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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AARON LAMONT STRIBLING,

Plaintiff,

v.

J. LEWIS,

Defendant.

No. 2:18-cv-0951-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 *Stribling v. Defazio*, No. 2:12-cv-2729-JAM-EFB (E.D. Cal.) (“*Defazio*”) qualified as a strike for purposes of 28 U.S.C. § 1915(g) and recommending that plaintiff’s application for leave to proceed in forma pauperis be denied. ECF No. 6. Plaintiff did not file timely objections to that recommendation. On June 14, 2018, the district judge adopted the findings and recommendations and subsequently referred the case to the undersigned for further litigation. ECF Nos. 7, 8. On that same day plaintiff belatedly filed objections to the findings and recommendations. ECF No. 9. The court construes his belated objections as a motion for reconsideration of the June 14, 2018 order denying plaintiff’s application for leave to proceed in forma pauperis, and now recommends that it be granted.¹

¹ “Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3)

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

10 Accordingly, IT IS HEREBY RECOMMENDED that:

- 11 1. Plaintiff's belated objections (ECF No. 9) be construed as a motion for reconsideration
12 of the June 14, 2018 order (ECF No. 7), and that so construed, the motion be
13 GRANTED;
- 14 2. The June 14, 2018 order denying plaintiff's application for leave to proceed in forma
15 pauperis (ECF No. 7) be VACATED; and
- 16 3. The matter be referred back to the magistrate judge for further litigation.

17 These findings and recommendations are submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
19 after being served with these findings and recommendations, any party may file written
20 objections with the court and serve a copy on all parties. Such a document should be captioned
21 “Objections to Magistrate Judge's Findings and Recommendations.” Failure to file objections

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25 if there is an intervening change in controlling law.” *School Dist. No. 1J v. AC and S, Inc.*, 5 F.3d
26 1255, 1263 (9th Cir. 1993). Further, Local Rule 230(j) requires that a motion for reconsideration
27 state “what new or different facts or circumstances are claimed to exist which did not exist or
28 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 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: October 11, 2018.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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