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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID PERRYMAN,  
  
Plaintiff,  
  
v.  
  
JEFF LYNCH, et al.,  
  
Defendants.

No. 2:22-cv-1636 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 seeks leave to proceed in forma pauperis under 28 U.S.C. § 1915(a). ECF No. 2. The Prison Litigation Reform Act of 1995 (PLRA) 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 judgement in a civil action or proceeding under this section if the prisoner has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the 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.

1 28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded  
2 from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three  
3 frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook,  
4 169 F.3d 1176, 1178 (9th Cir. 1999).

5 “[Section] 1915(g) should be used to deny a prisoner’s [in forma pauperis] status only  
6 when, after careful evaluation of the order dismissing an action, and other relevant information,  
7 the district court determines that the action was dismissed because it was frivolous, malicious or  
8 failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005). “[W]hen a  
9 district court disposes of an in forma pauperis complaint ‘on the grounds that [the claim] is  
10 frivolous, malicious, or fails to state a claim upon which relief may be granted,’ such a complaint  
11 is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such dismissal as denial of  
12 the prisoner’s application to file the action without prepayment of the full filing fee.” O’Neal v.  
13 Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original). Dismissal also counts  
14 as a strike under § 1915(g) “when (1) a district court dismisses a complaint on the ground that it  
15 fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an  
16 amended complaint” regardless of whether the case was dismissed with or without prejudice.  
17 Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

18 Inspection of other cases filed by plaintiff has led to the identification of at least six cases  
19 that qualify as strikes. The court takes judicial notice of the following lawsuits filed by plaintiff:<sup>1</sup>

- 20 1. Perryman v. Duffy, E.D. Cal. No. 2:14-cv-2967 EFB (complaint dismissed with leave  
21 to amend for failure to state a claim (ECF No. 43), case dismissed on June 6, 2017, for  
22 failure to file an amended complaint (ECF No. 44)).
- 23 2. Perryman v. Duffy, E.D. Cal. No. 2:15-cv-0018 DB (second amended complaint  
24 dismissed without leave to amend on October 4, 2016, for failure to state a claim upon

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25 <sup>1</sup> The court “may take notice of proceedings in other courts, both within and without the federal  
26 judicial system, if those proceedings have a direct relation to matters at issue.” United States ex  
27 rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)  
(citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court  
28 may take judicial notice of facts that are capable of accurate determination by sources whose  
accuracy cannot reasonably be questioned).

1 which relief could be granted (ECF No. 47)).

- 2 3. Perryman v. Director, CDCR, E.D. Cal. No. 2:19-cv-2480 JAM DB (complaint  
3 dismissed without leave to amend on August 24, 2020, for failure to state a claim upon  
4 which relief could be granted (ECF No. 16)).
- 5 4. Perryman v. California Department of Corrections & Rehabilitation, E.D. Cal. No.  
6 2:19-cv-2517 JAM KJN (complaint dismissed with leave to amend for failure to state  
7 a claim (ECF No. 11), case dismissed on November 23, 2021, for failure to file an  
8 amended complaint (ECF No. 40)).
- 9 5. Perryman v. California Superior Court, County of Sacramento, E.D. Cal. No. 2:20-cv-  
10 1506 TLN AC (complaint dismissed without leave to amend on November 9, 2020, for  
11 failure to state a claim upon which relief could be granted (ECF No. 14)).
- 12 6. Perryman v. U.S. Internal Revenue Service, E.D. Cal. No. 2:21-cv-0044 TLN CKD  
13 (complaint dismissed with leave to amend for failure to state a claim (ECF No. 6), case  
14 dismissed on August 31, 2021, for failure to file an amended complaint (ECF No. 13)).

15 All of the preceding cases were dismissed well in advance of the September 16, 2022  
16 filing of the instant action, and none of the strikes have been overturned. Therefore, this court  
17 finds that plaintiff is precluded from proceeding in forma pauperis unless he is “under imminent  
18 danger of serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must  
19 have alleged facts that demonstrate that he was “under imminent danger of serious physical  
20 injury” at the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir.  
21 2007) (“[I]t is the circumstances at the time of the filing of the complaint that matters for  
22 purposes of the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie,  
23 239 F.3d 307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir.  
24 1999); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883,  
25 885 (5th Cir. 1998).

26 The complaint alleges that defendants have retaliated against him by taking or destroying  
27 his legal property during a cell search. ECF No. 1 at 5, 10-14. There are no allegations that  
28 would demonstrate an imminent risk of serious physical injury at the time of filing, and the

1 undersigned will therefore recommend that plaintiff be required to pay the filing fee in full or  
2 have the complaint dismissed.

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


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

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

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

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

20 DATED: September 26, 2022

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22 ALLISON CLAIRE  
23 UNITED STATES MAGISTRATE JUDGE  
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