APPENDIX

A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 18 2020

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

KEENAN G. WILKINS, AKA Nerrah Brown, Plaintiff-Appellant, v. C. JOKSCH, Correctional Officer; et al., Defendants-Appellees.	No. 19-16674 D.C. No. 2:18-cv-02518-MCE-DMC Eastern District of California, Sacramento ORDER

Before: SILVERMAN, McKEOWN, and BRESS, Circuit Judges.

On August 6, 2019, the district court revoked appellant's in forma pauperis status, finding that the Prisoner Litigation Reform Act's "three strikes" provision barred appellant from bringing his cause of action in forma pauperis because he had previously filed three actions that had been dismissed as frivolous, malicious, or for failure to state a claim, and appellant did not allege that he was under imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g). However, a review of the record indicates that appellant adequately alleged that he faced imminent danger of serious physical injury at the time he filed his complaint. *See id.*; *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015) (holding that a prisoner "may meet this requirement by alleging that prison officials continue with a practice that has injured him or others similarly situated in the past" (brackets

and internal quotation marks omitted)).

We therefore vacate the district court's August 6, 2019 order and remand for further proceedings consistent with this order.

All pending motions are denied as moot.

VACATED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 3 2020

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

KEENAN G. WILKINS, AKA Nerrah Brown,

Plaintiff-Appellant,

v.

C. JOKSCH, Correctional Officer; et al.,

Defendants-Appellees.

No. 19-16674

D.C. No. 2:18-cv-02518-MCE-DMC
Eastern District of California, Sacramento

ORDER

Before: SILVERMAN, McKEOWN, and BRESS, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 26) is denied. *See* 9th Cir. R. 27-10.

All remaining pending motions are denied as moot.

No further filings will be entertained in this closed case.

MN/MOATT

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

July 9, 2020

Keenan Wilkins
AN2387
P.O. Box 32290
Stockton, CA 95213

RE: Wilkins v. Galvin, et al.
No: 19-6705

Dear Mr. Wilkins:

The petition for rehearing in the above-entitled case was postmarked June 17, 2020, received June 25, 2020, and is herewith returned as out-of-time.

Pursuant to Rule 44 of the Rules of this Court, a petition for rehearing must be submitted within 25 days after the decision of the Court. As the petition for writ of certiorari was denied on May 18, 2020, the petition for rehearing was due on or before June 12, 2020.

Sincerely,
Scott S. Harris, Clerk
By:
Jacob Levitan
(202) 479-3392

Enclosures

PROOF OF SERVICE

I, Keeran Wilkins, Declare:

On 6/17/20 I gave CDCR officer 3 Envelopes Containing:

"Petitioners Request For Rehearing and/or Reconsideration"

Wilkins v Galvin et al

No. 19-6705

Addressed TO:

1. office of CLK
Supreme Ct of US
Washington, DC 20543

2. David Goodwin
D.A.G
State Atty Gen office
1300 I St Ste 125
Sac, CA 94244

3. David M. Shapiro, Esq
Roderick + Solange
MacArthur Justice Ctr
Northwestern Pritker
School of Law
375 East Chicago Ave
Chicago IL 60611

For outgoing US Postal Mail

I Declare this is True under Penalty of perjury

Executed this 17th Day of June 2020 at Stockton, California.

Keeran Wilkins
Petitioner

Keenan Wilkins - AN2387
(aka Nerrah Brown)
California Health Care Facility
PO Box 32290
Stockton, CA 95213
Petitioner, In Pro Per

UNITED STATES SUPREME COURT

KEENAN G. WILKINS
Petitioner

vs

J. GALVIN, et al
Respondant

No. 19-6705

PETITIONER'S REQUEST FOR REHEARING AND/OR RECONSIDERATION

I. INTRODUCTION

Petitioner, Keenan Wilkins received a letter from Counsel of Record David M. Shapiro dated stating the Court denied his Petition For Certiorari on Petitioner respectfully seeks Rehearing and/or Reconsideration by the Court to address 2 Claims "Conceded" by Respondant but left "unaddressed" by Petitioner's Counsel --- Claims far more eggregious than the one presented

II. REASON FOR REHEARING / RECONSIDERATION

a. Petitioner's original Petition Sought relief on 3 Claims:

1. Lack of Jurisdiction
2. Section 1915 (Failure To Prosecute)
3. Erroneous "Frivilous" Finding

b. The Court ordered a response and Respondant only addressed "one" of the 3 Claims --- The Section 1915 failure to Prosecute Claim. 9th Circuit and US Supreme Court Law holds that Respondants failure to argue the other 2 claims resulted in Waiver and/or Concession to the arguments (Medelin v Dretke (2005) 544 US 660 • Clem v. Lomeli, 566F 3d 1177, 9th Cir 2009; Tapia v. Wells 2015 US DIST LEXIS 102836).

c. Counsel of Record the ONLY addressed in Reply Brief the Respondant's Section 1915 failure To Prosecute Arguments but left wholly unaddressed Respondant's "Concession" to the most eggregioes of the 3 Claims --- the 9th Circuits lack of Jurisdiction to make a

"frivilous" finding on a "Non-Briefed Appeal --- when all thats before it was whether to Grant/Deny IFP for the Appeal (Rule 24; See Buck v Davis 137 S.Ct 759 (2017).

III. CONCLUSION

Wherefore, Petitioner respectfully seeks Rehearing and/or Reconsideration to address the "Conceded" to most eggregious Claim' (Lack of Jurisdiction) as this action circumvents Constitutional Due Process and Statues, Creating incredible hardship for indigent prisoners subjected to Constitutional deprivations.

Dated: 6/16/20

Respectfully Submitted

Keenan Wilkins
Petitioner

APPENDIX

D

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

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[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.")

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

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

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

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

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

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

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

13-cv-17060

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

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

Plaintiff appealed the district court's order denying his 60(b) motion and motion for administrative justice. In 13-17060, 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. 50-7 at 2.) The district court found that plaintiff's appeal was frivolous and therefore not taken in good faith. (ECF No. 50-5 at 51-52.)

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

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

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

Conclusion

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

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

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

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

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

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

[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.

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

Dated: October 23, 2017

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

Wilk347.mtd

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KEENAN WILKINS, also known as Nerrah Brown,

Plaintiff,

v.

C. JOKSCH, et al.,

Defendants.

No. 2:18-cv-02518-MCE-DMC-P

ORDER

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to Eastern District of California local rules.

On June 18, 2019, the Magistrate Judge filed findings and recommendations herein which were served on the parties and which contained notice that the parties may file objections within the time specified therein. Timely objections to the findings and recommendations have been filed.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304(f), this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed June 18, 2019, are adopted in full;

2. Defendant's motion to revoke plaintiff's in forma pauperis status (ECF No. 13) is granted;

3. This action is dismissed without prejudice to re-filing upon pre-payment of the filing fee;

4. All other pending motions (ECF Nos. 32, 33 and 37) are denied as moot; and

5. The Clerk of the Court is directed to enter judgment and close this file.

IT IS SO ORDERED.

Dated: August 6, 2019

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KEENAN WILKINS, also known as Nerrah Brown,

Plaintiff,

v.

C. JOKSCH, et al.,

Defendants.

No. 2:18-CV-2518-MCE-DMC-P

FINDINGS AND RECOMMENDATIONS

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendant Foulk's motion to revoke plaintiff's in forma pauperis status (ECF No. 13) and defendant Joksch's joinder (ECF No. 23). Defendants contends in forma pauperis status should be revoked pursuant to the Prison Litigation Reform Act (PLRA).

The PLRA's "three strikes" provision, found at 28 U.S.C. § 1915(g), provides as follows:

> In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on three or more prior occasions, while incarcerated or detained . . ., brought an action . . . in a court of the United States that was dismissed on the ground 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.
>
> Id.

Thus, when a prisoner plaintiff has had three or more prior actions dismissed for one of the reasons set forth in the statute, such "strikes" preclude the prisoner from proceeding in forma pauperis unless the imminent danger exception applies. Dismissals for failure to exhaust available administrative remedies generally do not count as "strikes" unless the failure to exhaust is clear on the face of the complaint. See Richey v. Dahne, 807 F.3d 1202, 1208 (9th Cir. 2015). Dismissed habeas petitions do not count as "strikes" under § 1915(g). See Andrews v. King, 398 F.3d 1113, 1122 (9th Cir. 2005). Where, however, a dismissed habeas action was merely a disguised civil rights action, the district court may conclude that it counts as a "strike." See id. at n.12.

When in forma pauperis status is denied, revoked, or otherwise unavailable under § 1915(g), the proper course of action is to dismiss the action without prejudice to re-filing the action upon pre-payment of fees at the time the action is re-filed. In Tierney v. Kupers, the Ninth Circuit reviewed a district court's screening stage dismissal of a prisoner civil rights action after finding under § 1915(g) that the plaintiff was not entitled to proceed in forma pauperis. See 128 F.3d 1310 (9th Cir. 1998). Notably, the district court dismissed the entire action rather than simply providing the plaintiff an opportunity to pay the filing fee. The Ninth Circuit held that the plaintiff's case was "properly dismissed." Id. at 1311. Similarly, in Rodriguez v. Cook, the Ninth Circuit dismissed an inmate's appeal in a prisoner civil rights action because it concluded that he was not entitled to proceed in forma pauperis on appeal pursuant to the "three strikes" provision. See 169 F.3d 1176 (9th Cir. 1999). Again, rather than providing the inmate appellant an opportunity to pay the filing fee, the court dismissed the appeal without prejudice and stated that the appellant "may resume this appeal upon prepaying the filing fee."

This conclusion is consistent with the conclusions reached in at least three other circuits. In Dupree v. Palmer, the Eleventh Circuit held that denial of in forma pauperis status under § 1915(g) mandated dismissal. See 284 F.3d 1234 (11th Cir. 2002). The court specifically held that "the prisoner cannot simply pay the filing fee after being denied IFP status" because "[h]e must pay the filing fee at the time he *initiates* the suit." Id. at 1236 (emphasis in original). The Fifth and Sixth Circuits follow the same rule. See Adepegba v. Hammons, 103 F.3d 383 (5th

Cir. 1996); In re Alea, 86 F.3d 378 (6th Cir. 2002).

This court has previously determined plaintiff has three or more "strikes." See Wilkins v. Gonzalez, No. 2:16-CV-0347-KJM-KJN; Brown (aka Wilkins) v. Galvin, No. 2:16-CV-2629-JAM-DB. The court takes judicial notice of these prior determinations, see Chandler v. U.S., 378 F.2d 906, 909 (9th Cir. 1967), and likewise concludes plaintiff has three or more "strikes." The court also finds plaintiff has not faced imminent danger of serious bodily physical injury at the time the action was filed. See Andrews v. Cerbantes, 493 F.3d 1047, 1055 (9th Cir. 2007). Plaintiff claims of being forced to share a cell with predatory inmates in late 2013 and into 2014. See ECF No. 1, pgs. 6-7. According to plaintiff, this alleged conduct exposed him to safety risks, in violation of the Eighth Amendment. See id. 8. Plaintiff also states that, on April 4, 2014, his classification was "made 'single cell' status." Id. Thus, as of the time this action was filed, plaintiff was not in imminent danger of serious physical injury resulting from a predatory cellmate. To the extent plaintiff worries about the possibility of being double-celled in the future, any danger would be speculative, not imminent as of the date the complaint was filed.

Based on the foregoing, the undersigned recommends that defendant's motion to revoke plaintiff's in forma pauperis status (ECF No. 13) be granted and that this action be dismissed without prejudice to re-filing upon pre-payment of the full filing fee.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: June 18, 2019

DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE