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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RODERICK WASHINGTON,)	
)	
Plaintiff(s),)	No. C 07-0609 TEH (PR)
)	
vs.)	ORDER TO SHOW CAUSE
)	WHY CASE SHOULD NOT BE
UNITED STATES DISTRICT COURT)	DISMISSED UNDER 28 U.S.C.
FOR THE NORTHERN DISTRICT OF)	§ 1915 (g)
CALIFORNIA,)	
)	
Defendant(s).)	
_____)	

Plaintiff, a state prisoner currently incarcerated at Corcoran State Prison and a frequent litigant in the federal courts, has filed a pro se complaint under 42 U.S.C. § 1983 challenging the application of 28 U.S.C. § 1915(g), the three-strikes provision of the Prison Litigation Reform Act of 1995 ("PLRA") by this Court and other district court judges, to his many cases in the federal district courts of California.¹ This suit alleges a similar cause of action that was earlier dismissed by this Court under Case No. C-04-5313 TEH (PR) under the PLRA and for failure to state a claim. See, Washington v. United States District Court, No. C 04-5313 TEH (PR) (N.D. Cal. Dec. 20, 2004) (order of dismissal). In that

¹Since plaintiff filed his first federal prisoner action in 1995, he has filed more than 190 prisoner actions in the federal district courts of California and many appeals in the United States Court of Appeals for the Ninth Circuit according to this Court's review of the PACER U.S. Party/Case Index.

1 order, this Court also identified three prior claims before it that had been
2 dismissed because they were frivolous, malicious, or fail to state a claim upon
3 which relief may be granted. Plaintiff has neither paid the filing fee nor filed a
4 motion to proceed in forma pauperis. On January 30, 2007, the Clerk of Court
5 informed Plaintiff that failure to pay the filing fee or to file such a motion within
6 thirty days would result in the dismissal of this action.

7 Under the PLRA, a prisoner may not bring a civil action or appeal a civil
8 judgment under 28 U.S.C. § 1915 "if the prisoner has, on 3 or more prior
9 occasions, while incarcerated or detained in any facility, brought an action or
10 appeal in a court of the United States that was dismissed on the grounds that it is
11 frivolous, malicious, or fails to state a claim upon which relief may be granted,
12 unless the prisoner is under imminent danger of serious physical injury." 28
13 U.S.C. § 1915(g).

14 Since the Court's earlier 1915(g) dismissal of Plaintiff's 2004 case, the
15 Ninth Circuit has shed light on the requirements for such a dismissal. Andrews v.
16 King, 398 F.3d 1113 (9th Cir. 2005). For purposes of a dismissal that may be
17 counted under § 1915(g), the phrase "fails to state a claim on which relief may be
18 granted" parallels the language of Federal Rule of Civil Procedure 12(b)(6) and
19 carries the same interpretation, the word "frivolous" refers to a case that is "of
20 little weight or importance: having no basis in law or fact," and the word
21 "malicious" refers to a case "filed with the 'intention or desire to harm another.'"
22 Id. at 1121 (citation omitted). Only cases within one of these three categories can
23 be counted as strikes for § 1915(g) purposes, so the mere fact that Plaintiff has
24 filed hundreds of cases and appeals does not alone warrant dismissal under §
25 1915(g). See id. Rather, dismissal of an action under § 1915(g) should only
26 occur when, "after careful evaluation of the order dismissing an [earlier] action,

1 and other relevant information, the district court determines that the action was
2 dismissed because it was frivolous, malicious or failed to state a claim." Id.

3 Andrews requires that the prisoner be given notice of the potential
4 applicability of § 1915(g), by either the district court or the defendants, but also
5 requires the prisoner to bear the ultimate burden of persuasion that § 1915(g)
6 does not bar pauper status for him. Id. Andrews implicitly allows the court to
7 sua sponte raise the § 1915(g) problem, but requires the court to notify the
8 prisoner of the earlier dismissals it considers to support a § 1915(g) dismissal and
9 allow the prisoner an opportunity to be heard on the matter before dismissing the
10 action. See id. at 1120. A dismissal under § 1915(g) means that a prisoner
11 cannot proceed with his action as a pauper under § 1915(g), but he still may
12 pursue his claims if he pays the full filing fee at the outset of the action.

13 A review of the dismissal orders in Washington's prior prisoner actions in
14 this Court reveals that Plaintiff has had at least three such cases dismissed on the
15 ground that they were frivolous, malicious, or failed to state a claim upon which
16 relief may be granted. Plaintiff is now given notice that the court believes the
17 following dismissals may be counted as dismissals for purposes of § 1915(g): (1)
18 Washington v. Cambra, No. C 95-3356 TEH (N.D. Cal. Oct. 2, 1995) (order of
19 dismissal); (2) Washington v. Cambra, No. C 95-3641 TEH (N.D. Cal. Nov. 7,
20 1995) (order of dismissal); and (3) Washington v. Cambra, No. C 95-3763 TEH
21 (N.D. Cal. Nov. 20, 1995) (order of dismissal); (4) Washington v. United States
22 District Court, No. C 04-5313 TEH (N.D. Cal. Dec. 20, 2004) (order of
23 dismissal). The court made its evaluation of these cases based on the dismissal
24 orders in them. See Andrews, 398 F.3d at 1120 (sometimes the docket records
25 may be sufficient, and sometime the actual court files may need to be consulted).


26 In addition to these orders, this Court has also reviewed a decision from
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1 the United States District Court for the Central District of California, Washington
2 v. United States District Court, Case No. 2:01-cv-00716-UA-AJW (CD Cal. Feb.
3 5, 2001) (order of dismissal as legally and/or factually frivolous) and a decision
4 from the United States District Court for the Eastern District of California,
5 Washington v. United States District Court, Case No. 1:01-mc-00009 (ED Cal.
6 Jan. 24, 2001) (order of dismissal under § 1915(g) and for failure to state a
7 claim). Plaintiff is notified that the Court also believes these dismissals may be
8 counted as dismissals for purposes of § 1915(g).

9 In light of these dismissals, and because Plaintiff does not appear to be
10 under imminent danger of serious physical injury, he is ORDERED TO SHOW
11 CAUSE in writing filed no later than **thirty (30) days from the date of this**
12 **order** why this action should not be dismissed pursuant to 28 U.S.C. § 1915(g).
13 In the alternative to showing cause why this action should not be dismissed,
14 Plaintiff may avoid dismissal by paying the full \$350.00 filing fee by the
15 deadline.

16
17 SO ORDERED.

18
19 DATED: 02/07/07



THELTON E. HENDERSON
United States District Judge