

APPEND I X

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEENAN WILKINS,
Plaintiff,

v.
PAUL GONZALES, et al.,
Defendants.

No. 2:16-cv-0347 KJM KJN P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants' motion to revoke plaintiff's in forma pauperis status. (ECF No. 50.) For the reasons stated herein, the undersigned recommends that defendants' motion be denied.

Title 28 U.S.C. § 1915 generally 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 judgment in a civil action or proceeding under this section if the prisoner has, on 3 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 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).

2 In Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005), the Ninth Circuit explained,
3 “The PLRA does not define the terms ‘frivolous,’ or ‘malicious,’ nor does it define dismissals for
4 failure to ‘state a claim upon which relief could be granted’... We have held that the phrase ‘fails
5 to state a claim on which relief may be granted,’ as used elsewhere in § 1915, ‘parallels the
6 language of Federal Rule of Civil Procedure 12(b)(6).” In defining the terms frivolous and
7 malicious, the Andrews court held, “[W]e look to their ‘ordinary, contemporary, common
8 meaning.’... Thus, a case is frivolous if it is ‘of little weight or importance: having no basis in law
9 or fact’... A case is malicious if it was filed with the ‘intention or desire to harm another.’”
10 Andrews, 398 F.3d at 1121 (internal quotations and citations omitted).

11 The Andrews court further noted, “[n]ot all unsuccessful cases qualify as a strike under
12 § 1915(g). Rather, § 1915(g) should be used to deny a prisoner’s IFP status only when, after
13 careful evaluation of the order dismissing an action, and other relevant information, the district
14 court determines that the action was dismissed because it was frivolous, malicious or failed to
15 state a claim.” Id. at 1121. In making the determination whether a dismissal counts as a strike, it
16 is the substance of the dismissal which is determinative, not the styling of the dismissal. El-
17 Shaddai v. Zamora, 833 F.3d 1036, 1042 (9th Cir. 2016); O’Neal v. Price, 531 F.3d 1146, 1153
18 (9th Cir. 2008).

19 Defendants argue that plaintiff has five strikes pursuant to 42 U.S.C. § 1915(g). The
20 undersigned discusses each alleged strike separately herein.

21 97-cv-2298

22 Defendants argue that Brown aka Wilkins v. North County Jail, No. 3: 97-2298 MMC
23 (N.D. Cal.), counts as a strike. Exhibits attached to defendants’ motion show that the United
24 States District Court for the Northern District of California dismissed 97-2298 for failing to state
25 a claim upon which relief may be granted on August 4, 2017. (ECF No. 50-3 at 8.) Thus, 97-
26 2298 is a strike pursuant to 28 U.S.C. § 1915(g).

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1 08-cv-3850

2 Defendants next argue that Wilkins v. Ahorn, No. 3: 08-cv-3850 MMC (N.D.), counts as a
3 strike. Exhibits attached to defendants' motion to dismiss show that the Northern District
4 dismissed this action with prejudice on February 9, 2009. (ECF No. 50-4 at 15.) Plaintiff filed
5 08-3850 as a class action challenging conditions in the Santa Rita Jail. (Id. at 14.) The Northern
6 District dismissed the action on grounds that plaintiff was not able to act as a class representative.
7 (Id.) The Northern District also found that plaintiff had a currently pending action before the
8 Northern District, filed on his own behalf, containing claims that were identical to those raised in
9 08-3850. (Id.) As noted by defendants, the Northern District did not identify whether the
10 dismissal was because the complaint was frivolous, malicious or failed to state a claim.

11 Defendants argue that 08-cv-3850 counts as a strike because it was dismissed as
12 duplicative of another action filed by plaintiff in the Northern District. Defendants argue that
13 other courts have determined that actions are frivolous or malicious under 28 U.S.C. § 1915(g)
14 when they present duplicative allegations and claims from the same plaintiff in prior actions.

15 Some courts in this district have held that actions dismissed as duplicative are frivolous
16 and thus count as strikes under § 1915(g). See, e.g., Turner v. Gibson, 2013 WL 5587391, *1
17 (E.D.Cal. Oct.10, 2013), citing Cato v. U.S., 70 F.3d 1103, 1105 n.2 (9th Cir. 1995). In Bailey v.
18 Johnson, 846 F.2d 1019, 1021 (5th Cir. 1988) the Fifth Circuit Court of Appeals characterized
19 duplicative litigation as "malicious." In Cato v. U.S., 70 F.3d 1103, 1105 n. 2 (9th Cir. 1995), the
20 Ninth Circuit, citing Bailey, agreed that where a complaint repeats pending or previously litigated
21 claims, it is subject to dismissal under the in forma pauperis statute as being frivolous or
22 malicious.

23 As discussed above, plaintiff attempted to bring 08-3850 as a class action, although he had
24 a pending individual suit raising the same claims. Because plaintiff attempted to bring 08-3850
25 as a class action, the undersigned does not find that it was maliciously brought. While 08-3850
26 contained the same claims as plaintiff's individual action, it appears that plaintiff filed it based on
27 the mistaken belief that he was authorized to represent the class. Based on these circumstances,
28 the undersigned finds that 08-3850 does not qualify as a strike pursuant to 28 U.S.C. § 1915(g).

11-cv-2704

Defendants next argue that Brown v. Alameda, 11-cv-2704 LHK (N.D. Cal.), counts as a strike. On May 1, 2012, the Northern District dismissed 11-2704 for failing to comply with Federal Rules of Civil Procedure 18 and 20. (ECF No. 50-5 at 39-41.) The Northern District found that the amended complaint contained improperly joined defendants and claims. (Id.)

The Northern District did not dismiss 11-2704 on the grounds that plaintiff failed to state claims upon which relief may be granted. The Northern District also did not dismiss 11-2704 on the grounds that plaintiff's claims were frivolous, i.e., "of little weight or importance: having no basis in law or fact..." Andrews, 398 F.3d at 1121. Finally, the Northern District did not dismiss 11-2704 on the grounds that it was malicious, i.e., filed with the "intention or desire to harm another." Id.

Because the Northern District did not dismiss 11-2704 on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief may be granted, the undersigned finds that 11-2704 does not qualify as a strike pursuant to 42 U.S.C. § 1915(g).¹ Rather, 11-2704 is an unsuccessful case that does not qualify as a strike. Andrews, 398 F.3d at 1121.

12-cv-16170

Defendants next argue that the Ninth Circuit's dismissal of plaintiff's appeal of the district court's order in 11-2704 counts as a strike. The background to this appeal follows herein.

After plaintiff appealed the dismissal of 11-2704, in 12-16170 the Ninth Circuit referred the case back to the district court to determine whether plaintiff's in forma pauperis status should continue on appeal or if the appeal was taken in bad faith. (ECF No. 50-6 at 1.) The district court certified that the appeal was frivolous and therefore not taken in good faith. (ECF No. 50-5 at 45-46.)

In 12-16170, the Ninth Circuit then issued an order confirming the district court's certification that plaintiff's appeal was frivolous. (ECF No. 50-6 at 3.) The Ninth Circuit denied

¹ Dismissal of a complaint, in its entirety, for improper joinder is not proper. See Williams v. California Department of Corrections, 467 Fed.Appx. 672 at *674 (9th Cir. 2012), citing Fed. R. Civ. P. 21 ("Misjoinder of parties is not a ground for dismissing an action.")

1 plaintiff's application to proceed in forma pauperis on appeal and ordered him to pay the filing
2 fee. (Id.) After plaintiff failed to pay the filing fee, on September 12, 2012, the Ninth Circuit
3 dismissed the appeal for plaintiff's failure to pay the filing fee. (Id. at 5.)

4 The issue before the undersigned is whether the dismissal of plaintiff's appeal for failure
5 to file an in forma pauperis application, after the appeal was found frivolous, counts as a strike
6 under § 1915(g). In considering whether 12-16170 qualifies as a § 1915(g) strike, the
7 undersigned notes the following cases.

8 In Hafed v. Fed. Bureau of Prison, 635 F.3d 1172, 1179 (10th Cir. 2011), the Tenth
9 Circuit held that an appeal dismissed for failure to pay the filing fee, after the appeal was found
10 frivolous, is a § 1915(g) strike. In Hafed, the plaintiff appealed a district court order dismissing
11 an action as frivolous. Id. at 1178. The Tenth Circuit stated that the determination that the appeal
12 was frivolous by the appellate court when it denied the appellant's motion to proceed in forma
13 pauperis on appeal "can properly be termed the 'but for' cause of that court's subsequent
14 dismissal ...it would be 'hypertechnical' to hold that the resulting dismissal for nonpayment was
15 not a strike." Id.

16 In contrast to the Tenth Circuit, the Eleventh Circuit in Daker v. Commissioner, Georgia
17 Department of Corrections, 820 F.3d 1278 (11th Cir. 2016), held that an appeal dismissed for
18 failure to prosecute, after having been found frivolous, does not count as a § 1915(g) strike,
19 apparently without regard for the reasons behind the dismissal by the district court.

20 In Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017), the Ninth Circuit found
21 that actions dismissed for failure to file amended complaints, after the original complaints were
22 dismissed for failing to state a claim, count as strikes under 28 U.S.C. § 1915(g). The Ninth
23 Circuit found that dismissals, under these circumstances, "rang the PLRA bells of ... failure to
24 state a claim," even if the 'procedural posture' meant that the entry of judgment in each case was
25 delayed until it became clear that Harris would not file an amended complaint that did state a
26 claim." Id. at 1142, citing Thompson v. Drug Enf't Admin., 492 F.3d 428, 433 (D.C. Cir. 2007).

27 Based on the circumstances surrounding 12-16170, the undersigned finds that it does not
28 qualify as a strike under § 1915(g). If the court adopts the reasoning of the Eleventh Circuit in

1 Daker, 12-16170 is not a strike. Appeal 12-16170 can also be distinguished from Harris and
2 Hafed because the underlying order by the Northern District did not dismiss plaintiff's case as
3 frivolous, malicious or for failing to state a claim upon which relief may be granted. Instead, the
4 district court dismissed the case based on improper joinder. Based on these circumstances, even
5 though the district certified that the appeal was not taken in good faith, which the Ninth Circuit
6 confirmed, plaintiff's appeal did not ring the PLRA bell.

7 *13-cv-17060*

8 Defendants next argue that the Ninth Circuit's dismissal of plaintiff's appeal no. 13-17060
9 is a § 1915(g) strike. The background to this appeal follows herein.

10 Following the Ninth Circuit's dismissal of appeal 12-16170, plaintiff filed two motions in
11 the district court: a motion for relief from judgment pursuant to Federal Rule of Civil Procedure
12 60(b) and a motion for administrative justice. (See ECF No. 50-5 at 48-49.) The district court
13 denied both of these post-judgment motions in one order. (Id.) In particular, the district court
14 denied the 60(b) motion as untimely. (Id.) The district court denied the motion for administrative
15 justice on the grounds that it sought legal advice, which the court was not authorized to provide.
16 (Id.)

17 Plaintiff appealed the district court's order denying his 60(b) motion and motion for
18 administrative justice. In 13-17060, the Ninth Circuit referred the case back to the district court
19 to determine whether plaintiff's in forma pauperis status should continue on appeal, or if the
20 appeal was taken in bad faith. (ECF No. 50-7 at 2.) The district court found that plaintiff's
21 appeal was frivolous and therefore not taken in good faith. (ECF No. 50-5 at 51-52.)

22 In 13-17060, the Ninth Circuit issued an order confirming that plaintiff's appeal was
23 frivolous. (ECF No. 50-7 at 4-5.) The Ninth Circuit granted plaintiff twenty-one days to pay the
24 filing fee. (Id.) On March 17, 2014, the Ninth Circuit dismissed the appeal after plaintiff failed
25 to pay the filing fee. (Id. at 6.)

26 Case 13-17060 is not a strike for the same reasons 12-16170 is not a strike. The district
27 court order appealed in 13-17060 did not involve a finding of frivolousness, failure to state a
28 claim or maliciousness. While the district court and the Ninth Circuit found that plaintiff's appeal

1 was frivolous, 13-17060 did not ring the PLRA bell.

2 Conclusion

3 For the reasons discussed above, the undersigned finds that plaintiff does not have three
4 prior strikes pursuant to 28 U.S.C. § 1915(g). While other jurists may disagree with
5 undersigned's findings that four of the five cases discussed do not qualify as strikes, the,
6 undersigned does not enter orders finding § 1915(g) strikes lightly.²

7 In the motion to dismiss, defendants also argue that plaintiff is collaterally estopped from
8 challenging his ineligibility for in forma pauperis status under 28 U.S.C. § 1915(g) because the
9 Northern District has previously determined that plaintiff has § 1915(g) strikes in four of the
10 cases cited by defendants, 97-2298, 08-3850, 11-2704 and 13-17060. As discussed above, the
11 undersigned did not find that 08-3850, 11-2704 and 13-17060 count as strikes under § 1915(g).

12 On April 26, 2017, in Brown v. Contra Costa, 16-7016 TEH, the Northern District ordered
13 plaintiff to show cause why the case should not be deemed to be three strikes barred and the
14 application to proceed in forma pauperis denied based on 97-2298, 08-3850, 11-2704 and 13-
15 17060. (ECF No. 50-8 at 1-5.) The district court denied plaintiff's application to proceed in
16 forma pauperis, but defendants in the instant action did not provide this court with a copy of the
17 order making that finding. After plaintiff failed to pay the filing fee, the district court dismissed
18 16-7016. (Id. at 7.) Plaintiff appealed the order denying his application to proceed in forma
19 pauperis. (Id. at 15.)

20 Assuming that the Northern District found the four cases cited above to count as strikes
21 under 28 U.S.C. § 1915(g), while the undersigned gives such a decision significant consideration,
22 this court is not bound by the decision of another district court.

23 Accordingly, for the reasons discussed above, IT IS HEREBY RECOMMENDED that
24 defendants' motion to revoke plaintiff's in forma pauperis status (ECF No. 50) be denied.

25 These findings and recommendations are submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

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28 ² Neither party addresses the issue of whether plaintiff meets the imminent injury exception to
§ 1915(g). Accordingly, the undersigned also does not address this issue.

1 after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
4 objections shall be filed and served within fourteen days after service of the objections. The
5 parties are advised that failure to file objections within the specified time may waive the right to
6 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7 Dated: October 23, 2017

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9 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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APPENDIX X
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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 KEENAN WILKINS,
12 Plaintiff,

13 v.

14 PAUL GONZALES, et al.,
15 Defendants.
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No. 2: 16-cv-347 KJM KJN P

ORDER

17 Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief
18 under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided
19 by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

20 On October 23, 2017, the magistrate judge filed findings and recommendations, which
21 were served on all parties and which contained notice to all parties that any objections to the
22 findings and recommendations were to be filed within fourteen days. Defendants have filed
23 objections to the findings and recommendations.

24 The magistrate judge recommended that defendants' motion to revoke plaintiff's in forma
25 pauperis status be denied. Defendants argued that plaintiff has five strikes under 42 U.S.C.
26 § 1915(g). The magistrate judge found that only one of the five strikes cited by defendants
27 qualified as a strike under 28 U.S.C. § 1915(g). In accordance with the provisions of 28 U.S.C.
28 § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case.

1 Defendants object to the magistrate judge's finding that plaintiff's two appeals do not
2 qualify as strikes. Resolution of defendants' objection is controlled by *Richey v. Dahne*, 807 F.3d
3 1202 (9th Cir. 2015). In *Richey*, the United States Court of Appeals for the Ninth Circuit applied
4 the rule announced in *O'Neal v. Price*, 531 F.3d 1146 (9th Cir. 2008) to appeals, as follows:

5 In *O'Neal v. Price*, 531 F.3d 1146 (9th Cir. 2008), we held that
6 "when a district court disposes of an in forma pauperis complaint
7 'on the grounds that [the claim is frivolous, malicious, or fails to
8 state a claim upon which relief may be grant,' such a complaint is
9 'dismissed' for purposes of 1915(g) even if the district court styles
10 such dismissal as a denial of the prisoner's application to file the
action without prepayment of the full filing fee." *Id.* at 1153
(alteration in original). *O'Neal's* reasoning applies equally to the
situation in *Thaut III*, as we rejected *Richey's* request for IFP status
because the appeal was frivolous even though we did not dismiss
the appeal until later when *Richey* did not pay the filing fee.

11 *Richey*, 807 F.3d at 1208. The panel's reasoning did not rest on the fact that the action underlying
12 the appeal in *Richey's* prior case denominated *Thaut III* had been dismissed as frivolous. The
13 holding was based on the fact that a motions panel had determined the appeal to be frivolous,
14 denied *Richey* IFP status on appeal but allowed him an opportunity to pay the filing fee and
15 proceed with the appeal, and then dismissed the appeal for failure to pay the filing fee. *Id.*

16 Here, the two appeals at issue were found to be frivolous by both the district court and the
17 court of appeals. See ECF No. 59 at 4, 6. Following those determinations, in each instance the
18 court of appeals ordered plaintiff to pay the filing fees. *Id.* at 5, 6. The appeals were dismissed
19 after plaintiff failed to pay the required filing fees. *Id.* at 5, 6. *Richey* requires that the two
20 appeals be considered strikes under 28 U.S.C. § 1915(g).

21 Given the foregoing, plaintiff has three strikes under 28 U.S.C. § 1915(g) and therefore
22 can only proceed in forma pauperis with this action if he is "under imminent danger of serious
23 physical injury." 28 U.S.C. §1915(g). The allegations of the cognizable claims in this action do
24 not support the required finding.

25 Having reviewed the file, the court declines to adopt the findings that plaintiff's appeals,
26 12-cv-16170 and 13-cv-17060, are not strikes under 28 U.S.C. §1915(g) or the recommendation
27 that defendants' motion to revoke plaintiff's in form pauperis status be denied. For the reasons
28 set forth in the findings and recommendations and this order, the court finds that before filing this

1 action plaintiff has filed one civil action and two appeals that were dismissed on the grounds that
2 they were frivolous, and that the cognizable claims in this action do not support a finding that
3 plaintiff is under imminent danger of serious physical injury.

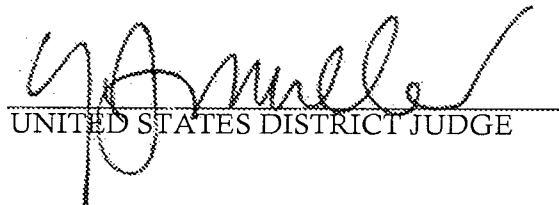
4 Accordingly, IT IS HEREBY ORDERED that:

5 1. The findings and recommendations filed October 23, 2017 are adopted to the extent
6 consistent with this order;

7 2. Defendants' motion to revoke plaintiff's in forma pauperis status, ECF No. 50, is
8 granted; and

9 3. Plaintiff's in forma pauperis status is revoked and plaintiff is granted thirty days from
10 the date of this order in which to pay the filing fee of four hundred dollars (\$400.00) for this
11 action. Failure to comply with this order will result in the dismissal of this action.

12 DATED: January 31, 2018.

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14 UNITED STATES DISTRICT JUDGE
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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 KEENAN WILKINS,

No. 2:16-cv-0347 KJM KJN

11 Plaintiff,

12 v.

ORDER

13 PAUL GONZALEZ, et al.,

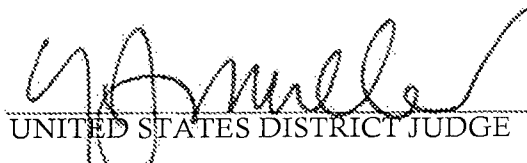
14 Defendants.
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16 Plaintiff, a state prisoner, filed this civil rights action without counsel in February
17 2016. Because plaintiff has filed several frivolous requests and rebuffed multiple requests to pay
18 filing fees, this court revoked his *in forma pauperis* status on March 14, 2018, and ordered him to pay
19 a \$400.00 filing fee within thirty days. Order, ECF No. 61, at 3. Plaintiff requested to extend this
20 deadline another thirty days. ECF No. 62. The court granted his request and pushed the deadline to
21 April 2, 2018, but warned that absent good cause, “[f]ailure to comply with this order will result in
22 dismissal of this action.” ECF No. 63.

23 The April 2, 2018 deadline lapsed over a month ago, yet plaintiff has neither paid
24 the \$400.00 filing fee nor shown any good cause for not doing so. The court therefore
25 DISMISSES this action in full. The Clerk of the Court is directed to close this case.

26 IT IS SO ORDERED.

27 DATED: May 4, 2018.
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UNITED STATES DISTRICT JUDGE

APPEND I X

B-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 19 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KEENAN G. WILKINS, AKA Nerrah
Brown,

Plaintiff-Appellant,

v.

PAUL GONZALEZ; et al.,

Defendants-Appellees.

No. 18-15643

D.C. No.

2:16-cv-00347-KJM-KJN

Eastern District of California,
Sacramento

ORDER

Before: TASHIMA and GRABER, Circuit Judges.

Appellees' motion to take judicial notice (Docket Entry No. 5) is granted.

See Fed. R. Evid. 201; *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007).

Appellant's motion to proceed in forma pauperis (Docket Entry No. 3) is denied because appellant has had three or more prior actions or appeals dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted, and appellant has not alleged imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g).

Within 21 days after the date of this order, appellant shall pay \$505.00 to the district court as the docketing and filing fees for this appeal and file proof of payment with this court. Failure to pay the fees will result in the automatic dismissal of the

appeal by the Clerk for failure to prosecute, regardless of further filings. *See* 9th Cir. R. 42-1.

No motions for reconsideration, clarification, or modification of the denial of appellant's in forma pauperis status shall be entertained.

If the appeal is dismissed for failure to comply with this order, the court will not entertain any motion to reinstate the appeal that is not accompanied by proof of payment of the docketing and filing fees.

Briefing is suspended pending further order of this court.

APPEND I X

B-2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 31 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KEENAN G. WILKINS, AKA Nerrah
Brown,

Plaintiff - Appellant,

v.

PAUL GONZALEZ; et al.,

Defendants - Appellees.

No. 18-15643

D.C. No. 2:16-cv-00347-KJM-KJN
U.S. District Court for Eastern
California, Sacramento

ORDER

A review of the docket demonstrates that appellant has failed to pay the docketing/filing fees in this case.

Pursuant to Ninth Circuit Rule 42-1, this appeal is dismissed for failure to prosecute.

This order served on the district court shall, 21 days after the date of the order, act as the mandate of this court.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Marc Eshoo
Deputy Clerk
Ninth Circuit Rule 27-7

**Additional material
from this filing is
available in the
Clerk's Office.**