

1 upon which relief may be granted, unless the prisoner is under
2 imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

3 For purposes of a dismissal that may be counted under
4 § 1915(g), the phrase "fails to state a claim on which relief may be
5 granted" parallels the language of Federal Rule of Civil Procedure
6 12(b)(6) and carries the same interpretation, the word "frivolous"
7 refers to a case that is "of little weight or importance: having no
8 basis in law or fact," and the word "malicious" refers to a case
9 "filed with the 'intention or desire to harm another.'" Andrews v.
10 King, 398 F.3d 1113, 1121 (9th Cir. 2005) (citation omitted). Only
11 cases within one of these three categories can be counted as strikes
12 for § 1915(g) purposes. See id. Dismissal of an action under
13 § 1915(g) should only occur when, "after careful evaluation of the
14 order dismissing an [earlier] action, and other relevant
15 information, the district court determines that the action was
16 dismissed because it was frivolous, malicious or failed to state a
17 claim." Id.

18 Andrews requires that the prisoner be given notice of the
19 potential applicability of § 1915(g), by either the district court
20 or the defendants, but also requires the prisoner to bear the
21 ultimate burden of persuasion that § 1915(g) does not bar pauper
22 status for him. Id. Andrews implicitly allows the Court to raise
23 the § 1915(g) problem sua sponte, but requires the Court to notify
24 the prisoner of the earlier dismissals it considers to support a
25 § 1915(g) dismissal and allow the prisoner an opportunity to be
26 heard on the matter before dismissing the action. See id. at 1120.

1 A dismissal under § 1915(g) means that a prisoner cannot proceed
2 with his action as a pauper under § 1915(g), but he still may pursue
3 his claims if he pays the full filing fee at the outset of the
4 action.

5 A review of the dismissal orders in Plaintiff's prior
6 prisoner actions in this Court reveals that Plaintiff has had at
7 least three such cases dismissed on the ground that they were
8 frivolous, malicious, or failed to state a claim upon which relief
9 may be granted. Plaintiff is now given notice that the Court
10 believes the following dismissals may be counted as dismissals for
11 purposes of § 1915(g): Larkin v. Jeter, No. CV 12-00209-TEH (N.D.
12 Cal. Jan. 12, 2012) (failure to state a claim); In re Jethro K.
13 Larkin, II, No. CV 12-01713-TEH (N.D. Cal. April 5, 2012) (same);
14 and Larkin v. Still, No. CV 12-2482-TEH (N.D. Cal. May 16, 2012)
15 (same). Plaintiff therefore may proceed in forma pauperis only if
16 he is seeking relief from a danger of serious physical injury which
17 is "imminent" at the time of filing. See Andrews v. Cervantes, 493
18 F.3d 1047, 1053 (9th Cir. 2007). See also Abdul-Akbar v. McKelvie,
19 239 F.3d 307, 312 (3d Cir. 2001) (en banc); Medberry v. Butler, 185
20 F.3d 1189, 1192-93 (11th Cir. 1999); Ashley v. Dilworth, 147 F.3d
21 715, 717 (8th Cir. 1998); Banos v. O'Guin, 144 F.3d 883, 885 (5th
22 Cir. 1998). He is not.

23 In light of these dismissals, and because Plaintiff does
24 not appear to be under imminent danger of serious physical injury,
25 he is ORDERED TO SHOW CAUSE in writing no later than thirty (30)
26 days from the date of this Order why in forma pauperis should not be
27

1 denied and this action should not be dismissed pursuant to 28 U.S.C.
2 § 1915(g). If Plaintiff is so inclined, he may avoid dismissal by
3 paying the \$350.00 filing fee. In any event, the Court will
4 continue to review under § 1915(g) all future actions filed by
5 Plaintiff while he is incarcerated in which he seeks in forma
6 pauperis status.

7 Failure to file a timely response or failure to pay the
8 full filing fee in will result in the dismissal of this action
9 without further notice to Plaintiff.

10 IT IS SO ORDERED.

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12 DATED 07/16/2012



THELTON E. HENDERSON
United States District Judge

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