

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAKENNAN G. WILKINS aka NERRAH  
BROWN,

Plaintiff,

v.

COUNTY OF CONTRA COSTA, et.  
al.,

Defendants.

Case No. [16-cv-7016-TEH](#)

ORDER TO SHOW CAUSE

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. Plaintiff has also filed an application to proceed in forma pauperis. Plaintiff alleges that while being held at Martinez Detention Facility his Due Process and Equal Protection rights were violated, he was denied access to the courts, he was the victim of retaliation and subject to cruel and unusual punishment. He is now incarcerated at RJ Donovan Prison in San Diego County.

The Prison Litigation Reform Act of 1995 ("PLRA"), enacted April 26, 1996, provides that a prisoner may not bring a civil action or appeal a civil judgment under 28 U.S.C. § 1915 "if the prisoner has, on three or more prior 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

1 claim upon which relief may be granted, unless the prisoner is  
2 under imminent danger of serious physical injury." 28 U.S.C. §  
3 1915(g). The phrase "fails to state a claim on which relief may  
4 be granted," as used in § 1915(g), "parallels the language of  
5 Federal Rule of Civil Procedure 12(b)(6)." Andrews v. King, 398  
6 F.3d 1113, 1121 (9th Cir. 2005) (internal quotation marks  
7 omitted). A case is "frivolous" within the meaning of § 1915(g)  
8 if "it is of little weight or importance: having no basis in law  
9 or fact." Id. (internal quotation marks omitted). Further,  
10 because § 1915(g) is a procedural rule that does not raise  
11 retroactivity concerns, cases dismissed before the effective date  
12 of § 1915(g) may be counted as qualifying dismissals or  
13 "strikes." See Tierney v. Kupers, 128 F.3d 1310, 1311-12 (9th  
14 Cir. 1997). A court may count as strikes dismissals of district  
15 court cases as well as dismissals of appeals. See Rodriguez v.  
16 Cook, 169 F.3d 1176, 1178 (9th Cir. 1999) (prisoner does not get  
17 three frivolous claims and three frivolous appeals before being  
18 barred by § 1915(g)). A dismissal under § 1915(g) means that a  
19 prisoner cannot proceed with his action as a pauper under §  
20 1915(g), but he still may pursue his claim if he pays the full  
21 filing fee at the outset of the action.

22 It appears that plaintiff has at least four strikes pursuant  
23 to § 1915(g). In Brown aka Wilkins v. North County Jail, No. 97-  
24 2298 MMC (N.D. Cal.), the Court dismissed Plaintiff's action  
25 regarding the unauthorized, negligent, or intentional deprivation  
26 of his property for failure to state claim. This constitutes a  
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1 strike.<sup>1</sup>

2 In Wilkins v. Ahorn, No. 08-3850 MMC (N.D. Cal.), the Court  
3 dismissed Plaintiff's action because Plaintiff sought to proceed  
4 with the case as a class action. Docket No. 8 in No. 08-3850.  
5 The Court noted that Plaintiff was already proceeding with a  
6 separate action with the same claims that just involved him.  
7 This Court finds that the dismissal qualifies as a strike as a  
8 dismissal for failure to state a claim.

9 In Brown v. County of Alameda, No. 11-2704 LHK (N.D. Cal.),  
10 the Court dismissed Plaintiff's second amended complaint without  
11 leave to amend due to Plaintiff's failure to comply with the  
12 Federal Rules of Civil Procedure concerning joinder of claims and  
13 Defendants. Docket No. 21 in No. 11-2704. Plaintiff filed an  
14 appeal that the Court certified was not taken in good faith.  
15 Docket No. 26 in No. 11-2704. The Ninth Circuit denied the  
16 appeal for failure to prosecute. Docket No. 31 in No. 11-2704.  
17 Plaintiff also filed a motion for reconsideration in the District  
18 Court that was denied and a motion for relief from judgment that  
19 was also denied. Docket Nos. 29, 32, 34, 36. This Court  
20 construes this dismissal as Plaintiff's third strike for failure  
21 to state a claim and as frivolous.

22 Plaintiff then appealed the denial of the two post-judgment  
23 motions in No. 11-2074 to the Ninth Circuit in Brown v. County of  
24 Alameda, 13-17060 (9th Cir.). The Ninth Circuit specifically  
25 found the appeal to frivolous. Docket No. 7 in No. 13-17060 (9th  
26 Cir.). This qualifies as Plaintiff's fourth strike.


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28 <sup>1</sup> This case was filed and dismissed after § 1915 was enacted on  
April 26, 1996, and counts as a strike.

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Plaintiff shall show cause within twenty-one (21) days, why  
this case should not be deemed three strikes barred and the  
application to proceed in forma pauperis denied. Failure to  
reply will result in dismissal.

IT IS SO ORDERED.  
Dated: 4/25/2017

  
THELTON E. HENDERSON  
United States District Judge

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