ECF No. 11. After review of plaintiff’s litigative history, the court concludes that he is a “three-striker” within the meaning of 28 U.S.C. § 1915(g).

The Prison Litigation Reform Act of 1995 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 judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any

1 facility, brought an action or appeal in a court of the United States
2 that was dismissed on the grounds that it is frivolous, malicious, or
3 fails to state a claim upon which relief may be granted, unless the
4 prisoner is under imminent danger of serious physical injury.

5 28 U.S.C. § 1915(g). The court takes judicial notice¹ of the following lawsuits previously filed
6 by plaintiff:

- 7 (1) Allen v. Social Security Administration, 2:11-cv-04253 UA E (C.D. Cal. Jun. 22,
8 2011), denying filing of complaint without prepayment of full filing fee after
9 determining that complaint was frivolous, malicious, or failed to state a complaint
10 upon which relief could be granted. *Id.*, ECF No. 2.²
- 11 (2) Allen v. C.S.P. –Los Angeles County, 2:12-cv-08338 DMG E (C.D. Cal. May 1,
12 2013), initial complaint dismissed for failure to state a claim and action dismissed
13 after plaintiff failed to submit an amended complaint within the allotted time. *Id.*,
14 ECF No. 12.³

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16 ¹ Judicial notice may be taken of court records. *Valerio v. Boise Cascade Corp.*, 80
17 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
18 (1981).

19 ² The Ninth Circuit has determined that an action that was similarly adjudicated – that is,
20 denied filing without prepayment of full filing fee – constituted a strike. *See O'Neal v. Price*,
21 531 F.3d 1146, 1155 (9th Cir. 2008).

22 ³ In a recent decision, the Ninth Circuit held that:

23 There is nothing in § 1915(g) that suggests a dismissal for failure to
24 state a claim only counts as a strike when the complaint is obviously
25 unsalvageable on its face. We have previously held that “[l]eave to
26 amend should be granted if it appears *at all possible* that the plaintiff
27 can correct the defect” and that opportunities to amend are
28 “particularly important for the pro se litigant.” *Crowley v. Bannister*,
734 F.3d 967, 977-78 (9th Cir. 2013) (emphasis added in *Crowley*)
(quoting *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000)).
In light of this “longstanding rule,” *Lopez*, 203 F.3d at 1130, district
courts may routinely give pro se plaintiffs opportunities to amend
their complaints regardless of how meritless their claims may appear.
A prisoner may not avoid incurring strikes simply by declining to
take advantage of these opportunities to amend.

Harris v. Mangum, 863 F.3d 1133, 1142-1143 (9th Cir. 2017).

1 (3) Allen v. Masameno, 2:12-cv-09981 DMG E (C.D. Cal. Feb, 20, 2014), initial
2 complaint dismissed for failure to state a claim and action dismissed after plaintiff
3 failed to submit an amended complaint within the allotted time. *Id.*, ECF No. 19.

4 The court's review of the above records reveals that on at least three occasions, lawsuits
5 filed by plaintiff have been dismissed on the grounds that they were frivolous or malicious or
6 failed to state a claim upon which relief may be granted. Therefore, this court finds that plaintiff
7 is precluded from proceeding in forma pauperis in this action unless plaintiff is "under imminent
8 danger of serious physical injury." 28 U.S.C. § 1915(g). To meet the exception, plaintiff must
9 have alleged facts that demonstrate that he was "under imminent danger of serious physical
10 injury" at the time of filing the complaint. *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir.
11 2007) (holding that "it is the circumstances at the time of the filing of the complaint that matters
12 for purposes of the 'imminent danger' exception under § 1915(g).").

13 Plaintiff has not alleged any facts which suggest that he is under imminent danger of
14 serious physical injury. In his complaint, plaintiff alleges that defendant Perez used excessive
15 force when he shot plaintiff in the genitals. ECF No. 1 at 3-5. This incident is alleged to have
16 occurred well before the complaint was filed⁴ and plaintiff does not allege that Perez poses any
17 imminent danger to him.

18 Because the court finds that plaintiff has not made the requisite showing of "imminent
19 danger" to qualify for an exception to the "three strikes" bar under 1915(g), plaintiff should be
20 denied in forma pauperis status and be required to pay the full filing fee in order to proceed with
21 this action.

22 Accordingly, it is hereby ORDERED that the August 23, 2017 findings and
23 recommendation (ECF No. 6) are VACATED.

24 Further, it is RECOMMENDED that:

25 1. Plaintiff's motion to proceed in forma pauperis (ECF No. 11) be DENIED;

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27 _____
28 ⁴ The complaint was filed on July 6, 2017. ECF No. 1. The excessive force incident
underlying the complaint is alleged to have occurred on November 9, 2016. *Id.* at 3.

1 2. Plaintiff be directed to pay the filing of \$400.00 in full within fourteen days after any
2 order adopting these findings and recommendations and admonished that failure to timely comply
3 will result in dismissal of this action.

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

11 DATED: July 2, 2018.

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13 EDMUND F. BRENNAN
14 UNITED STATES MAGISTRATE JUDGE
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