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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MELVIN JOSEPH SIMMONS,  
  
Plaintiff,  
  
v.  
  
CALIFORNIA DEPARTMENT OF  
CORRECTIONS, et al.,  
  
Defendants.

No. 2:21-cv-1236 AC P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983.

I. Three Strikes Analysis

Plaintiff has not yet submitted an application to proceed in forma pauperis in this case or paid the required filing fee of \$350.00 plus the \$52.00 administrative fee. However, as explained below, plaintiff will not be given the opportunity to submit an application to proceed in forma pauperis because he has accrued at least three strikes under 28 U.S.C. § 1915(g) and he has not shown that he is under imminent danger of serious physical injury. Accordingly, the court will recommend that plaintiff be required to pay the \$402.00 in required fees or suffer dismissal of the complaint.

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

4 [i]n no event shall a prisoner bring a civil action or appeal a  
5 judgement in a civil action or proceeding under this section if the  
6 prisoner has, on 3 or more occasions, while incarcerated or detained  
7 in any facility, brought an action or appeal in a court of the United  
8 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.

9 28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded  
10 from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three  
11 frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook,  
12 169 F.3d 1176, 1178 (9th Cir. 1999). “[Section] 1915(g) should be used to deny a prisoner’s [in  
13 forma pauperis] status only when, after careful evaluation of the order dismissing an action, and  
14 other relevant information, the district court determines that the action was dismissed because it  
15 was frivolous, malicious or failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th  
16 Cir. 2005). “[W]hen a district court disposes of an in forma pauperis complaint ‘on the grounds  
17 that [the claim] is frivolous, malicious, or fails to state a claim upon which relief may be granted,’  
18 such a complaint is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such  
19 dismissal as denial of the prisoner’s application to file the action without prepayment of the full  
20 filing fee.” O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original).  
21 Dismissal also counts as a strike under § 1915(g) “when (1) a district court dismisses a complaint  
22 on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff  
23 then fails to file an amended complaint” regardless of whether the case was dismissed with or  
24 without prejudice. Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

25 Inspection of other cases filed by plaintiff has led to the identification of at least three  
26 cases brought by plaintiff that qualify as strikes. The court takes judicial notice of the following

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1 lawsuits filed by plaintiff:<sup>1</sup>

- 2 1. Simmons v. Giurbino, N.D. Cal. No. 3:11-cv-2169 WHA (case dismissed for failure to  
3 state a claim on June 1, 2011 (ECF No. 4))
- 4 2. Simmons v. Kernon, N.D. Cal. No. 5:16-cv-7319 LHK (case dismissed for failure to  
5 state a claim on July 25, 2017 (ECF No. 28))
- 6 3. Simmons v. State of California, N.D. Cal. No. 5:17-cv-5595 LHK (complaint  
7 dismissed with leave to amend for failure to state a claim (ECF No. 6), case dismissed  
8 on January 24, 2018, for failure to file an amended complaint (ECF No. 7))

9 All of the preceding cases were dismissed in advance of the July 8, 2021<sup>2</sup> filing of the  
10 instant action, and none of the strikes have been overturned. Therefore, this court finds that  
11 plaintiff is precluded from proceeding in forma pauperis unless he is “under imminent danger of  
12 serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must have  
13 alleged facts that demonstrate that he was “under imminent danger of serious physical injury” at  
14 the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007)  
15 (“[I]t is the circumstances at the time of the filing of the complaint that matters for purposes of  
16 the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie, 239 F.3d  
17 307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999);  
18 Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883, 885 (5th  
19 Cir. 1998).

20 The complaint is largely unintelligible but appears to relate to alleged infringements on  
21 plaintiff’s unspecified intellectual property. ECF No. 1. There are no allegations that would  
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23 <sup>1</sup> The court “may take notice of proceedings in other courts, both within and without the federal  
24 judicial system, if those proceedings have a direct relation to matters at issue.” United States ex  
25 rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)  
26 (citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court  
may take judicial notice of facts that are capable of accurate determination by sources whose  
accuracy cannot reasonably be questioned).

27 <sup>2</sup> Since plaintiff is a prisoner proceeding pro se, he is afforded the benefit of the prison mailbox  
28 rule. Houston v. Lack, 487 U.S. 266, 276 (1988) (establishing rule that a prisoner’s court  
document is deemed filed on the date the prisoner delivered the document to prison officials for  
mailing).

1 demonstrate an imminent risk of serious physical injury at the time of filing, and the undersigned  
2 will therefore recommend that plaintiff be required to pay the filing fee in full or have the  
3 complaint dismissed.

4 II. Plain Language Summary of this Order for a Pro Se Litigant

5 You have at least three strikes under § 1915(g) and cannot be granted in forma pauperis  
6 status unless you show the court that you were in imminent danger of serious physical injury at  
7 the time you filed the complaint. You have not shown that you were in imminent danger of  
8 serious physical injury and so it is being recommended that your motion to proceed in forma  
9 pauperis be denied and you be required to pay the whole filing fee at one time.

10 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court shall randomly  
11 assign a United States District Judge to this action.

12 IT IS FURTHER RECOMMENDED that plaintiff be ordered to pay the entire \$402.00 in  
13 required fees within thirty days or face dismissal of the case.

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

21 DATED: July 19, 2021

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23 ALLISON CLAIRE  
24 UNITED STATES MAGISTRATE JUDGE  
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