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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AARON LAMONT STRIBLING,
Plaintiff,
v.
BRITTON,
Defendant.

No. 2:18-cv-0870-KJM-EFB P

FINDINGS AND RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. On May 3, 2018, the court issued findings and recommendations finding that the dismissal of an earlier civil action by plaintiff, *Stribling v. Defazio*, No. 2:12-cv-2729-JAM-EFB (E.D. Cal.) (“*Defazio*”) be counted as a strike for purposes of 28 U.S.C. § 1915(g). Based on that finding, it was recommended that plaintiff’s application for leave to proceed in forma pauperis be denied. ECF No. 7. Plaintiff did not file timely objections to the findings and recommendations and on June 14, 2018, the district judge adopted them and then referred the case to the undersigned for further litigation.¹ ECF Nos. 8, 9. Plaintiff subsequently filed a motion for reconsideration and/or motion for extension of time to file objections. ECF Nos. 11, 12. The court construes these filings collectively as a request for reconsideration of the June 14, 2018

¹ On that same day, plaintiff belatedly filed objections to the recommendation. ECF No. 10.

1 order denying plaintiff's application for leave to proceed in forma pauperis, and now recommends
2 that the request be granted.²

3 Plaintiff's belated objections reference another case plaintiff is litigating – *Stribling v.*
4 *Lewis*, No. 2:17-cv-2009-KJM-EFB. On July 12, 2018, the court issued findings and
5 recommendations in that case, reasoning that the dismissal of *Defazio*, while a “close call,” does
6 not constitute a strike for purposes of 28 U.S.C. § 1915(g) because it is clear that the court did not
7 pass on the merits of plaintiff's claims. *See Stribling v. Lewis*, No. 2:17-cv-2009-KJM-EFB, ECF
8 No. 23 at 3 (citing *Knapp v. Hogan*, 738 F.3d 1106, 1109-10 (9th Cir. 2013)). Having revisited
9 plaintiff's request under that analysis, the court now finds that the dismissal of *Defazio* should not
10 qualify as a strike for purposes of § 1915(g). Therefore, the June 14, 2018 order denying
11 plaintiff's application to proceed in forma pauperis (ECF No. 8) should be vacated.

12 Accordingly, IT IS HEREBY RECOMMENDED that:

- 13 1. Plaintiff's belated objections, motion for reconsideration and/or motion for extension
14 of time to file objections (ECF Nos. 10, 11, 12) be construed together as a motion for
15 reconsideration of the June 14, 2018 order (ECF No. 8), and that so construed, the
16 motion be GRANTED;
- 17 2. The June 14, 2018 order denying plaintiff's application for leave to proceed in forma
18 pauperis (ECF No. 8) be VACATED; and
- 19 3. The matter be referred back to the magistrate judge for further litigation.

20 These findings and recommendations are submitted to the United States District Judge
21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
22 after being served with these findings and recommendations, any party may file written
23

24 ² “Reconsideration is appropriate if the district court (1) is presented with newly
25 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3)
26 if there is an intervening change in controlling law.” *School Dist. No. 1J v. AC and S, Inc.*, 5 F.3d
27 1255, 1263 (9th Cir. 1993). Further, Local Rule 230(j) requires that a motion for reconsideration
28 state “what new or different facts or circumstances are claimed to exist which did not exist or
were not shown upon such prior motion, or what other grounds exist for the motion,” and “why
the facts or circumstances were not shown at the time of the prior motion.” E.D. Cal., Local Rule
230(j)(3)-(4).

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
3 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
4 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

5 DATED: October 11, 2018.

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7 EDMUND F. BRENNAN
8 UNITED STATES MAGISTRATE JUDGE
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