22-0050

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

WASEEM DAKER,
Petitioner

v.

TIMOTHY WARD, ET AL,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

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APPENDIX:

APPENDIX A:

ELEVENTH CIRCUIT OPINION

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11723

D.C. Docket No. 6:18-cv-00032-JRH-BWC

WASEEM DAKER,

Plaintiff - Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Defendant - Appellee,

TIMOTHY WARD, et. al.,
Assistant Commissioner,

Defendants.

No. 19-11849

D.C. Docket No. 6:18-cv-00073-RSB-BWC

WASEEM DAKER,

Plaintiff - Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
HOMER BRYSON,
Former GDC Commissioner,
ASSISTANT COMMISSIONER, DEPARTMENT OF CORRECTIONS,
WARDEN,
Facilities Director,
STEVE UPTON,
Deputy Facilities Director, et al.,

Defendants - Appellees.

Appeals from the United States District Court
for the Southern District of Georgia

(August 16, 2021)

Before JORDAN, JILL PRYOR and TJOFLAT, Circuit Judges.

PER CURIAM:

Waseem Daker appeals the district court's *sua sponte* dismissal without prejudice of two actions under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a), alleging various constitutional and statutory violations relating to the Georgia Department of Corrections' ("GDC") grooming policy.[1] Daker is a practicing Muslim. As part

[1] Daker proceeded *pro se* in the district court in both cases. We consolidated the appeals when we determined they presented the same question and appointed counsel to represent Daker.

of his religion, he must wear a beard at least as long as the width of his fist, about three inches. GDC requires prisoners to have beards of no longer than half an inch. Along with challenging this policy, Daker alleged in both complaints that GDC has a custom and practice of forcibly shaving him with unsanitized clippers and using excessive force. Daker maintains that this practice puts him at risk of contracting infectious diseases and sustaining serious injury.

Daker moved to proceed *in forma pauperis* at the time he filed each complaint. The district court *sua sponte* dismissed both suits under the Prison Litigation Reform Act's "three-strikes" provision, which prohibits inmates who have had three previous civil actions dismissed "on the grounds that [they are] frivolous, malicious, or fail[] to state a claim" from proceeding *in forma pauperis*. 28 U.S.C. § 1915(g). On appeal, Daker argues that the district court erred because his complaints alleged an imminent danger of serious physical harm—an exception to the three strikes provision. *Id.*

After we ordered that this case be orally argued, another panel of this Court held that an essentially identical complaint in another of Daker's appeals failed to allege an imminent danger of future harm under § 1915(g). *Daker v. Ward*, 999 F.3d 1300, 1311–13 (11th Cir. 2021). Daker himself described the claims in *Daker v. Ward* and the instant cases as similar, and our review confirms that the complaints in all three cases are substantially identical. Given this similarity, we

conclude that this appeal is foreclosed by our decision in *Daker v. Ward*.[2] We thus affirm the district court's dismissal.

AFFIRMED.

[2] This is not to say that Daker is foreclosed from proceeding under § 1915(g)'s imminent danger of serious physical injury exception for any claim challenging GDC's grooming policy. But on the complaints before us, as in the complaint in *Daker v. Ward*, Daker has not sufficiently alleged that the GDC practices create such a risk.

APPENDIX B:

DISTRICT COURT ORDER DISMISSING COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

WASEEM DAKER,

Plaintiff,

v.

COMMISSIONER GREGORY DOZIER, et al.,

Defendants.

CIVIL ACTION NO.: 6:18-cv-32

ORDER

The Court has conducted an independent and de novo review of the entire record and concurs with the Magistrate Judge's Report and Recommendation, (doc. 19). Plaintiff first submitted a Motion to Extend Time to Object, asserting that he needed more time to prepare and file his Objections. (Doc. 21). Despite that assertion, Daker filed a 44-page document styled as his "Partial Objections" on March 28, 2019.[1] (Doc. 22). After consideration of Daker's partial Objections, (doc. 22), the Court finds that nothing in these Objections alters the Magistrate Judge's

[1] The Magistrate Judge issued the Report and Recommendation on March 7, 2019. Doc. 19. The record before the Court reflects that a copy was mailed to Plaintiff the same day. Thus, Daker had until March 25, 2019, to file his Objections or to make a timely request for an extension. See Daker v. Comm'r, Georgia Dep't of Corr., 820 F.3d 1278, 1286 (11th Cir. 2016) (stating that prisoners have 17 days to file objections to a Report and Recommendation (citing Fed. R. Civ. P. 6(d), 72(b)(2))); see also Forde v. Miami Fed. Dep't of Corr., 730 F. App'x 794, 800–01 (11th Cir. 2018) ("The prison mailbox rule provides that a pro se prisoner's legal submission is considered filed on the date it is delivered to prison authorities for mailing."); Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001) (noting that "absent evidence to the contrary," courts "assume that [a prisoner's pleading] was delivered to prison authorities the day [the prisoner] signed it."); see also Fed. R. Civ. P. 6(a)(1)(C) (providing that, when computing a time period where "the last day is a Saturday, Sunday, or legal holiday," the time period "continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday"). Daker signed his Motion on March 18, 2019, and the envelope bears a March 22, 2019 postmark. (Doc. 21, pp. 1–2). Similarly, Daker's Partial Objections were signed and postmarked on March 24, 2019. (Doc. 22, pp. 43–44). Thus, even though the Court received Daker's Motion and his Partial Objections on March 26 and March 28, respectively, both are timely filed.

conclusion that Daker should be denied *in forma pauperis* status. The Court, therefore, **OVERRULES** Daker's Objections and **ADOPTS** the Magistrate Judge's Report and Recommendation as the Order of the Court. The Court **DENIES** Daker's Motion to Extend Time to Object, (doc. 21), and will not consider any other objections postmarked after March 25, 2019.[2] The Court also **DENIES** Daker's request for emergency remand for evidentiary hearing, (doc. 22, p. 30).[3] The Court **DISMISSES without prejudice** Plaintiff's Complaint, (doc. 1), **DIRECTS** the Clerk of Court to **CLOSE** this case and enter the appropriate judgment of dismissal, and **DENIES** Plaintiff *in forma pauperis* status on appeal.

I. Daker's Motion to Extend Time, (doc. 21)

Rule 6(b) allows courts to extend filing deadlines when a party makes a timely request and shows good cause to do so. Fed. R. Civ. P. 6(b). Thus, "[a] request for an extension, made before the expiration of the deadline, should be granted where good cause is shown." Sensi v. Fla. Officers of Court, 737 F. App'x 433, 436 (11th Cir. 2018); Shepherd v. Wilson, 663 F. App'x 813,

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[2] Because the time to file objections is now past, Daker's self-styled "Partial Objections," (doc. 22), are, in fact, his full Objections. Additionally, in his Motion, Daker indicated that he intended to file objections to both the Report and Recommendation, (doc. 19), and the Court's Order, filed the same day, which denied Daker leave to proceed *in forma pauperis*, (doc. 18). (Doc. 22, p. 1). In denying the Motion to Extend Time to Object, the Court is denying Daker any additional time to file any Objections to either the Report and Recommendation or the Order denying *in forma pauperis* status. See Fed. R. Civ. P. 72 (setting the same time period for filing objections to both dispositive and non-dispositive rulings from a magistrate judge).

[3] Daker requests an "emergency remand" for an evidentiary hearing, arguing that the evidentiary hearing would be especially helpful because "each of the forcible shavings at issue were videotaped" and the recordings will prove that "there was no need to forcibly shave Plaintiff" and that "on each occasion, [D]efendants forcibly shaved him with unsantized clippers." (Doc. 22, p. 30). First, the issue before the Court is whether Daker may proceed without prepayment of filing fees, not whether the forcible shaving was necessary or whether it occurred with unsanitized clippers. For purposes of this Order, the Court accepts as true that these forcible shavings occurred and that unsanitized clippers were used each time. Moreover, because the purpose of the Prisoner Litigation Reform Act ("PLRA") is to curb abusive litigation, it follows that evidentiary hearings on preliminary issues such as imminent danger or exhaustion of administrative remedies should be rarely granted. See, e.g., Stephens v. Howerton, No. CV 105-171, 2007 WL 1810242, at *11 (S.D. Ga. June 21, 2007); Williams v. Rich, No. CV 606-003, 2006 WL 2534417, at *5, n.5 (S.D. Ga. Aug. 30, 2006).

817–18 (11th Cir. 2016); United States v. Johnson, No. 1:05-CR-1, 2011 WL 66044, at *1 (N.D. Fla. Jan. 7, 2011) (denying, in a criminal case, a request for an extension of time to file objections when defendant failed to show good cause). "To establish good cause, the party seeking the extension must establish that the schedule could not be met despite the party's diligence." Ashmore v. Sec'y, Dep't of Transp., 503 F. App'x 683, 685 (11th Cir. 2013).

Though Daker timely filed his Motion, he fails to show that good cause justifies his request for an extension. The Magistrate Judge recommended dismissal because Daker has filed at least three previous actions which courts dismissed as frivolous, and Daker failed to show he was in imminent danger of a future physical injury at the time he filed his Complaint. (Doc. 19, pp. 8–9) (citing Smith v. Clemons, 465 F. App'x 835, 836 (11th Cir. 2012)). In support of his Motion, Daker argues that he needs more time because he is pro se, incarcerated, and "needs outside assistance from family members or friends to assist with preparing and filing his Objections." (Doc. 21). However, Daker does not explain what additional Objections he might raise if he was given additional time, nor does he explain why he requires additional outside assistance.[4] Additionally, Daker does not explain why his incarceration and pro se status prevent him from meeting the deadline for objections "despite his diligence." FTC v. Lalonde, 545 F. App'x 825, 835 (11th Cir. 2013) (finding no error in denying an incarcerated plaintiff's motion for a discovery extension when the plaintiff "did not show that the deadline for discovery could not be met despite his diligence"). Further, some impairment of Daker's "civil litigating capacity" is "one of the constitutional consequences of his incarceration." Id.

[4] However, the subsequently-filed Partial Objections, (doc. 22), provide some guidance on what Daker might argue. As further explained below, nothing in these Objections demonstrates that Daker was in imminent danger of a serious physical injury at the time he filed his Complaint. Additionally, the Court notes that Daker's Partial Objections contain a hodgepodge of arguments, many of which this Court has previously considered and dismissed. Here, Daker filed the same document containing the same Partial Objections in two different cases and, within his Objections, continually refers to filings not contained within the present action and which may have taken place in other litigation.

Moreover, Daker's assertion that he needs more time to formulate his objections is vitiated by his own filings of record. First, Daker timely filed 44 pages of Objections, despite this Motion. (Doc. 22). Even if Daker had not submitted such voluminous Objections, he knew the Court would issue a Report and Recommendation in his case and filed—not just one, but two—motions to expedite the Court's requisite frivolity review. (Docs. 14, 17). Daker's simultaneous attempts to expedite the Court's rulings and to extend his own time to respond weigh against a finding of good cause. In both of his motions to expedite, Daker asserted that his claims should proceed because he was in imminent danger of physical injury. (Docs. 14, 17). Notably, Daker is a well-known litigant with an extensive history of filing federal lawsuits. Daker v. Bryson, No. 5:15-CV-88, 2015 WL 4973548, at *1 (M.D. Ga. Aug. 20, 2015) ("A review of court records . . . reveals that Plaintiff has filed more than one hundred federal civil actions and appeals since 1999."); Daker v. Warren, No. 1:11-CV-1711, 2014 WL 806858, at *1 (N.D. Ga. Feb. 28, 2014) ("Waseem Daker is an extremely litigious state prisoner[.]"); see also Mathis v. Smith, 181 F. App'x 808, 809–10 (11th Cir. 2006) ("When considering the issue of frivolity, 'a litigant's history of bringing unmeritorious litigation can be considered.'" (quoting Bilal v. Driver, 251 F.3d 1346, 1349 (11th Cir. 2001))). Thus, Daker was well aware that the Magistrate Judge's Report and Recommendation would be forthcoming and that he may have to prepare legal and factual defenses regarding his imminent danger claim.

While he would not be able to prepare the precise objections until he received the Report and Recommendation, nothing prevented Daker from preparing any additional factual evidence or legal argument beforehand. In fact, if more evidence existed, Daker could easily have submitted it to the Court for consideration before frivolity review. Because Daker's Partial Objections, (doc. 22), were timely filed, the Court will consider them. However, because Daker fails to show

good cause for an extension, the Court **DENIES** Plaintiff's Motion to Extend Time to Object, (doc. 21).

II. Daker's Objections, (doc. 22)[5]

A. Imminent Danger of Serious Physical Injury

Next, Daker argues that he faces—and since early 2015 has faced—an "ongoing danger" that physical force will be used against him. (Doc. 22, pp. 12–14). He cites to multiple sources of authority to show that prison officials are not justified in using force to effectuate these shavings. (Id.). He argues that, even if the grooming policy was valid (a point he does not concede), "it does not follow that force is justified to maintain it." (Id.).

Daker is correct that the imminent danger standard does not require prisoners suffer a physical injury before bringing suit. However, he still fails to show that an "ongoing danger" of forced shavings creates an imminent danger of serious physical injury. More importantly, questions around the justification for use of force go to the merits of Daker's actions. The question currently before the Court is not whether prison officials are justified in their use of force, but rather, whether Daker has sufficiently alleged that he faced an imminent danger of physical injury at the time he brought his Complaint. It may be that prison officials cannot forcibly shave Daker

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[5] Daker argues that the Magistrate Judge erred by construing the facts asserted by Daker against Daker, rather than in his favor. That is incorrect. A plain reading of the Magistrate Judge's Report and Recommendation demonstrates that the Magistrate Judge construed all facts alleged in Daker's favor and assumed those facts to be true for purposes of the three-strikes review. Moreover, it is entirely appropriate for the Magistrate Judge to weigh Daker's history as a serial litigant when considering whether his claims are sufficiently serious as to allow him to proceed without payment. Mathis v. Smith, 181 F. App'x 808, 809–10 (11th Cir. 2006) ("When considering the issue of frivolity, 'a litigant's history of bringing unmeritorious litigation can be considered.'" (quoting Bilal v. Driver, 251 F.3d 1346, 1349 (11th Cir. 2001))); see Skillern v. Paul, 202 F. App'x 343, 344 (11th Cir. 2006) (considering, during the analysis of imminent danger under § 1915(g), that "the PLRA was enacted to 'curtail abusive prisoner litigation'"); see also Daker v. Comm'r, Ga. Dep't of Corr., 820 F.3d 1278, 1281 (11th Cir. 2016) ("Daker has submitted over a thousand pro se filings in over a hundred actions and appeals in at least nine different federal courts."); Daker v. Warren, No. 1:11-cv-1711, 2014 WL 806858, at *1 (N.D. Ga. Feb. 28, 2014) ("Waseem Daker is an extremely litigious state prisoner . . . .").

in the manner which he alleges.[6] However, the issue the Court must currently determine is whether Daker faced an imminent danger of a serious physical injury at the time he brought his Complaint. If so, then Daker's claim may proceed without prepayment of cost. If not, then this action will be dismissed, but dismissal would not foreclose the claim. If Daker chooses, he may proceed with his claim simply by refiling it and paying the costs up front. But, the underlying merits of forcible shaving and grooming policies are not currently before the Court.

Notably, Daker must show not that he is currently or has been under threat of imminent danger, but rather that he faced an imminent danger of physical injury at the time he filed his complaint. See Owens v. Schwartz, 519 F. App'x 992, 994 (11th Cir. 2013) ("A prisoner who qualifies under imminent danger of serious physical injury at the time that he filed his complaint, however, can proceed [*in forma pauperis*]."). Here, Daker originally submitted a 67-page Complaint and supplement at the time he filed this action. Additional factual arguments must therefore be extremely limited in scope—any new fact-based allegations are only relevant if they pertain to the dangers Daker faced at Georgia State Prison on or around March 26, 2018, when he initially filed this action. (Doc. 1).

First, Daker argues he faces an ongoing imminent danger because the prison uses unsanitized clippers every time he is forcibly shaved. (Doc. 22, pp. 5, 23). This argument does not alter the Magistrate Judge's conclusion that Daker's assertion that use of unsanitized clippers may lead him to contract HIV or hepatitis is merely "hypothetical conjecture" which is insufficient to sustain a finding of imminent danger. (Doc. 19, pp. 11–12). As the Magistrate Judge noted, this case—like Daker's other cases challenging the GDC's grooming policy—involves "duplicative, longstanding allegations of imminent harm [from] infectious diseases which have never come to fruition." (Doc. 19, p. 12 n.14). Daker alleges in this case that the forcible shavings

[6] Indeed, the issue is currently being litigated in Smith v. Owens, 848 F.3d 975 (11th Cir. 2017).

began in 2015, though in other cases, he has claimed that such shavings began as early as 2012. (Id., p. 11 & n.13). However, Daker never states that he has personally contracted any communicable disease from the unsanitized clippers, nor does he provide even one instance of another inmate who contracted a disease. While prisoners are not required to show they have personally contracted a disease in order to successfully claim imminent danger, simply pointing to a "documented causal link" between unsanitized tools and disease is not enough to show that Daker, specifically, suffers risk of disease from the prison's use of unsanitized shaving tools. (Doc. 22, pp. 27–28). The Court's consideration of the lack of disease does not, as Daker alleges, create a situation where there is no way to bring an imminent danger claim. Rather, the length of time such conditions have persisted without any infection, coupled with Daker's allegations of frequent forced shaves and the prison's common and widespread practice of providing inmates with unsanitary grooming materials, are factors which speak directly to Daker's risk of injury. These factors weigh strongly against a finding of any "imminent" danger.

In his Objections, Daker also argues that he faces imminent danger of serious physical injury due to the force used in the prison's implementation of grooming policy. (Id., pp. 11–22). This includes the prison's use of handcuffs, chemical sprays, and other restraints during the forcible shavings. For the first time in this action, Daker states that prison officials used a chemical spray on him during three forced shaves on November 10, 2016, January 10, 2017, and, finally, on September 18, 2018, about six months after Daker filed this action.[7] (Id., p. 21; Doc. 1). As a result, Daker suffered skin irritation, characterized as a "burn," which lasted "over a week." (Doc. 22, p. 7). This is a new factual allegation, as Daker did not assert that prison officials used chemical sprays on him in any of his prior filings in this action. (Doc. 1; Doc. 19, p. 11). Regardless, it is

[7] As Daker admits, he has already filed multiple actions to challenge these forced shaving practices, including the use of chemical sprays during forced shavings. (Doc. 22, pp. 3 & n.1, 21).

difficult to see how this additional fact shows that Daker was in imminent danger of a serious physical injury at the time he filed his Complaint. Like the bruises, split toenails, and minor scrapes of which he complains, a skin rash lasting slightly over a week is not a serious physical injury. Rather, it is the natural and anticipated result of the use of chemical agents on a prisoner who is actively resisting prison guards ordered to implement a Georgia Department of Corrections ("GDC") policy. Daker does not state the skin rash was so severe as to require medical attention, nor does he describe any long-lasting, permanent, or life-threatening consequences. See, e.g., Jackson v. Jackson, 335 F. App'x 14, 15 (11th Cir. 2009) (finding imminent danger of physical injury when plaintiff-prisoner alleged that he faced "face tissue death, gangrene, and internal bleeding" due to lack of medical attention). Daker may pay the filing fee if he desires to litigate the underlying merits of such forcible shavings and the use of force, including chemical agents, to effectuate the GDC grooming policy. However, a skin injury lasting only days or weeks does not constitute a serious physical injury sufficient to overcome § 1915(g) and allow Daker to proceed *in forma pauperis* in this action.

Not only does Daker not face serious physical injury, there are multiple factors which weigh against a finding that Daker is in *imminent* danger of any physical injury. First, Daker alleges he faced imminent danger during his confinement at Georgia State Prison, and he has since been transferred to Valdosta State Prison. (Doc. 15). This transfer makes it less likely that Daker can assert new facts upon which his imminent danger allegation may rest. See, e.g., Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999) (finding no error in denying a plaintiff-prisoner leave to amend when the prisoner had been transferred after filing his complaint because any additional allegations of imminent danger faced at the new prison would be futile). Notably, though Daker alleges that he has been subjected to around 14 forced shaves since 2015, only three of these involved the use of chemical spray. (Doc. 22, pp. 7, 26). While Daker may be subject to a forcible

shaving while confined to any GDC institution, he does not provide any facts which show that the new prison officials are also likely to employ chemical sprays. Thus, Daker fails to show he imminent danger at the time he filed the Complaint.

Daker devotes six pages of his 44-page Objections to attacking the Magistrate Judge's conclusion that Daker created the imminent danger he allegedly faces. (Id., pp. 14–20). First, the Magistrate Judge based his finding on other grounds in addition to finding that Daker's "danger," to the extent it exists, is self-created. (specifically, that Daker did not show the danger he faced was imminent, nor that it was likely to result in a serious physical injury). (Doc. 19, pp. 11–12). Second, Daker argues that the finding of the Magistrate Judge in this regard "opens a dangerous can of worms." (Doc. 22, p. 19). Daker then proceeds to propose a series of hypotheticals that he asserts show the error in holding that he created the own danger that he faces. (Id., p. 20). However, the Court is not charged with resolving hypothetical disputes. Instead, the Court must decide if Daker created his own harm in this case.

To the extent Daker asserts he is not subjecting himself to this imminent danger, he is incorrect. Daker is not forced to choose between punishment for expressing his professed religious belief and compliance with prison regulations. The result is the same whether Daker complies with prison policy or does not—in either scenario, he cannot grow a beard of his desired length. Daker's resistance does not allow him to express his professed religious belief. Instead, it merely manufactures the "imminent danger" which Daker asserts and then results in the same outcome as if he had complied with regulations. Daker could certainly challenge the constitutionality of the prison policy while complying with it. If Daker chose to do so, he could not avoid paying filing fees due to an imminent danger of physical injury. For all of the reasons above, the Court finds Daker failed to meet his burden of demonstrating an imminent danger of serious physical harm.

B. The Constitutionality of § 1915(g)

Daker specifically concedes that the cases the Magistrate Judge cited as strikes "were both filed by Mr. Daker and dismissed as frivolous." (Doc. 22, pp. 26–27, 33–34). However, Daker alleges that the "three-strikes" provision in § 1915(g) is unconstitutional. First, the Court notes that this is not the first time Plaintiff has made this argument, nor the first time this Court has dismissed it. See Daker v. Bryson, 6:16-cv-57 (S.D. Ga. Mar. 20, 2017). Daker states the Rivera decision did not address each and every constitutional challenge to § 1915(g), such as the issue of the First Amendment "breathing space" principle. (Doc. 22, pp. 31–44). Additionally, Plaintiff challenges § 1915(g) on equal protection grounds. (Id.). Plaintiff also maintains § 1915(g) violates his right to access to the courts.

In Rivera v. Allin, the Eleventh Circuit Court of Appeals answered many of Plaintiff's present challenges to § 1915(g). 144 F.3d 719 (11th Cir. 1998), *abrogated on other grounds by* Jones v. Bock, 549 U.S. 199 (2007). Specifically, the Eleventh Circuit determined § 1915(g) does not violate a prisoner-plaintiff's right of access to the courts. Rather, the Court stated that § 1915(g) "does not prevent a prisoner with three strikes from filing civil actions; it merely prohibits him from enjoying IFP ["*in forma pauperis*"] status." Id. at 723–24 (first alteration in original) (citing Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997) (rejecting plaintiff's claim that § 1915(g) is unconstitutional because it blocks access to the courts), and Lyon v. Krol, 127 F.3d 763, 765 (8th Cir. 1997) ("Section 1915(g) does not prohibit prisoners from pursuing legal claims if they have had 'three strikes' or three prior dismissals. It only limits their ability to proceed [IFP]."). The Eleventh Circuit asserted "proceeding IFP is a privilege, not a right—fundamental or otherwise." Id. at 724. The Eleventh Circuit continued by stating that Rivera's claims of deliberate indifference to serious medical needs did not implicate a fundamental right, such as "state controls or intrusions or family relationships." Id. (internal citation omitted).

The Eleventh Circuit also determined the three strikes provision does not violate a litigant's right to due process or to equal protection. Id. at 727 (citing Parsell v. United States, 218 F.2d 232, 235 (5th Cir. 1955) (denying leave to proceed IFP "does not offend the requirements of due process"), and Hampton v. Hobbs, 106 F.3d 1281, 1287 (6th Cir. 1997) ("Hampton's ability to petition the government for redress of grievances has not been deprived or limited by the [PLRA] and thus that interest cannot provide the basis for a due process violation.")).

As for an equal protection argument, the Eleventh Circuit noted the equal protection clause is not implicated if a law does not burden a fundamental right or target a suspect classification. Id. The Eleventh Circuit determined that Rivera did not and could not contend "that prisoner indigents (specifically, frequent filer prisoner indigents) form a suspect or quasi-suspect class." Id. (citations omitted). The Court had already rejected Rivera's fundamental rights argument and declined his "invitation to review section 1915(g) under any standard more onerous than rational basis." Id. The Eleventh Circuit noted Congress enacted § 1915(g) to curb "abusive prisoner tort, civil rights and conditions litigation" and to preserve "scarce judicial resources" and determined this law serves those ends "through its requirement that prisoner indigents with three strikes prepay the entire filing fee before the court may further review their lawsuit (unless imminent danger of serious physical injury exists)." Id.

The Seventh Circuit Court of Appeals had occasion to tangentially address the "breathing space" principle Plaintiff advances here. Lewis v. Sullivan, 279 F.3d 526 (7th Cir. 2002). In Lewis, the Seventh Circuit reversed the judgment of the district court that § 1915(g) "would be unconstitutional unless read to allow judges to dispense with prepayment whenever, in their discretion, they viewed the prisoners' claims to be substantial." Lewis, 279 F.3d at 527 (citing 135 F. Supp. 2d 954 (W.D. Wis. 2001)). In so doing, the Seventh Circuit looked to the decisions of the other seven Courts of Appeals concerning constitutionality challenges to § 1915(g),

including the Eleventh Circuit's decision in Rivera. The Seventh Circuit noted § 1915(g) had been challenged on several grounds, including the right to access the courts, due process, and the First Amendment right to petition for redress of grievances, and none of the challenges had been successful. Id. at 528 (collecting cases). The Seventh Circuit agreed with its sister Circuits which had decided the issue and found the "decisions to be sound," because "there is no constitutional entitlement to subsidy." Id. "Federal courts are subsidized dispute-resolvers; filing fees defray only a small portion of the costs. A requirement that plaintiffs cover some of these costs cannot be called unconstitutional. The Supreme Court has never held that access to the courts must be free; it has concluded, rather, that reasonably adequate opportunities for access suffice." Id. (citing Lewis v. Casey, 518 U.S. 343 (1996)). This Court agrees with the Seventh Circuit's analysis and conclusion.

Daker's constitutional challenges to § 1915(g), whether generally or to his situation, are without merit, as has been determined by the Eleventh Circuit, other Courts of Appeals, and this Court. What is more, Daker does not attempt to show how § 1915(g) violates *his* constitutional rights. Instead, Daker makes blanket statements in this regard. However, even if Daker had provided reasoning in support of his arguments, such reasoning would be without merit. Having to prepay his filing fee before the Court addresses the relative merits of his claims, unless he shows he is in imminent danger of serious physical injury, does not violate Daker's rights. Consequently, the Court **OVERRULES** this Objection.

CONCLUSION

The Court **OVERRULES** Daker's Objections and **ADOPTS** the Magistrate Judge's Report and Recommendation as the opinion of the Court. The Court **DENIES** Daker's Motion to Extend Time, (doc. 21), and his request for emergency remand for evidentiary hearing, (doc. 22, p. 30). The Court **DISMISSES without prejudice** Plaintiff's Complaint, **DENIES** Plaintiff *in*

forma pauperis status on appeal, and **DIRECTS** the Clerk of Court to **CLOSE** this case and enter the appropriate judgment of dismissal.

SO ORDERED, this 29th day of March, 2019.

J. RANDAL HALL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C:

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

WASEEM DAKER,

Plaintiff,

v.

COMMISSIONER GREGORY DOZIER, et al.,

Defendants.

CIVIL ACTION NO.: 6:18-cv-32

ORDER AND MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff, while incarcerated at Macon State Prison in Oglethorpe, Georgia, filed this action pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") 42 U.S.C. § 2000cc-1 *et seq.*, contesting certain conditions of his confinement while incarcerated at Georgia State Prison ("GSP") in Reidsville, Georgia.[1] Docs. 1, 1-1. Plaintiff also filed a Motion for Leave to Proceed *in Forma Pauperis*, doc. 2, and Motions for Preliminary Injunction or Temporary Restraining Order, docs. 6, 7, 8, 9.[2] For the reasons set forth below, the Court **DENIES** Plaintiff leave to proceed *in forma pauperis*. Additionally, I **RECOMMEND** that the Court **DISMISS without prejudice** Plaintiff's Complaint, **DENY as moot** Plaintiff's remaining Motions, docs. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, **DIRECT** the

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1 Plaintiff is now confined at Valdosta State Prison. Doc. 16.

2 In addition, Plaintiff filed two identical Motions for Recusal of Judge R. Stan Baker and Judge J. Randal Hall, docs. 3, 5, which are still pending.

Clerk of Court to close this case and enter the appropriate judgment of dismissal, and **DENY** Plaintiff *in forma pauperis* status on appeal.[3]

PLAINTIFF'S ALLEGATIONS

In his Complaint, Plaintiff asserts numerous claims against dozens of Defendants regarding his confinement at GSP. Doc. 1-1. Plaintiff contends that: (1) Defendants' shaving policies and customs violate the First and Eighth Amendments and RLUIPA; (2) Defendants' disciplinary report procedures violate substantive and procedural due process as well as RLUIPA; (3) Defendants' administrative segregation review violates the Equal Protection Clause; (4) Defendants retaliated against him by keeping him in administrative segregation; (5) Defendants' restrictions on inmates in administrative segregation as well as the cell conditions there violate the First and Eighth Amendments and RLUIPA; and (6) Defendants violate due process by confiscating prisoners' personal property without inventory or opportunity for return.[4] Id. at 55–58.

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[3] A "district court can only dismiss an action on its own motion as long as the procedure employed is fair. To employ fair procedure, a district court must generally provide the plaintiff with notice of its intent to dismiss or an opportunity to respond." Tazoe v. Airbus S.A.S., 631 F.3d 1321, 1336 (11th Cir. 2011) (citations and internal quotations marks omitted). A Magistrate Judge's Report and Recommendation ("R&R") provides such notice and opportunity to respond. See Shivers v. Int'l Bhd. of Elec. Workers Local Union 349, 262 F. App'x 121, 125, 127 (11th Cir. 2008) (indicating that a party has notice of a district court's intent to grant summary judgment *sua sponte* when a magistrate judge issues a report recommending the *sua sponte* granting of summary judgment); Anderson v. Dunbar Armored, Inc., 678 F. Supp. 2d 1280, 1296 (N.D. Ga. 2009) (noting that R&R served as notice that claims would be *sua sponte* dismissed). This R&R constitutes fair notice to Plaintiff that his suit is barred and due to be dismissed. As indicated below, Plaintiff will have the opportunity to present his objections to this finding, and the presiding district judge will review *de novo* properly submitted objections. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; see also Glover v. Williams, No. 1:12-CV-3562, 2012 WL 5930633, at *1 (N.D. Ga. Oct. 18, 2012) (explaining that an R&R constituted adequate notice and petitioner's opportunity to file objections provided a reasonable opportunity to respond).

[4] As discussed in detail below, the Court will only reach the merits of Plaintiff's allegations if Plaintiff pays the entire filing fee upfront or is granted leave to appeal *in forma pauperis*.

Plaintiff contends Defendants maintain a custom of forcibly shaving inmates with unsanitary or broken clippers and ensure compliance with forced shavings through disciplinary reports, tasers, pepper-spray, and similar chemical agents. Id. at 6–9. Plaintiff contends the Georgia Department of Corrections' ("GDC") written policy requires shaving clippers be sanitized after every use to prevent the spread of infectious disease. Id. According to Plaintiff, Defendants ignore this policy and forcibly use broken or "unsanitized" clippers. As a result of Defendants' alleged shaving customs, Plaintiff was forcibly shaved several times, most recently on December 4, 2017. Id.

Plaintiff asserts Defendants threatened to forcibly shave him at various times, beginning on September 20, 2017, and occurring most recently on March 5, 2018. Id. at 9–13. Plaintiff contends Defendants created false disciplinary reports regarding his refusal to shave. Doc. 1-1 at 9–11. After Plaintiff refused to shave, Plaintiff alleges multiple Defendants forcibly shaved him, causing injuries to his shoulders, cuts and bruises on his neck, hands, wrists, and ankles, and skin damage to his pinky finger. Id. Afterward, Plaintiff alleges Defendants subjected him to a series of false disciplinary reports, confinement in administrative segregation, and continued threats of forced shaving. Id. at 11–13.

Plaintiff avers Defendants placed him in administrative segregation in violation of his due process rights. Id. at 13–19. Plaintiff contends administrative segregation hearings do not afford inmates a meaningful opportunity to be heard, and that the disciplinary report procedures run afoul of due process guarantees. Id. at 19–24. Finally, Plaintiff states the cell conditions and various restrictions imposed in administrative segregation violate his rights under the First and Eighth Amendment and his rights under RLUIPA. Id. at 24–55.

Plaintiff argues he is in "imminent danger of serious physical injury" from the forced shaves and from Defendants' means of enforcing the shaving policy, which include disciplinary action and the use of pepper spray and tasers. Id. at 6–8 & n.2, 58–59. Further, Plaintiff claims he is in imminent danger because Defendants injured him during past forced shaves, threaten future forced shaves with unsanitary clippers, and, when he is in administrative segregation, deny him adequate food, medical care, and exercise, and subject him to unsanitary cell conditions. Id. at 58–59.

In addition, Plaintiff avers he faces imminent danger due to Defendants' custom of providing insufficient food to prisoners in administrative segregation. Id. at 32–34. Plaintiff claims this custom caused him to lose 17 pounds and made him more susceptible to sinus infections. Id. As to imminent danger due to lack of adequate medical care, Plaintiff states Defendants have not provided timely care for his shoulder pain and nerve damage in his hands (although Plaintiff later underwent surgery for his right wrist). Id. at 35–37. Plaintiff also states Defendants do not provide timely dental care or dentist-recommended Sensodyne toothpaste. Id. Finally, Plaintiff feels he faces imminent danger due to unsanitary cell conditions because Defendants allegedly leave him exposed to feces, triggering allergy problems and three sinus infections. Id. at 38–39, 58.

DISCUSSION

I. Three-Strikes Dismissal Under § 1915(g)

A. Legal Standard

An incarcerated individual, such as Plaintiff, attempting to proceed *in forma pauperis* in a civil action in federal court must comply with the mandates of the Prison Litigation Reform Act ("PLRA"). Pertinently, 28 U.S.C. § 1915(g) of the PLRA provides:

> In 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.

28 U.S.C. § 1915(g). The Eleventh Circuit Court of Appeals has explained that "[t]his provision of the PLRA, 'commonly known as the 'three strikes' provision,' requires frequent filer prisoners to prepay the entire filing fee before federal courts may consider their lawsuits and appeals." Rivera v. Allin, 144 F.3d 719, 723 (11th Cir. 1998) (quoting Lyon v. Krol, 127 F.3d 763, 764 (8th Cir. 1997)), *abrogated in part on different grounds by* Jones v. Bock, 549 U.S. 199 (2007).[5] A prisoner barred from proceeding *in forma pauperis* due to the "three strikes" provision in § 1915(g) must pay the entire filing fee when he initiates suit.[6] Vanderberg v. Donaldson, 259 F.3d 1321, 1324 (11th Cir. 2001). When a prisoner who is barred by the "three strikes" provision seeks *in forma pauperis* status, courts must dismiss the complaint without prejudice. Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002) (finding that because the filing fee must be paid "at the time [the plaintiff-inmate] *initiates* the suit," plaintiff-inmates "cannot simply pay the filing fee after being denied in forma pauperis status" but may refile file

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[5] In the Eleventh Circuit, dismissals for failing to follow court orders or for abusing the judicial process are also considered strikes. See Rivera, 144 F.3d at 731; Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1544 (11th Cir. 1993).

[6] The applicable filing fee is now $400.00. "The entire fee to be paid in advance of filing a civil complaint is $400. That fee includes a filing fee of $350 plus an administrative fee of $50, for a total of $400. A prisoner who is granted *in forma pauperis* status will, instead, be assessed a filing fee of $350 and will not be responsible for the $50 administrative fee. A prisoner who is denied *in forma pauperis* status must pay the full $400, including the $350 filing fee and the $50 administrative fee, before the complaint will be filed." Callaway v. Cumberland Cty. Sheriff Dep't, No. Civ. 14-4853, 2015 WL 2371614, at *1 (D.N.J. May 18, 2015); see also Owens v. Sec'y Fla. Dep't of Corr., Case No. 3:15cv272, 2015 WL 5003649 (N.D. Fla. Aug. 21, 2015) (noting that the filing fee applied to cases in which a prisoner-plaintiff is denied *in forma pauperis* status is $400.00).

action after dismissal and pay the entire filing fee upfront). The only exception is if the prisoner is "under imminent danger of serious physical injury." § 1915(g); Medberry v. Butler, 185 F.3d 1189, 1192 (11th Cir. 1999).

B. Plaintiff's Litigation History

Pursuant to its inherent authority under Federal Rule of Evidence 201, the Court takes judicial notice of the dispositions of many of Plaintiff's previous lawsuits.[7] The Court also takes judicial notice of the determination of the United States District Court for the Middle District of Georgia, finding that "Plaintiff has had more than three of his cases or appeals dismissed on the statutorily-enumerated grounds [of § 1915(g)]."[8] Daker v. Comm'r, No. 5:16-cv-538, 2017 WL 3584910, at *2 (M.D. Ga. Aug. 17, 2017).

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[7] Courts routinely take judicial notice of a plaintiff's litigation history when evaluating if the plaintiff has three strikes under § 1915(g). See Lloyd v. Benton, 686 F.3d 1225, 1226 (11th Cir. 2012); Rivera 144 F.3d at 721 (noting that the trial court took judicial notice of the results of plaintiff's prior lawsuits when evaluating if plaintiff had three strikes.) Moreover, the dispositions of a plaintiff's previous actions "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

[8] This Court, as well as other courts, previously observed that Plaintiff is a serial litigant with a significant history of filing frivolous lawsuits. See, e.g., Daker v. Head, 739 F. App'x 597 (11th Cir. 2018) ("During his incarceration for murder, Daker has filed over a hundred pro se suits."); Daker v. Comm'r, Ga. Dep't of Corr., 820 F.3d 1278, 1281 (11th Cir. 2016) ("Daker has submitted over a thousand pro se filings in over a hundred actions and appeals in at least nine different federal courts."); Daker v. Head, No. 6:14-cv-47 (S.D. Ga. Sept. 8, 2014) (denying Plaintiff leave to proceed *in forma pauperis* due to three striker status); Daker v. Warren, No. 1:11-cv-1711, 2014 WL 806858, at *1 (N.D. Ga. Feb. 28, 2014) ("Waseem Daker is an extremely litigious state prisoner . . . ."). Moreover, this Court's review of Plaintiff's filing history reveals scores of other civil actions and appeals which were dismissed and which may count as strikes under § 1915(g). See In re Daker, No. 1:11-cv-1711, 2014 WL 2548135, at *2 (N.D. Ga. June 5, 2014) (summarizing Plaintiff's litigation history); see also Daker v. Dozier, No. 5:17-CV-0025, 2017 WL 3037420, at *2 (M.D. Ga. July 18, 2017) (reviewing Daker's status as a three-striker in light of the Eleventh Circuit opinion); Daker v. Bryson, No. 6:16-CV-57, 2017 WL 242615, at *5 (S.D. Ga. Jan. 19, 2017) (listing five cases, including the four listed here, which constitute strikes under § 1915(g)). The Eleventh Circuit already "determined that the 'three strikes' provision of the Prison Litigation Reform Act of 1995 is applicable to" Plaintiff. See, e.g., Letter dated May 29, 2014, in Daker v. Comm'r, No. 14–12139 (11th Cir. 2014); Letter dated April 18, 2014, in Daker v. Comm'r, No. 14–11571 (11th Cir. 2014).

Plaintiff has filed more than three civil actions or appeals which count as strikes under § 1915(g).[9] Actions filed by Plaintiff which count as strikes under § 1915(g) include:

(1) Daker v. Governor, Case No. 15-13179 (11th Cir. Order dated Dec. 19, 2016) (three-judge panel dismissing appeal as frivolous);

(2) Daker v. Ferrero, Case No. 15-13176 (11th Cir. Order dated Nov. 3, 2016) (three-judge panel dismissing appeal as frivolous);

(3) Daker v. Commissioner, Case No. 15-11266 (11th Cir. Order dated Oct. 7, 2016) (three-judge panel dismissing appeal as frivolous);

(4) Daker v. Warden, Case No. 15-13148 (11th Cir. Order dated May 26, 2016) (three-judge panel dismissing appeal as frivolous).;

(5) Daker v. Warren, Case No. 13-11630 (11th Cir. Order dated Mar. 4, 2014) (three-judge panel dismissing appeal as frivolous);

(6) Daker v. NBC, et al., No. 15-330 (2d Cir. May 22, 2015), ECF No. 35 (dismissing Plaintiff's appeal because it "lacks an arguable basis either in law or in fact");

(7) Daker v. Robinson, 1:12-cv-00118 (N.D. Ga. Sept. 12, 2013) (dismissing based on Plaintiff's failure to follow a court order); and

(8) Daker v. Dawes, 1:12-cv-00119 (N.D. Ga. Sept. 12, 2013) (dismissing based on Plaintiff's failure to follow a court order).

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[9] In 2016, in a separate action, the Eleventh Circuit reviewed a district court order finding Daker accumulated at least three strikes under § 1915(g). See Daker v. Comm'r, Ga. Dep't of Corr., 820 F.3d 1278, 1284–85 (11th Cir. 2016). The Eleventh Circuit found that three of the five cases the district court relied on to form the basis of the three-strikes dismissal did not qualify as strikes. Id. The Eleventh Circuit explicitly declined to opine on whether Plaintiff had any other strikes. Id. at 1286 ("We express no view on whether Daker has any other strikes."). In calculating Plaintiff's strikes in this case, the cases that the Eleventh Circuit found did not qualify as strikes against Plaintiff have not been included.

(9) Daker v. Mokwa, 2:14-cv-395 (C.D. Cal. Feb. 4, 2014) (dismissing as frivolous, malicious, or failing to state a claim);

The above actions and appeals were dismissed for being frivolous, malicious, failing to state a claim for relief, or for abusing the judicial process, not on grounds which failed to address the merits of Plaintiff's claims.[10] As Plaintiff has filed at least three previously dismissed cases or appeals which qualify as strikes under § 1915(g), Plaintiff cannot proceed *in forma pauperis* unless he meets the "imminent danger of serious physical injury" exception to § 1915(g).

C. Section 1915(g)'s Imminent Danger Exception

"In order to come within the imminent danger exception, the Eleventh Circuit requires 'specific allegations of present imminent danger that may result in serious physical harm.'" Odum v. Bryan Cty. Judicial Circuit, No. CV407-181, 2008 WL 766661, at *1 (S.D. Ga. Mar. 20, 2008) (quoting Skillern v. Jackson, No. CV606-49, 2006 WL 1687752, at *2 (S.D. Ga. June 14, 2006)). In determining whether Plaintiff's allegations sufficiently overcome the three-strikes bar, the Court will abide by the long-standing principle that the pleadings of unrepresented parties are held to a less stringent standard than those drafted by attorneys and, therefore, must be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972); Boxer X v. Harris, 437 F.3d 1107, 1110 (11th Cir. 2006) ("Pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys . . . . " (emphasis omitted) (quoting Hughes v. Lott, 350 F.3d 1157, 1160 (11th Cir. 2003))). However, the § 1915(g) exception requires plaintiffs include

[10] The last two cited causes of action were dismissed based on Plaintiff's failure to follow the orders of a court. The Eleventh Circuit treats dismissals for "abuse of the judicial process," including dismissals for providing false filing-history information and failing to comply with court orders, as "strikes" under § 1915(g). See Ingram v. Warden, 735 F. App'x 706 (11th Cir. 2018) (affirming that dismissals for failure to truthfully disclose litigation history constitute a strike under § 1915(g)); Rivera, 114 F.3d at 731 (dismissing for failure to disclose prior litigation is "precisely the type of strike that Congress envisioned when drafting § 1915(g)").

specific facts indicating serious physical injury is imminent. Brown v. Johnson, 387 F.3d 1344, 1349–50 (11th Cir. 2004). General or conclusory allegations, even construed liberally, do not "invoke the exception absent specific fact allegations of ongoing serious physical injury or a pattern of misconduct evidencing the likelihood of imminent serious physical injury." Id.; see also Margiotti v. Nichols, No. CV306-113, 2006 WL 1174350, at *2 (N.D. Fla. May 2, 2006).

"[A] prisoner cannot create the imminent danger so as to escape the three strikes provision of the PLRA." Ball v. Allen, No. 06-0496, 2007 WL 484547, at *2 (S.D. Ala. Feb. 8, 2007) (quoting Muhammad v. McDonough, No. CV306-527-J-32, 2006 WL 1640128, at *1 (M.D. Fla. June 9, 2006)). Moreover, harms already incurred or dangers now past do not justify an exception to the three strikes bar. Medberry, 185 F.3d at 1193 ("Prisoner's allegation that he faced imminent danger sometime in the past is an insufficient basis to allow him to proceed *in forma pauperis* pursuant to the imminent danger exception to the statute."); see also Parish v. Davis, No. 4:16-CV-148, 2016 WL 1579385, at *1 (N.D. Fla. Mar. 25, 2016) ("The imminent danger exception should be applied only in 'genuine emergencies' where 'time is pressing,' the 'threat or prison condition is real and proximate," and 'the potential consequence is serious physical injury.'" (quoting Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002))).

D. Plaintiff's Claims of Imminent Danger

Plaintiff should not be excused from prepaying the filing fee because his claims do not show any imminent danger of serious physical injury. Rather, Plaintiff's claims, as drafted, show that he is "a seasoned vexatious litigant who has read 28 U.S.C. § 1915(g) and is manipulating it to serve his ends." Skillern, 2006 WL 1687752, at *2 (quoting McNeil v. United

States, No. C05-1975, 2006 WL 581081, at *3 n.3 (W.D. Wash. Mar. 8, 2006)); see also Daker v. Bryson, No. 6:16-CV-57, 2017 WL 242615, at *1 (S.D. Ga. Jan. 19, 2017).

First, the overwhelming majority of Plaintiff's claims do not approach § 1915(g)'s requirement of serious risk of imminent physical danger. First, the claims regarding the December 4, 2017 forcible shaving center on past physical injuries which occurred before Plaintiff filed his Complaint, not dangers Plaintiff faces in the imminent future. Likewise, Plaintiff's allegations related to his treatment in administrative segregation, including lack of exercise and unsanitary housing conditions, relate to past treatment without showing the possibility of serious future injury.[11] Claims based on other past forced shaving incidents with unsanitary hair clippers also seek redress for past injuries. Plaintiff's claims that Defendants violated his religious beliefs under RLUIPA, confiscated his property, and did not provide him due process at his disciplinary and administrative confinement hearings do not allege physical injury, much less an imminent threat of future serious *physical* injury.[12]

Although allegations of denied medical care can sometimes show imminent danger, Plaintiff's complaints—that he was denied his toothpaste of choice and denied speedy dental, orthopedic, and nerve care—fail to show that Plaintiff faces imminent, serious physical injury. Notably, some of these claims relate to past harm, as Plaintiff eventually received orthopedic

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[11] In a similar case, Plaintiff alleged that he was denied outdoor recreation, that "he is housed with inmates who throw feces, and [he] is being denied adequate sanitation and cleaning supplies." Daker v. Dozier, No. 5:17-CV-0025, 2017 WL 3037420, at *4 (M.D. Ga. July 18, 2017). The Middle District of Georgia found these allegations insufficient to establish an exception to the three-strikes rule. Id. at *6.

[12] The circumstances Plaintiff alleges created imminent danger arose during Plaintiff's confinement at Georgia State Prison, but Plaintiff is now incarcerated at Valdosta State Prison in the Middle District of Georgia. Doc. 15. However, his "transfer does not affect [the] imminent danger analysis, as that analysis focuses on whether Smith alleged an imminent danger at the time his complaint was filed." Smith v. Dewberry, 741 F. App'x 683, 687 n.3 (11th Cir. 2018).

treatment and surgery for his nerve damage. Doc. 1-1 at 35–36. Similarly, while Plaintiff claims the lack of adequate food in administrative segregation caused sinus infections and weight loss, he admits his sinus infections have been successfully treated with antibiotics. Id. at 34. Plaintiff does not describe any serious physical harm related to his purported weight loss.

Only Plaintiff's claims related to Defendants forcible use of broken or unsanitary hair clippers begin to approach the "imminent danger of serious physical injury" requirement. Here, however, Plaintiff merely offers generalized and conclusory allegations devoid of any specific facts showing an actual, imminent threat of physical injury. Plaintiff alleges the damaged, unsanitized clippers may spread HIV or hepatitis, but this is simply hypothetical conjecture. Plaintiff claims he has been forcibly shaved with allegedly dangerous clippers at least nine times since February 5, 2015, but does not claim to have contracted any infection or disease or suffered any other serious, negative health effects.[13] Id. at 8. Moreover, while Plaintiff claims that Defendants use force and chemical agents to effectuate the forced shavings, he does not state that Defendants used these chemical agents on him.

Generalized allegations such as these do not sufficiently demonstrate that the prisoner faces "imminent danger of serious physical injury" as required under § 1915(g). See, e.g., Daker v. Dozier, No. 5:17-CV-0025, 2017 WL 3037420, at *5–6 (M.D. Ga. July 18, 2017) (finding Daker's nearly identical allegations, including forced shavings with unsanitary clippers and poor administrative confinement conditions, did not show imminent danger of serious physical injury); Ball v. Allen, No. CIV. 06-0496, 2007 WL 484547, at *1 (S.D. Ala. Feb. 8, 2007) (finding the provision of clean clothes twice per week, unsanitary showers, inadequate fire safety

[13] Indeed, in another action, Plaintiff made similar allegations concerning the use of broken, unsanitary clippers, which he claims started as early as 2012. See Daker v. Bryson, No. 6:16-CV-57, 2017 WL 242615, at *1 (S.D. Ga. Jan. 19, 2017). Despite this apparently longstanding practice, Plaintiff has not suffered any of the serious physical injuries he claims this custom creates.

in cells, lack of cleaning supplies for cells, inadequate lighting, and inadequate, unsanitary, and contaminated food and beverages, are insufficient under § 1915(g)). Plaintiff, therefore, fails to show the danger posed by forced shaving warrants application of the § 1915(g) exception.

At best, Plaintiff shows the forced shavings caused him a series of cuts, bruises, shoulder pain, and skin damage and that he will likely be subject to this custom again.[14] Doc. 1-1 at 8 & n.2, 11. Even assuming, without deciding, that the threat that Plaintiff may endure these same injuries in the future is sufficiently "imminent" and "serious" to trigger the exception to § 1915(g), Plaintiff still cannot avail himself of this exception because his actions created the harm. Plaintiff alleges Defendants forcibly shaved him because he refused to comply with the prison's grooming policy due to a religious objection. Id. at 6, 8–11. Because Plaintiff is subjected to Defendants' forced shaving custom due to his own behavior, Plaintiff is empowered to end the forcible shaving by choosing to comply with the grooming policy. What Plaintiff cannot do, however, is create a physically harmful situation through his own conduct and then claim the dangers his actions create excuse him from the PLRA's three-strikes bar. Ball, 2007 WL 484547, at *2 (prisoner cannot create imminent danger to escape three strikes rule);

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[14] Although not mentioned in his Complaint, Plaintiff argues in his preliminary injunction Motion that "[c]ourts have repeatedly recognized that use of unsanitized clippers satisfies" § 1915(g). Doc. 6 at 8. As support, Plaintiff cites: Andrews v. Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007) (finding a prisoner's "allegation that he is at serious risk of contracting HIV or Hepatitis C, if true, more than plausibly raises the specter of serious physical injury"); Bingham v. Morales, No. CV 311-019, 2011 WL 53585941, at *1 n.2 (S.D. Ga. Nov. 4, 2011) (noting that the magistrate judge concluded that prisoner satisfied imminent danger exception based on allegation that prisoner was forced to share razors with other inmates under unsanitary conditions); James v. Dormire, No. 07-4141, 2008 WL 625027, at *2–3 (W.D. Mo. Mar. 4, 2008) (allowing a claim to proceed based on allegations that sharing electric razors presented danger of spreading infection, then found the § 1915(g) exception inapplicable when officials showed that they cleaned the razors between uses with Barbicide). Each of these cases is distinguishable from Daker's claims. First, none of these cases involve duplicative, longstanding allegations of imminent harm with infectious diseases which have never come to fruition, like Plaintiff's forced shaving allegations. Second, none involve an alleged imminent danger of serious physical injury of the inmate's own making, as Plaintiff's refusal to comply with GSP's grooming policy does.

Muhammad, 2006 WL 1640128, at *1. Thus, he cannot invoke the §1915(g) exception based on this harm.

The above reasons demonstrate that § 1915(g) bars Plaintiff from proceeding *in forma pauperis* in this action.[15] Plaintiff has not paid the filing fee required of all plaintiffs who are not allowed to proceed *in forma pauperis*. I, therefore, **RECOMMEND** the Court **DISMISS without prejudice** the Complaint, and, accordingly, **DENY as moot** the remainder of Plaintiff's Motions. Docs. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17. I **DENY** Plaintiff's Motion for Leave to Proceed *in Forma Pauperis*. Doc. 2. If Plaintiff wishes to proceed with his claims, he may do so by refiling the action and paying the entire filing fee upfront. Dupree, 284 F.3d at 1236.

II. Leave to Appeal *in Forma Pauperis*

The Court should also deny Plaintiff leave to appeal *in forma pauperis*.[16] Though Plaintiff has, of course, not yet filed a notice of appeal, it is appropriate to address these issues in the Court's order of dismissal. Fed. R. App. P. 24(a)(3) (providing that a trial court may certify that appeal is not take in good faith "before or after the notice of appeal is filed"). An appeal cannot be taken *in forma pauperis* if the trial court certifies that the appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3). Good faith in this context is judged by an objective standard. Busch v. County of Volusia, 189 F.R.D. 687, 691 (M.D. Fla. 1999). A party does not proceed in good faith when he seeks to advance a frivolous claim or argument. See Coppedge v. United States, 369 U.S. 438, 445 (1962). A claim or argument is frivolous when it appears the factual allegations are clearly baseless or the legal theories are indisputably meritless. Neitzke v. Williams, 490 U.S. 319, 327 (1989); Carroll v. Gross, 984 F.2d 392, 393

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[15] If Plaintiff wishes to continue to litigate his claims against Defendants, he may do so, but he must pay the entire filing fee upfront. See Vanderberg, 259 F.3d at 1324.

[16] A certificate of appealability is not required in this § 1983 action.

(11th Cir. 1993). An *in forma pauperis* action is frivolous and not brought in good faith if it is "without arguable merit either in law or fact." Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002); see also Brown v. United States, Nos. 407CV085, 403CR001, 2009 WL 307872, at *1–2 (S.D. Ga. Feb. 9, 2009).

The above analysis of Plaintiff's action shows that Plaintiff does not possess any non-frivolous issues to raise on appeal, and an appeal would not in good faith. Just as Daker's status as a three-striker prevents him from filing this action without prepaying the filing fee in this Court, it also blocks him from achieving *in forma pauperis* status on appeal. Thus, the Court should **DENY** him *in forma pauperis* status on appeal.

CONCLUSION

For the above-stated reasons, the Court **DENIES** Plaintiff's Motion for Leave to Proceed *in forma pauperis*. Doc. 2. Additionally, I **RECOMMEND** the Court **DISMISS without prejudice** Plaintiff's Complaint, **DENY as moot** Plaintiff's Motions for Preliminary Injunction or Temporary Restraining Order, docs. 6, 7, 8, 9, 10, **DENY as moot** Plaintiff's remaining Motions, docs. 11, 12, 13, 14, 15, 17, **DIRECT** the Clerk of Court to close this case and enter the appropriate judgment of dismissal, and **DENY** Plaintiff *in forma pauperis* status on appeal.

The Court **ORDERS** any party seeking to object to this Report and Recommendation to file specific written objections within 14 days of the date on which this Report and Recommendation is entered. Any objections asserting that the Magistrate Judge failed to address any contention raised in the Complaint must also be included. Failure to do so will bar any later challenge or review of the factual findings or legal conclusions of the Magistrate Judge. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140 (1985). A copy of the objections must be served upon all other parties to the action.

Upon receipt of Objections meeting the specificity requirement set out above, a United States District Judge will make a *de novo* determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the Magistrate Judge. Objections not meeting the specificity requirement set out above will not be considered by a District Judge. A party may not appeal a Magistrate Judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a District Judge. The Court **DIRECTS** the Clerk of Court to serve a copy of this Report and Recommendation upon Plaintiff.

SO ORDERED and **REPORTED and RECOMMENDED**, this 7th day of March, 2019.

BENJAMIN W. CHEESBRO
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

APPENDIX D:

ELEVENTH CIRCUIT ORDER DENYING REHEARING AND REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11723-GG

D.C. Docket No. 6:18-cv-00032-JRH-BWC

WASEEM DAKER,

Plaintiff - Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Defendant - Appellee,

TIMOTHY WARD, et. al.,
Assistant Commissioner,

Defendants.

No. 19-11849-GG

D.C. Docket No. 6:18-cv-00073-RSB-BWC

WASEEM DAKER,

Plaintiff - Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
HOMER BRYSON,
Former GDC Commissioner,
ASSISTANT COMMISSIONER, DEPARTMENT OF CORRECTIONS,
WARDEN,
Facilities Director,
STEVE UPTON,
Deputy Facilities Director, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, JILL PRYOR, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

Date Filed: 08/16/2021

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11723

D.C. Docket No. 6:18-cv-00032-JRH-BWC

WASEEM DAKER,

Plaintiff-Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

TIMOTHY WARD, et al.,
Assistant Commissioner,

Defendants.

No. 19-11849

D.C. Docket No. 6:18-cv-00073-RSB-BWC

WASEEM DAKER,

Plaintiff-Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
HOMER BRYSON,
Former GDC Commissioner,
ASSISTANT COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
WARDEN,
Facilities Director,
STEVE UPTON,
Deputy Facilities Director, et al.,

Defendants-Appellees

Appeals from the United States District Court
for the Southern District of Georgia

(August 16, 2021)

Before JORDAN, JILL PRYOR and TJOFLAT, Circuit Judges.

PER CURIAM:

Waseem Daker appeals the district court's *sua sponte* dismissal without prejudice of two actions under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a), alleging various constitutional and statutory violations relating to the Georgia Department of

Corrections' ("GDC") grooming policy.[1] Daker is a practicing Muslim. As part of his religion, he must wear a beard at least as long as the width of his fist, about three inches. GDC requires prisoners to have beards of no longer than half an inch. Along with challenging this policy, Daker alleged in both complaints that GDC has a custom and practice of forcibly shaving him with unsanitized clippers and using excessive force. Daker maintains that this practice puts him at risk of contracting infectious diseases and sustaining serious injury.

Daker moved to proceed *in forma pauperis* at the time he filed each complaint. The district court *sua sponte* dismissed both suits under the Prison Litigation Reform Act's "three-strikes" provision, which prohibits inmates who have had three previous civil actions dismissed "on the grounds that [they are] frivolous, malicious, or fail[] to state a claim" from proceeding *in forma pauperis*. 28 U.S.C. § 1915(g). On appeal, Daker argues that the district court erred because his complaints alleged an imminent danger of serious physical harm—an exception to the three strikes provision. *Id.*

After we ordered that this case be orally argued, another panel of this Court held that an essentially identical complaint in another of Daker's appeals failed to allege an imminent danger of future harm under § 1915(g). *Daker v. Ward*, 999 F.3d 1300, 1311–

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[1] Daker proceeded *pro se* in the district court in both cases. We consolidated the appeals when we determined they presented the same question and appointed counsel to represent Daker.

13 (11th Cir. 2021). Daker himself described the claims in *Daker v. Ward* and the instant cases as similar, and our review confirms that the complaints in all three cases are substantially identical. Given this similarity, we conclude that this appeal is foreclosed by our decision in *Daker v. Ward*.[2] We thus affirm the district court's dismissal.

AFFIRMED.

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[2] This is not to say that Daker is foreclosed from proceeding under § 1915(g)'s imminent danger of serious physical injury exception for any claim challenging GDC's grooming policy. But on the complaints before us, as in the complaint in *Daker v. Ward*, Daker has not sufficiently alleged that the GDC practices create such a risk.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION**

WASEEM DAKER,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	6:18-cv-32
	:	
COMMISSIONER GREGORY DOZIER, et al,	:	
	:	
Defendants.	:	

ORDER

The Court has conducted an independent and de novo review of the entire record and concurs with the Magistrate Judge's Report and Recommendation, (doc. 19). Plaintiff first submitted a Motion to Extend Time to Object, asserting that he needed more time to prepare and file his Objections. (Doc. 21). Despite that assertion, Daker filed a 44-page document styled as his "Partial Objections" on March 28, 2019.[1] (Doc. 22).

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[1] The Magistrate Judge issued the Report and Recommendation on March 7, 2019. Doc. 19. The record before the Court reflects that a copy was mailed to Plaintiff the same day. Thus, Daker had until March 25, 2019, to file his Objections or to make a timely request for an extension. Daker v. Comm'r. Georgia Dep't of Corr., 820 F.3d 1278, 1286 (11th Cir.

After consideration of Daker's partial Objections, (doc. 22), the Court finds that nothing in these Objections alters the Magistrate Judge's conclusion that Daker should be denied *in forma pauperis* status. The Court, therefore, **OVERRULES** Daker's Objections and **ADOPTS** the Magistrate Judge's Report and Recommendation as the Order of the Court. The Court **DENIES** Daker's Motion to Extend Time to Object, (doc.

2016) (stating that prisoners have 17 days to file objections to a Report and Recommendation (citing Fed. R. Civ. P. 6(d), 72(b)(2))); see also Forde v. Miami Fed. Dep't of Corr., 730 F. App'x 794, 800-01 (11th.Cir.2018) ("The prison mailbox rule provides that a pro se prisoner's legal submission is considered filed on the date it is delivered to prison authorities for mailing."); Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001) (noting that "absent evidence to the contrary," courts "assume that [a prisoner's pleading] was delivered to prison authorities the day [the prisoner] signed it."); see also Fed. R. Civ. P. 6(a)(1)(C) (providing that, when computing a time period where "the last day is a Saturday, Sunday, or legal holiday," the time period "continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday"). Daker signed his Motion on March 18, 2019, and the envelope bears a March 22,2019 postmark. (Doc. 21, pp. 1-2). Similarly, Daker's Partial Objections were signed and postmarked on March 24, 2019. (Doc. 22, pp. 43-44). Thus, even though the Court received Daker's Motion and his Partial Objections on March 26 and March 28, respectively, both are timely filed.

21), and will not consider any other objections postmarked after March 25,2019.[2] The Court also **DENIES** Daker's request for emergency remand for evidentiary hearing, (doc. 22, p. 30).[3] The Court **DISMISSES without prejudice** Plaintiffs Complaint, (doc.

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[2] Because the time to file objections is now past, Daker's self-styled "Partial Objections," (doc. 22), are, in fact, his full Objections. Additionally, in his Motion, Daker indicated that he intended to file objections to both the Report and Recommendation, (doc. 19), and the Court's Order, filed the same day, which denied Daker leave to proceed *in forma pauperis*, (doc. 18). (Doc. 22, p. 1). In denying the Motion to Extend Time to Object, the Court is denying Daker any additional time to file any Objections to either the Report and Recommendation or the Order denying *in forma pauperis* status. See Fed. R. Civ. P. 72 (setting the same time period for filing objections to both dispositive and non-dispositive rulings from a magistrate judge).

[3] Daker requests an "emergency remand" for an evidentiary hearing, arguing that the evidentiary hearing would be especially helpful because "each of the forcible shavings at issue were videotaped" and the recordings will prove that "there was no need to forcibly shave Plaintiff' and that "on each occasion, [Defendants forcibly shaved him with unsanitized clippers." (Doc. 22, p. 30). First, the issue before the Court is whether Daker may proceed without prepayment of filing fees, not whether the forcible shaving was necessary or whether it occurred with unsanitized clippers. For purposes of this Order, the Court accepts as true that these forcible shavings occurred

1), **DIRECTS** the Clerk of Court to **CLOSE** this case and enter the appropriate judgment of dismissal, and **DENIES** Plaintiff *in forma pauperis* status on appeal.

I. Daker's Motion to Extend Time, (doc. 21)

Rule 6(b) allows courts to extend filing deadlines when a party makes a timely request and shows good cause to do so. Fed. R. Civ. P. 6(b). Thus, "[a] request for an extension, made before the expiration of the deadline, should be granted where good cause is shown." Sensi v. Fla. Officers of Court, 737 F. App'x 433, 436 (11th Cir. 2018); Shepherd v. Wilson, 663 F. App'x 813, 817-18 (11th Cir. 2016); United States v. Johnson, No. 1:05-CR-1, 2011 WL 66044, at *1 (N.D. Fla. Jan. 7,2011) (denying, in a criminal case, a request for an extension of time to file objections when defendant failed to show good cause). "To establish good cause, the party seeking the extension must establish that the schedule could not be met despite the party's diligence." Ashmore v. Sec'y, Dep't of Transn., 503 F. App'x 683, 685 (11th Cir. 2013).

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and that unsanitized clippers were used each time. Moreover, because the purpose of the Prisoner Litigation Reform Act ("PLRA") is to curb abusive litigation, it follows that evidentiary hearings on preliminary issues such as imminent danger or exhaustion of administrative remedies should be rarely granted. See, e.g., Stephens v. Howerton, No. CV 105-171, 2007 WL 1810242, at * 11 (S.D. Ga. June 21, 2007); Williams v. Rich,No. CV 606-003, 2006 WL 2534417, at *5, n.5 (S.D. Ga. Aug. 30, 2006).

Though Daker timely filed his Motion, he fails to show that good cause justifies his request for an extension. The Magistrate Judge recommended dismissal because Daker has filed at least three previous actions which courts dismissed as frivolous, and Daker failed to show he was in imminent danger of a future physical injury at the time he filed his Complaint. (Doc. 19, pp. 8-9) (citing Smith v. Clemons, 465 F. App'x 835, 836 (11th Cir. 2012)). In support of his Motion, Daker argues that he needs more time because he is pro se, incarcerated, and "needs, outside assistance from family members or friends to assist with preparing and filing his Objections." (Doc. 21). However, Daker does not explain what additional Objections he might raise if he was given additional time, nor does he explain why he requires additional outside assistance."[4] Additionally, Daker does not explain why his incarceration and pro se status prevent him from meeting the deadline for objections "despite his diligence." FTC v. Lalonde, 545 F. App'x 825, 835 (11th

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[4] However, the subsequently-filed Partial Objections, (doc. 22), provide some guidance on what Daker might argue. As further explained below, nothing in these Objections demonstrates that Daker was in imminent danger of a serious physical injury at the time he filed his Complaint. Additionally, the Court notes that Daker's Partial Objections contain a hodgepodge of arguments, many of which this Court has previously considered and dismissed. Here, Daker filed the same document containing the same Partial Objections in two different cases and, within his Objections, continually refers to filings not contained within the present action and which may have taken place in other litigation.

Cir. 2013) (finding no error in denying an incarcerated plaintiffs motion for a discovery extension when the plaintiff "did not show that the deadline for discovery could not be met despite his diligence"). Further, some impairment of Daker's "civil litigating capacity" is "one of the constitutional consequences of his incarceration." Id.

Moreover, Daker's assertion that he needs more time to formulate his objections is vitiated by his own filings of record. First, Daker timely filed 44 pages of Objections, despite this Motion. (Doc. 22). Even if Daker had not submitted such voluminous Objections, he knew the Court would issue a Report and Recommendation in his case and filed—not just one, but two—motions to expedite the Court's requisite frivolity review. (Docs. 14, 17). Daker's simultaneous attempts to expedite the Court's rulings and to extend his own time to respond weigh against a finding of good cause. In both of his motions to expedite, Daker asserted that his claims should proceed because he was in imminent danger of physical injury. (Docs. 14, 17). Notably, Daker is a well-known litigant with an extensive history of filing federal lawsuits. Daker v. Brvson, No. 5:15-CV-88, 2015 WL 4973548, at *1 (M.D. Ga. Aug. 20, 2015) ("A review of court records . . . reveals that Plaintiff has filed more than one hundred federal civil actions and appeals since 1999."); Daker v. Warren, No. 1:11-CV-1711, 2014 WL 806858, at *1 (N.D. Ga. Feb. 28, 2014) ("Waseem Daker is an extremely litigious state prisoner[.]"); see also Mathis v. Smith, 181 F. App'x 808, 809-10 (11th Cir. 2006) ("When considering the issue of frivolity, 'a litigant's history of bringing unmeritorious litigation can be considered.'" (quoting Bilal v. Driver, 251 F.3d 1346, 1349 (11th Cir. 2001))). Thus, Daker was well aware

that the Magistrate Judge's Report and Recommendation would be forthcoming and that he may have to prepare legal and factual defenses regarding his imminent danger claim.

While he would not be able to prepare the precise objections until he received the Report and Recommendation, nothing prevented Daker from preparing any additional factual evidence or legal argument beforehand. In fact, if more evidence existed, Daker could easily have submitted it to the Court for consideration before frivolity review. Because Daker's Partial Objections, (doc. 22), were timely filed, the Court will consider them. However, because Daker fails to show good cause for an extension, the Court **DENIES** Plaintiffs Motion to Extend Time to Object, (doc. 21).

II. Daker's Objections, (doc. 22)[5]

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[5] Daker argues that the Magistrate Judge erred by construing the facts asserted by Daker against Daker, rather than in his favor. That is incorrect. A plain reading of the Magistrate Judge's Report and Recommendation demonstrates that the Magistrate Judge construed all facts alleged in Daker's favor and assumed those facts to be true for purposes of the three-strikes review. Moreover, it is entirely appropriate for the Magistrate Judge to weigh Daker's history as a serial litigant when considering whether his claims are sufficiently serious as to allow him to proceed without payment. Mathis v. Smith, 181 F. App'x 808, 809-10 (11th Cir. 2006) ("When considering the issue of frivolity, 'a litigant's history of bringing unmeritorious litigation can be

A. Imminent Danger of Serious Physical Injury

Next, Daker argues that he faces—and since early 2015 has faced—an "ongoing danger" that physical force will be used against him. (Doc. 22, pp. 12-14). He cites to multiple sources of authority to show that prison officials are not justified in using force to effectuate these shavings. (Id.). He argues that, even if the grooming policy was valid (a point he does not concede), "it does not follow that force is justified to maintain it." (Id.).

Daker is correct that the imminent danger standard does not require prisoners suffer a physical injury before bringing suit. However, he still fails to show that an "ongoing danger" of forced shavings creates an imminent danger of serious physical injury. More importantly, questions around the justification for use of force go to the merits of Daker's actions. The question currently before the Court is not whether prison officials are justified in their use of force, but

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considered.'" (quoting Bilal v. Driver, 251 F.3d 1346, 1349 (11th Cir. 2001))); see Skillern v. Paul, 202 F. App'x 343, 344 (11th Cir. 2006) (considering, during the analysis of imminent danger under § 1915(g), that "the PLRA was enacted to 'curtail abusive prisoner litigation'"); see also Daker v. Comm'r. Ga. Dep't of Corr., 820 F.3d 1278, 1281 (11th Cir. 2016) ("Daker has submitted over a thousand pro se filings in over a hundred actions and appeals in at least nine different federal courts."); Daker v. Warren, No. 1:11-cv-1711, 2014 WL 806858, at *1 (N.D. Ga. Feb. 28,2014) ("Waseem Daker is an extremely litigious state prisoner....").

rather, whether Daker has sufficiently alleged that he faced an imminent danger of physical injury at the time he brought his Complaint. It may be that prison officials cannot forcibly shave Daker in the manner which he alleges.[6] However, the issue the Court must currently determine is whether Daker faced an imminent danger of a serious physical injury at the time he brought his Complaint. If so, then Daker's claim may proceed without prepayment of cost. If not, then this action will be dismissed, but dismissal would not foreclose the claim. If Daker chooses, he may proceed with his claim simply by refiling it and paying the costs up front. But, the underlying merits of forcible shaving and grooming policies are not currently before the Court.

Notably, Daker must show not that he is currently or has been under threat of imminent danger, but rather that he faced an imminent danger of physical injury at the time he filed his complaint. See Owens v. Schwartz, 519 F. App'x 992, 994 (11th Cir. 2013) ("A prisoner who qualifies under imminent danger of serious physical injury at the time that he filed his complaint, however can proceed [*in forma pauperis*].").
Here, Daker originally submitted a 67-page Complaint and supplement at the time he filed this action. Additional factual arguments must therefore be extremely limited in scope—any new fact-based allegations are only relevant if they pertain to the dangers Daker faced at Georgia State Prison on or around

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[6] Indeed, the issue is currently being litigated in Smith v. Owens, 848 F.3d 975 (11th Cir. 2017).

March 26,2018, when he initially filed this action. (Doc. 1).

First, Daker argues he faces an ongoing imminent danger because the prison uses unsanitized clippers every time he is forcibly shaved. (Doc. 22, pp. 5, 23). This argument does not alter the Magistrate Judge's conclusion that Daker's assertion that use of unsanitized clippers may lead him to contract HIV or hepatitis is merely "hypothetical conjecture" which is insufficient to sustain a finding of imminent danger. (Doc. 19, pp. 11-12). As the Magistrate Judge noted, this case—like Daker's other cases challenging the GDC's grooming policy—involves "duplicative, longstanding allegations of imminent harm [from] infectious diseases which have never come to fruition." (Doc. 19, p. 12 n.14). Daker alleges in this case that the forcible shavings began in 2015, though in other cases, he has claimed that such shavings began as early as 2012. (Id., p. 11 & n.13). However, Daker never states that he has personally contracted any communicable disease from the unsanitized clippers, nor does he provide even one instance of another inmate who contracted a disease. While prisoners are not required to show they have personally contracted a disease in order to successfully claim imminent danger, simply pointing to a "documented causal link" between unsanitized tools and disease is not enough to show that Daker, specifically, suffers risk of disease from the prison's use of unsanitized shaving tools. (Doc. 22, pp. 27-28). The Court's consideration of the lack of disease does not, as Daker alleges, create a situation where there is no way to bring an imminent danger claim. Rather, the length of time such conditions have persisted without any infection, coupled with Daker's allegations of frequent forced shaves and the prison's

common and widespread practice of providing inmates with unsanitary grooming materials, are factors which speak directly to Daker's risk of injury. These factors weigh strongly against a finding of any "imminent" danger.

In his Objections, Daker also argues that he faces imminent danger of serious physical injury due to the force used in the prison's implementation of grooming policy. (Id., pp.21-22). This includes the prison's use of handcuffs, chemical sprays, and other restraints during the forcible shavings. For the first time in this action, Daker states that prison officials used a chemical spray on him during three forced shaves on November 10, 2016, January 10, 2017, and, finally, on September 18, 2018, about six months after Daker filed this action.[7] (Id., p. 21; Doc. 1). As a result, Daker suffered skin irritation, characterized as a "burn," which lasted "over a week." (Doc. 22, p. 7). This is a new factual allegation, as Daker did not assert that prison officials used chemical sprays on him in any of his prior filings in this action. (Doc. 1; Doc. 19, p. 11). Regardless, it is difficult to see how this additional fact shows that Daker was in imminent danger of a serious physical injury at the time he filed his Complaint. Like the bruises, split toenails, and minor scrapes of which he complains, a skin rash lasting slightly over a week is not a serious physical injury. Rather, it is the natural and anticipated result of the use of chemical agents on a prisoner who is actively

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[7] As Daker admits, he has already filed multiple actions to challenge these forced shaving practices, including the use of chemical sprays during forced shavings. (Doc. 22, pp. 3 & n.l, 21).

resisting prison guards ordered to implement a Georgia Department of Corrections ("GDC") policy. Daker does not state the skin rash was so severe as to require medical attention, nor does he describe any long-lasting, permanent, or life-threatening consequences. See, e.g., Jackson v. Jackson, 335 F. App'x 14, 15 (11th Cir. 2009) (finding imminent danger of physical injury when plaintiff-prisoner alleged that he faced "face tissue death, gangrene, and internal bleeding" due to lack of medical attention). Daker may pay the filing fee if he desires to litigate the underlying merits of such forcible shavings and the use of force, including chemical agents, to effectuate the GDC grooming policy. However, a skin injury lasting only days or weeks does not constitute a serious physical injury sufficient to overcome § 1915(g) and allow Daker to proceed in forma pauperis in this action.

Not only does Daker not face serious physical injury, there are multiple factors which weigh against a finding that Daker is in imminent danger of any physical injury. First, Daker alleges he faced imminent danger during his confinement at Georgia State Prison, and he has since been transferred to Valdosta State Prison. (Doc. 15). This transfer makes it less likely that Daker can assert new facts upon which his imminent danger allegation may rest. See, e.g., Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999) (finding no error in denying a plaintiff-prisoner leave to amend when the prisoner had been transferred after filing his complaint because any additional allegations of imminent danger faced at the new prison would be futile). Notably, though Daker alleges that he has been subjected to around 14 forced shaves since 2015, only three of these involved the use of chemical spray. (Doc. 22, pp. 7,26). While Daker may be subject

to a forcible shaving while confined to any GDC institution, he does not provide any facts which show that the new prison officials are also likely to employ chemical sprays. Thus, Daker fails to show he imminent danger at the time he filed the Complaint.

Daker devotes six pages of his 44-page Objections to attacking the Magistrate Judge's conclusion that Daker created the imminent danger he allegedly faces. (Id, pp. 14-20). First, the Magistrate Judge based his finding on other grounds in addition to finding that Daker's "danger," to the extent it exists, is self-created, (specifically, that Daker did not show the danger he faced was imminent, nor that it was likely to result in a serious physical injury). (Doc. 19, pp. 11-12). Second, Daker argues that the finding of the Magistrate Judge in this regard "opens a dangerous can of worms." (Doc. 22, p. 19). Daker then proceeds to propose a series of hypothetical that he asserts show the error in holding that he created the own danger that he faces. (Id, p. 20). However, the Court is not charged with resolving hypothetical disputes. Instead, the Court must decide if Daker created his own harm in this case.

To the extent Daker asserts he is not subjecting himself to this imminent danger, he is incorrect. Daker is not forced to choose between punishment for expressing his professed religious belief and compliance with prison regulations. The result is the same whether Daker complies with prison policy or does not—in either scenario, he cannot grow a beard of his desired length. Daker's resistance does not allow him to express his professed religious belief. Instead, it merely manufactures the "imminent danger" which Daker asserts and then results in the same outcome

as if he had complied with regulations. Daker could certainly challenge the constitutionality of the prison policy while complying with it. If Daker chose to do so, he could not avoid paying filing fees due to an imminent danger of physical injury. For all of the reasons above, the Court finds Daker failed to meet his burden of demonstrating an imminent danger of serious physical harm.

B. The Constitutionality of § 1915(g)

Daker specifically concedes that the cases the Magistrate Judge cited as strikes "were both filed by Mr. Daker and dismissed as frivolous." (Doc. 22, pp. 26-27, 33-34). However, Daker alleges that the "three-strikes" provision in § 1915(g) is unconstitutional. First, the Court notes that this is not the first time Plaintiff has made this argument, nor the first time this Court has dismissed it. See Daker v. Bryson, 6:16-cv-57 (S.D. Ga. Mar. 20, 2017). Daker states the Rivera decision did not address each and every constitutional challenge to § 1915(g), such as the issue of the First Amendment "breathing space" principle. (Doc. 22, pp. 31-44). Additionally, Plaintiff challenges § 1915(g) on equal protection grounds. (Id.). Plaintiff also maintains § 1915(g) violates his right to access to the courts.

In Rivera v. Allin, the Eleventh Circuit Court of Appeals answered many of Plaintiffs present challenges to § 1915(g). 144 F.3d 719 (11th Cir. 1998), *abrogated on other grounds by* Jones v. Bock, 549 U.S. 199 (2007). Specifically, the Eleventh Circuit determined § 1915(g) does not violate a prisoner-plaintiffs right of access to the courts. Rather, the Court stated that § 1915(g) "does not prevent a prisoner with three

strikes from filing civil actions; it merely prohibits him from enjoying IFP ["*in forma pauperis*"] status." Id. at 723-24 (first alteration in original) (citing Carson v. Johnson. 112 F.3d 818, 821 (5th Cir. 1997) (rejecting plaintiffs claim that § 1915(g) is unconstitutional because it blocks access to the courts), and Lyon v. Krol, 127 F.3d 763, 765 (8th Cir. 1997) ("Section 1915(g) does not prohibit prisoners from pursuing legal claims if they have had 'three strikes' or three prior dismissals. It only limits their ability to proceed [IFP].")). The Eleventh Circuit asserted "proceeding IFP is a privilege, not a right— fundamental or otherwise." Id. at 724. The Eleventh Circuit continued by stating that Rivera's claims of deliberate indifference to serious medical needs did not implicate a fundamental right, such as "state controls or intrusions on family relationships." Id. (internal citation omitted).

The Eleventh Circuit also determined the three strikes provision does not violate a litigant's right to due process or to equal protection. Id. at 727 (citing Parsell v. United States, 218 F.2d 232, 235 (5th Cir. 1955) (denying leave to proceed IFP "does not offend the requirements of due process"), and Hampton v. Hobbs, 106 F.3d 1281, 1287 (6th Cir. 1997) ("Hampton's ability to petition the government for redress of grievances has not been deprived or limited by the [PLRA] and thus that interest cannot provide the basis for a due process violation.")).

As for an equal protection argument, the Eleventh Circuit noted the equal protection clause is not implicated if a law does not burden a fundamental right or target a suspect classification. Id. The Eleventh Circuit determined that Rivera did not and could

not contend "that prisoner indigents (specifically, frequent filer prisoner indigents) form a suspect or quasi-suspect class." Id. (citations omitted). The Court had already rejected Rivera's fundamental rights argument and declined his "invitation to review section 1915(g) under any standard more onerous than rational basis." Id. The Eleventh Circuit noted Congress enacted § 1915(g) to curb "abusive prisoner tort, civil rights and conditions litigation" and to preserve "scarce judicial resources" and determined this law serves those ends "through its requirement that prisoner indigents with three strikes prepay the entire filing fee before the court may further review their lawsuit (unless imminent danger of serious physical injury exists)." Id.

The Seventh Circuit Court of Appeals had occasion to tangentially address the "breathing space" principle Plaintiff advances here. Lewis v. Sullivan, 279 F.3d 526 (7th Cir. 2002). In Lewis, the Seventh Circuit reversed the judgment of the district court that § 1915(g) "would be unconstitutional unless read to allow judges to dispense with prepayment whenever, in their discretion, they viewed the prisoners' claims to be substantial." Lewis, 279 F.3d at 527 (citing 135 F. Supp. 2d 954 (W.D. Wis. 2001)). In so doing, the Seventh Circuit looked to the decisions of the other seven Courts of Appeals concerning constitutionality challenges to § 1915(g), including the Eleventh Circuit's decision in Rivera. The Seventh Circuit noted § 1915(g) had been challenged on several grounds, including the right to access the courts, due process, and the First Amendment right to petition for redress of grievances, and none of the challenges had been successful. Id. at 528 (collecting cases). The Seventh Circuit agreed with its sister Circuits which had decided the issue

and found the "decisions to be sound," because "there is no constitutional entitlement to subsidy." Id. "Federal courts are subsidized dispute-resolvers; filing fees defray only a small portion of the costs. A requirement that plaintiffs cover some of these costs cannot be called unconstitutional. The Supreme Court has never held that access to the courts must be free; it has concluded, rather, that reasonably adequate opportunities for access suffice." Id. (citing Lewis v. Casey, 518 U.S. 343 (1996)). This Court agrees with the Seventh Circuit's analysis and conclusion.

Daker's constitutional challenges to § 1915(g), whether generally or to his situation, are without merit, as has been determined by the Eleventh Circuit, other Courts of Appeals, and this Court. What is more, Daker does not attempt to show how § 1915(g) violates his constitutional rights. Instead, Daker makes blanket statements in this regard. However, even if Daker had provided reasoning in support of his arguments, such reasoning would be without merit. Having to prepay his filing fee before the Court addresses the relative merits of his claims, unless he shows he is in imminent danger of serious physical injury, does not violate Daker's rights. Consequently, the Court **OVERRULES** this Objection.

CONCLUSION

The Court **OVERRULES** Daker's Objections and **ADOPTS** the Magistrate Judge's Report and Recommendation as the opinion of the Court. The Court **DENIES** Daker's Motion to Extend Time, (doc. 21), and his request for emergency remand for evidentiary hearing, (doc. 22, p. 30). The Court **DISMISSES without prejudice** Plaintiffs Complaint, **DENIES** Plaintiff

in forma pauperis status on appeal, and **DIRECTS** the Clerk of Court to **CLOSE** this case and enter the appropriate judgment of dismissal.

SO ORDERED, this 29th day of March, 2019.

/s/ J. Randal Hall
J. RANDAL HALL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

Case 6:18-cv-00032-JRH-BWC Document 19
Filed 03/07/19

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION**

WASEEM DAKER,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	6:18-cv-32
	:	
COMMISSIONER GREGORY DOZIER, et al,	:	
	:	
Defendants.	:	

ORDER AND MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff, while incarcerated at Macon State Prison in Oglethorpe, Georgia, filed this action pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") 42 U.S.C. § 2000cc-1 et seq., contesting certain conditions of his confinement while incarcerated at Georgia State Prison ("GSP") in Reidsville, Georgia.[1] Docs. 1, 1-1. Plaintiff also filed a Motion for Leave to Proceed in Forma Pauperis, doc. 2, and Motions for Preliminary Injunction or Temporary Restraining Order, docs. 6, 7,

[1] Plaintiff is now confined at Valdosta State Prison. Doc. 16.

8, 9.[2] For the reasons set forth below, the Court **DENIES** Plaintiff leave to proceed in forma pauperis. Additionally, I **RECOMMEND** that the Court **DISMISS without prejudice** Plaintiff's Complaint, **DENY** as moot Plaintiff's remaining Motions, docs. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, **DIRECT** the Clerk of Court to close this case and enter the appropriate judgment of dismissal, and **DENY** Plaintiff in forma pauperis status on appeal.[3]

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[2] In addition, Plaintiff filed two identical Motions for Recusal of Judge R. Stan Baker and Judge J. Randal Hall, docs. 3, 5, which are still pending.

[3] A "district court can only dismiss an action on its own motion as long as the procedure employed is fair. To employ fair procedure, a district court must generally provide the plaintiff with notice of its intent to dismiss or an opportunity to respond." Tazoe v. Airbus S.A.S., 631 F.3d 1321, 1336 (11th Cir. 2011) (citations and internal quotations marks omitted). A Magistrate Judge's Report and Recommendation ("R&R") provides such notice and opportunity to respond. See Shivers v. Int'l Bhd. of Elec. Workers Local Union 349, 262 F. App'x 121, 125, 127 (11th Cir. 2008) (indicating that a party has notice of a district court's intent to grant summary judgment *sua sponte* when a magistrate judge issues a report recommending the *sua sponte* granting of summary judgment); Anderson v. Dunbar Armored, Inc., 678 F. Supp. 2d 1280, 1296 (N.D. Ga. 2009) (noting that R&R served as notice that claims would be *sua sponte* dismissed). This R&R constitutes fair notice

PLAINTIFF'S ALLEGATIONS

In his Complaint, Plaintiff asserts numerous claims against dozens of Defendants regarding his confinement at GSP. Doc. 1-1. Plaintiff contends that: (1) Defendants' shaving policies and customs violate the First and Eighth Amendments and RLUIPA; (2) Defendants' disciplinary report procedures violate substantive and procedural due process as well as RLUIPA; (3) Defendants' administrative segregation review violates the Equal Protection Clause; (4) Defendants retaliated against him by keeping him in administrative segregation; (5) Defendants' restrictions on inmates in administrative segregation as well as the cell conditions there violate the First and Eighth Amendments and RLUIPA; and (6) Defendants violate due process by confiscating prisoners' personal property without inventory or opportunity for return.[4] Id. at 55–58.

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to Plaintiff that his suit is barred and due to be dismissed. As indicated below, Plaintiff will have the opportunity to present his objections to this finding, and the presiding district judge will review *de novo* properly submitted objections. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; see also Glover v. Williams, No. 1:12-CV-3562, 2012 WL 5930633, at *1 (N.D. Ga. Oct. 18, 2012) (explaining that an R&R constituted adequate notice and petitioner's opportunity to file objections provided a reasonable opportunity to respond).

[4] As discussed in detail below, the Court will only reach the merits of Plaintiff's allegations if

Plaintiff contends Defendants maintain a custom of forcibly shaving inmates with unsanitary or broken clippers and ensure compliance with forced shavings through disciplinary reports, tasers, pepper-spray, and similar chemical agents. Id. at 6–9. Plaintiff contends the Georgia Department of Corrections' ("GDC") written policy requires shaving clippers be sanitized after every use to prevent the spread of infectious disease. Id. According to Plaintiff, Defendants ignore this policy and forcibly use broken or "unsanitized" clippers. As a result of Defendants' alleged shaving customs, Plaintiff was forcibly shaved several times, most recently on December 4, 2017. Id.

Plaintiff asserts Defendants threatened to forcibly shave him at various times, beginning on September 20, 2017, and occurring most recently on March 5, 2018. Id. at 9–13. Plaintiff contends Defendants created false disciplinary reports regarding his refusal to shave. Doc. 1-1 at 9–11. After Plaintiff refused to shave, Plaintiff alleges multiple Defendants forcibly shaved him, causing injuries to his shoulders, cuts and bruises on his neck, hands, wrists, and ankles, and skin damage to his pinky finger. Id. Afterward, Plaintiff alleges Defendants subjected him to a series of false disciplinary reports, confinement in administrative segregation, and continued threats of forced shaving. Id. at 11–13.

Plaintiff avers Defendants placed him in administrative segregation in violation of his due pro-

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Plaintiff pays the entire filing fee upfront or is granted leave to appeal *in forma pauperis*.

cess rights. Id. at 13–19. Plaintiff contends administrative segregation hearings do not afford inmates a meaningful opportunity to be heard, and that the disciplinary report procedures run afoul of due process guarantees. Id. at 19–24. Finally, Plaintiff states the cell conditions and various restrictions imposed in administrative segregation violate his rights under the First and Eighth Amendment and his rights under RLUIPA. Id. at 24–55.

Plaintiff argues he is in "imminent danger of serious physical injury" from the forced shaves and from Defendants' means of enforcing the shaving policy, which include disciplinary action and the use of pepper spray and tasers. Id. at 6–8 & n.2, 58–59. Further, Plaintiff claims he is in imminent danger because Defendants injured him during past forced shaves, threaten future forced shaves with unsanitary clippers, and, when he is in administrative segregation, deny him adequate food, medical care, and exercise, and subject him to unsanitary cell conditions. Id. at 58–59.

In addition, Plaintiff avers he faces imminent danger due to Defendants' custom of providing insufficient food to prisoners in administrative segregation. Id. at 32–34. Plaintiff claims this custom caused him to lose 17 pounds and made him more susceptible to sinus infections. Id. As to imminent danger due to lack of adequate medical care, Plaintiff states Defendants have not provided timely care for his shoulder pain and nerve damage in his hands (although Plaintiff later underwent surgery for his right wrist). Id. at 35–37. Plaintiff also states Defendants do not provide timely dental care or dentist-recommended Sensodyne

toothpaste. Id. Finally, Plaintiff feels he faces imminent danger due to unsanitary cell conditions because Defendants allegedly leave him exposed to feces, triggering allergy problems and three sinus infections. Id. at 38–39, 58.

DISCUSSION

I. Three-Strikes Dismissal Under § 1915(g)

A. Legal Standard

An incarcerated individual, such as Plaintiff, attempting to proceed *in forma pauperis* in a civil action in federal court must comply with the mandates of the Prison Litigation Reform Act ("PLRA"). Pertinently, 28 U.S.C. § 1915(g) of the PLRA provides:

> In 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.

28 U.S.C. § 1915(g). The Eleventh Circuit Court of Appeals has explained that "[t]his provision of the PLRA, 'commonly known as the 'three strikes' provision,' requires frequent filer prisoners to prepay the entire filing fee before federal courts may consider their lawsuits and appeals." Rivera v. Allin, 144 F.3d 719, 723 (11th Cir. 1998) (quoting Lyon v. Krol, 127 F.3d 763, 764 (8th Cir. 1997)), *abrogated in part on different grounds by* Jones v. Bock, 549 U.S. 199 (2007).[5] A prisoner barred from proceeding *in forma pauperis* due to the "three strikes" provision in § 1915(g) must pay the entire filing fee when he initiates suit.[6] Vanderberg v.

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[5] In the Eleventh Circuit, dismissals for failing to follow court orders or for abusing the judicial process are also considered strikes. *See* Rivera, 144 F.3d at 731; Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1544 (11th Cir. 1993).

[6] The applicable filing fee is now $400.00. "The entire fee to be paid in advance of filing a civil complaint is $400. That fee includes a filing fee of $350 plus an administrative fee of $50, for a total of $400. A prisoner who is granted *in forma pauperis* status will, instead, be assessed a filing fee of $350 and will not be responsible for the $50 administrative fee. A prisoner who is denied *in forma pauperis* status must pay the full $400, including the $350 filing fee and the $50 administrative fee, before the complaint will be filed." Callaway v. Cumberland Cty. Sheriff Dep't, No. Civ. 14-4853, 2015 WL 2371614, at *1 (D.N.J. May 18, 2015); see also Owens v. Sec'y Fla. Dep't of Corr., Case No. 3:15cv272, 2015 WL 5003649 (N.D. Fla. Aug. 21, 2015) (noting that the filing fee applied to cases in which a prisoner-plaintiff is denied *in forma pauperis* status is $400.00).

Donaldson, 259 F.3d 1321, 1324 (11th Cir. 2001). When a prisoner who is barred by the "three strikes" provision seeks *in forma pauperis* status, courts must dismiss the complaint without prejudice. Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002) (finding that because the filing fee must be paid "at the time [the plaintiff-inmate] *initiates* the suit," plaintiff-inmates "cannot simply pay the filing fee after being denied in forma pauperis status" but may refile file action after dismissal and pay the entire filing fee upfront). The only exception is if the prisoner is "under imminent danger of serious physical injury." § 1915(g); Medberry v. Butler, 185 F.3d 1189, 1192 (11th Cir. 1999).

B. Plaintiff's Litigation History

Pursuant to its inherent authority under Federal Rule of Evidence 201, the Court takes judicial notice of the dispositions of many of Plaintiff's previous lawsuits.[7] The Court also takes judicial notice of the determination of the United States District Court for the Middle District of Georgia, finding that "Plaintiff

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[7] Courts routinely take judicial notice of a plaintiff's litigation history when evaluating if the plaintiff has three strikes under § 1915(g). See Lloyd v. Benton, 686 F.3d 1225, 1226 (11th Cir. 2012); Rivera, 144 F.3d at 721 (noting that the trial court took judicial notice of the results of plaintiff's prior lawsuits when evaluating if plaintiff had three strikes.) Moreover, the dispositions of a plaintiff's previous actions "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

has had more than three of his cases or appeals dismissed on the statutorily-enumerated grounds [of § 1915(g)]."[8] Daker v. Comm'r, No. 5:16-cv-538, 2017 WL 3584910, at *2 (M.D. Ga. Aug. 17, 2017).

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[8] This Court, as well as other courts, previously observed that Plaintiff is a serial litigant with a significant history of filing frivolous lawsuits. See, e.g., Daker v. Head, 739 F. App'x 597 (11th Cir. 2018) ("During his incarceration for murder, Daker has filed over a hundred pro se suits."); Daker v. Comm'r, Ga. Dep't of Corr., 820 F.3d 1278, 1281 (11th Cir. 2016) ("Daker has submitted over a thousand pro se filings in over a hundred actions and appeals in at least nine different federal courts."); Daker v. Head, No. 6:14-cv-47 (S.D. Ga. Sept. 8, 2014) (denying Plaintiff leave to proceed *in forma pauperis* due to three striker status); Daker v. Warren, No. 1:11-cv-1711, 2014 WL 806858, at *1 (N.D. Ga. Feb. 28, 2014) ("Waseem Daker is an extremely litigious state prisoner . . . ."). Moreover, this Court's review of Plaintiff's filing history reveals scores of other civil actions and appeals which were dismissed and which may count as strikes under § 1915(g). See In re Daker, No. 1:11-cv-1711, 2014 WL 2548135, at *2 (N.D. Ga. June 5, 2014) (summarizing Plaintiff's litigation history); see also Daker v. Dozier, No. 5:17-CV-0025, 2017 WL 3037420, at *2 (M.D. Ga. July 18, 2017) (reviewing Daker's status as a three-striker in light of the Eleventh Circuit opinion); Daker v. Bryson, No. 6:16-CV-57, 2017 WL 242615, at *5 (S.D. Ga. Jan. 19, 2017) (listing five cases, including the four listed here, which constitute strikes under § 1915(g)). The Eleventh Circuit already "determined

Plaintiff has filed more than three civil actions or appeals which count as strikes under § 1915(g).[9] Actions filed by Plaintiff which count as strikes under § 1915(g) include:

(1) Daker v. Governor, Case No. 15-13179 (11th Cir. Order dated Dec. 19, 2016) (three-judge panel dismissing appeal as frivolous);

(2) Daker v. Ferrero, Case No. 15-13176 (11th Cir. Order dated Nov. 3, 2016) (three-judge panel dismissing appeal as frivolous);

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that the 'three strikes' provision of the Prison Litigation Reform Act of 1995 is applicable to" Plaintiff. See, e.g., Letter dated May 29, 2014, in Daker v. Comm'r, No. 14–12139 (11th Cir. 2014); Letter dated April 18, 2014, in Daker v. Comm'r, No. 14–11571 (11th Cir. 2014).

[9] In 2016, in a separate action, the Eleventh Circuit reviewed a district court order finding Daker accumulated at least three strikes under § 1915(g). See Daker v. Comm'r, Ga. Dep't of Corr., 820 F.3d 1278, 1284–85 (11th Cir. 2016). The Eleventh Circuit found that three of the five cases the district court relied on to form the basis of the three-strikes dismissal did not qualify as strikes. Id. The Eleventh Circuit explicitly declined to opine on whether Plaintiff had any other strikes. Id. at 1286 ("We express no view on whether Daker has any other strikes."). In calculating Plaintiff's strikes in this case, the cases that the Eleventh Circuit found did not qualify as strikes against Plaintiff have not been included.

(3) Daker v. Commissioner, Case No. 15-11266 (11th Cir. Order dated Oct. 7, 2016) (three-judge panel dismissing appeal as frivolous);

(4) Daker v. Warden, Case No. 15-13148 (11th Cir. Order dated May 26, 2016) (three-judge panel dismissing appeal as frivolous);

(5) Daker v. Warren, Case No. 13-11630 (11th Cir. Order dated Mar. 4, 2014) (three-judge panel dismissing appeal as frivolous);

(6) Daker v. NBC, et al., No. 15-330 (2d Cir. May 22, 2015), ECF No. 35 (dismissing Plaintiff's appeal because it "lacks an arguable basis either in law or in fact");

(7) Daker v. Robinson, 1:12-cv-00118 (N.D. Ga. Sept. 12, 2013) (dismissing based on Plaintiff's failure to follow a court order); and

(8) Daker v. Dawes, 1:12-cv-00119 (N.D. Ga. Sept. 12, 2013) (dismissing based on Plaintiff's failure to follow a court order).

(9) Daker v. Mokwa, 2:14-cv-395 (C.D. Cal. Feb. 4, 2014) (dismissing as frivolous, malicious, or failing to state a claim);

The above actions and appeals were dismissed for being frivolous, malicious, failing to state a claim for relief, or for abusing the judicial process, not on

grounds which failed to address the merits of Plaintiff's claims.[10] As Plaintiff has filed at least three previously dismissed cases or appeals which qualify as strikes under § 1915(g), Plaintiff cannot proceed in forma pauperis unless he meets the "imminent danger of serious physical injury" exception to § 1915(g).

C. Section 1915(g)'s Imminent Danger Exception

"In order to come within the imminent danger exception, the Eleventh Circuit requires 'specific allegations of present imminent danger that may result in serious physical harm.'" Odum v. Bryan Cty. Judicial Circuit, No. CV407-181, 2008 WL 766661, at *1 (S.D. Ga. Mar. 20, 2008) (quoting Skillern v. Jackson, No. CV606-49, 2006 WL 1687752, at *2 (S.D. Ga. June 14, 2006)). In determining whether Plaintiff's allegations sufficiently overcome the three-strikes bar, the Court will abide by the long-standing principle that the pleadings of unrepresented parties are held to a

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[10] The last two cited causes of action were dismissed based on Plaintiff's failure to follow the orders of a court. The Eleventh Circuit treats dismissals for "abuse of the judicial process," including dismissals for providing false filing-history information and failing to comply with court orders, as "strikes" under § 1915(g). See Ingram v. Warden, 735 F. App'x 706 (11th Cir. 2018) (affirming that dismissals for failure to truthfully disclose litigation history constitute a strike under § 1915(g)); Rivera, 114 F.3d at 731 (dismissing for failure to disclose prior litigation is "precisely the type of strike that Congress envisioned when drafting § 1915(g)").

less stringent standard than those drafted by attorneys and, therefore, must be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972); Boxer X v. Harris, 437 F.3d 1107, 1110 (11th Cir. 2006) ("Pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys . . . . " (emphasis omitted) (quoting Hughes v. Lott, 350 F.3d 1157, 1160 (11th Cir. 2003))). However, the § 1915(g) exception requires plaintiffs include specific facts indicating serious physical injury is imminent. Brown v. Johnson, 387 F.3d 1344, 1349–50 (11th Cir. 2004). General or conclusory allegations, even construed liberally, do not "invoke the exception absent specific fact allegations of ongoing serious physical injury or a pattern of misconduct evidencing the likelihood of imminent serious physical injury." Id.; see also Margiotti v. Nichols, No. CV306-113, 2006 WL 1174350, at *2 (N.D. Fla. May 2, 2006).

"[A] prisoner cannot create the imminent danger so as to escape the three strikes provision of the PLRA." Ball v. Allen, No. 06-0496, 2007 WL 484547, at *2 (S.D. Ala. Feb. 8, 2007) (quoting Muhammad v. McDonough, No. CV306-527-J-32, 2006 WL 1640128, at *1 (M.D. Fla. June 9, 2006)). Moreover, harms already incurred or dangers now past do not justify an exception to the three strikes bar. Medberry, 185 F.3d at 1193 ("Prisoner's allegation that he faced imminent danger sometime in the past is an insufficient basis to allow him to proceed in forma pauperis pursuant to the imminent danger exception to the statute."); see also Parish v. Davis, No. 4:16-CV-148, 2016 WL 1579385, at *1 (N.D. Fla. Mar. 25, 2016) ("The imminent danger exception should be applied only in 'genuine emergencies' where 'time is pressing,' the 'threat

or prison condition is real and proximate," and 'the potential consequence is serious physical injury.'" (quoting Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002))).

D. Plaintiff's Claims of Imminent Danger

Plaintiff should not be excused from prepaying the filing fee because his claims do not show any imminent danger of serious physical injury. Rather, Plaintiff's claims, as drafted, show that he is "a seasoned vexatious litigant who has read 28 U.S.C. § 1915(g) and is manipulating it to serve his ends." Skillern, 2006 WL 1687752, at *2 (quoting McNeil v. United States, No. C05-1975, 2006 WL 581081, at *3 n.3 (W.D. Wash. Mar. 8, 2006)); see also Daker v. Bryson, No. 6:16-CV-57, 2017 WL 242615, at *1 (S.D. Ga. Jan. 19, 2017).

First, the overwhelming majority of Plaintiff's claims do not approach § 1915(g)'s requirement of serious risk of imminent physical danger. First, the claims regarding the December 4, 2017 forcible shaving center on past physical injuries which occurred before Plaintiff filed his Complaint, not dangers Plaintiff faces in the imminent future. Likewise, Plaintiff's allegations related to his treatment in administrative segregation, including lack of exercise and unsanitary housing conditions, relate to past treatment without showing the possibility of serious future injury. [11]

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[11] In a similar case, Plaintiff alleged that he was denied outdoor recreation, that "he is housed with inmates who throw feces, and [he] is being denied adequate sanitation and cleaning supplies."

Claims based on other past forced shaving incidents with unsanitary hair clippers also seek redress for past injuries. Plaintiff's claims that Defendants violated his religious beliefs under RLUIPA, confiscated his property, and did not provide him due process at his disciplinary and administrative confinement hearings do not allege physical injury, much less an imminent threat of future serious physical injury.[12]

Although allegations of denied medical care can sometimes show imminent danger, Plaintiff's complaints—that he was denied his toothpaste of choice and denied speedy dental, orthopedic, and nerve care—fail to show that Plaintiff faces imminent, serious physical injury. Notably, some of these claims relate to past harm, as Plaintiff eventually received orthopedic treatment and surgery for his nerve damage. Doc. 1-1 at 35–36. Similarly, while Plaintiff claims the lack of adequate food in administrative segregation

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Daker v. Dozier, No. 5:17-CV-0025, 2017 WL 3037420, at *4 (M.D. Ga. July 18, 2017). The Middle District of Georgia found these allegations insufficient to establish an exception to the three-strikes rule. Id. at *6.

[12] The circumstances Plaintiff alleges created imminent danger arose during Plaintiff's confinement at Georgia State Prison, but Plaintiff is now incarcerated at Valdosta State Prison in the Middle District of Georgia. Doc. 15. However, his "transfer does not affect [the] imminent danger analysis, as that analysis focuses on whether Smith alleged an imminent danger at the time his complaint was filed." Smith v. Dewberry, 741 F. App'x 683, 687 n.3 (11th Cir. 2018).

caused sinus infections and weight loss, he admits his sinus infections have been successfully treated with antibiotics. Id. at 34. Plaintiff does not describe any serious physical harm related to his purported weight loss.

Only Plaintiff's claims related to Defendants forcible use of broken or unsanitary hair clippers begin to approach the "imminent danger of serious physical injury" requirement. Here, however, Plaintiff merely offers generalized and conclusory allegations devoid of any specific facts showing an actual, imminent threat of physical injury. Plaintiff alleges the damaged, unsanitized clippers may spread HIV or hepatitis, but this is simply hypothetical conjecture. Plaintiff claims he has been forcibly shaved with allegedly dangerous clippers at least nine times since February 5, 2015, but does not claim to have contracted any infection or disease or suffered any other serious, negative health effects.[13] Id. at 8. Moreover, while Plaintiff claims that Defendants use force and chemical agents to effectuate the forced shavings, he does not state that Defendants used these chemical agents on him.

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[13] Indeed, in another action, Plaintiff made similar allegations concerning the use of broken, unsanitary clippers, which he claims started as early as 2012. See Daker v. Bryson, No. 6:16-CV-57, 2017 WL 242615, at *1 (S.D. Ga. Jan. 19, 2017). Despite this apparently longstanding practice, Plaintiff has not suffered any of the serious physical injuries he claims this custom creates.

Generalized allegations such as these do not sufficiently demonstrate that the prisoner faces "imminent danger of serious physical injury" as required under § 1915(g). See, e.g., Daker v. Dozier, No. 5:17-CV-0025, 2017 WL 3037420, at *5–6 (M.D. Ga. July 18, 2017) (finding Daker's nearly identical allegations, including forced shavings with unsanitary clippers and poor administrative confinement conditions, did not show imminent danger of serious physical injury); Ball v. Allen, No. CIV. 06-0496, 2007 WL 484547, at *1 (S.D. Ala. Feb. 8, 2007) (finding the provision of clean clothes twice per week, unsanitary showers, inadequate fire safety in cells, lack of cleaning supplies for cells, inadequate lighting, and inadequate, unsanitary, and contaminated food and beverages, are insufficient under § 1915(g)). Plaintiff, therefore, fails to show the danger posed by forced shaving warrants application of the § 1915(g) exception.

At best, Plaintiff shows the forced shavings caused him a series of cuts, bruises, shoulder pain, and skin damage and that he will likely be subject to this custom again.[14] Doc. 1-1 at 8 & n.2, 11. Even as-

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[14] Although not mentioned in his Complaint, Plaintiff argues in his preliminary injunction Motion that "[c]ourts have repeatedly recognized that use of unsanitized clippers satisfies" § 1915(g). Doc. 6 at 8. As support, Plaintiff cites: Andrews v. Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007) (finding a prisoner's "allegation that he is at serious risk of contracting HIV or Hepatitis C, if true, more than plausibly raises the specter of serious physical injury"); Bingham v. Morales, No. CV 311-019, 2011 WL 53585941,

suming, without deciding, that the threat that Plaintiff may endure these same injuries in the future is sufficiently "imminent" and "serious" to trigger the exception to § 1915(g), Plaintiff still cannot avail himself of this exception because his actions created the harm. Plaintiff alleges Defendants forcibly shaved him because he refused to comply with the prison's grooming policy due to a religious objection. Id. at 6, 8–11. Because Plaintiff is subjected to Defendants' forced shaving custom due to his own behavior, Plaintiff is empowered to end the forcible shaving by choosing to comply with the grooming policy. What Plaintiff cannot do, however, is create a physically harmful situa-

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at *1 n.2 (S.D. Ga. Nov. 4, 2011) (noting that the magistrate judge concluded that prisoner satisfied imminent danger exception based on allegation that prisoner was forced to share razors with other inmates under unsanitary conditions); James v. Dormire, No. 07-4141, 2008 WL 625027, at *2–3 (W.D. Mo. Mar. 4, 2008) (allowing a claim to proceed based on allegations that sharing electric razors presented danger of spreading infection, then found the § 1915(g) exception inapplicable when officials showed that they cleaned the razors between uses with Barbicide). Each of these cases is distinguishable from Daker's claims. First, none of these cases involve duplicative, longstanding allegations of imminent harm with infectious diseases which have never come to fruition, like Plaintiff's forced shaving allegations. Second, none involve an alleged imminent danger of serious physical injury of the inmate's own making, as Plaintiff's refusal to comply with GSP's grooming policy does.

tion through his own conduct and then claim the dangers his actions create excuse him from the PLRA's three-strikes bar. Ball, 2007 WL 484547, at *2 (prisoner cannot create imminent danger to escape three strikes rule); Muhammad, 2006 WL 1640128, at *1. Thus, he cannot invoke the §1915(g) exception based on this harm.

The above reasons demonstrate that § 1915(g) bars Plaintiff from proceeding *in forma pauperis* in this action.[15] Plaintiff has not paid the filing fee required of all plaintiffs who are not allowed to proceed *in forma pauperis*. I, therefore, RECOMMEND the Court **DISMISS without prejudice** the Complaint, and, accordingly, **DENY** as moot the remainder of Plaintiff's Motions. Docs. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17. I **DENY** Plaintiff's Motion for Leave to Proceed *in Forma Pauperis*. Doc. 2. If Plaintiff wishes to proceed with his claims, he may do so by refiling the action and paying the entire filing fee upfront. Dupree, 284 F.3d at 1236.

II. Leave to Appeal in Forma Pauperis

The Court should also deny Plaintiff leave to appeal in forma pauperis.[16] Though Plaintiff has, of course, not yet filed a notice of appeal, it is appropriate

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[15] If Plaintiff wishes to continue to litigate his claims against Defendants, he may do so, but he must pay the entire filing fee upfront. See Vanderberg, 259 F.3d at 1324.

[16] A certificate of appealability is not required in this § 1983 action.

to address these issues in the Court's order of dismissal. Fed. R. App. P. 24(a)(3) (providing that a trial court may certify that appeal is not take in good faith "before or after the notice of appeal is filed"). An appeal cannot be taken in forma pauperis if the trial court certifies that the appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3). Good faith in this context is judged by an objective standard. Busch v. County of Volusia, 189 F.R.D. 687, 691 (M.D. Fla. 1999). A party does not proceed in good faith when he seeks to advance a frivolous claim or argument. See Coppedge v. United States, 369 U.S. 438, 445 (1962). A claim or argument is frivolous when it appears the factual allegations are clearly baseless or the legal theories are indisputably meritless. Neitzke v. Williams, 490 U.S. 319, 327 (1989); Carroll v. Gross, 984 F.2d 392, 393 (11th Cir. 1993). An in forma pauperis action is frivolous and not brought in good faith if it is "without arguable merit either in law or fact." Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002); see also Brown v. United States, Nos. 407CV085, 403CR001, 2009 WL 307872, at *1–2 (S.D. Ga. Feb. 9, 2009).

The above analysis of Plaintiff's action shows that Plaintiff does not possess any nonfrivolous issues to raise on appeal, and an appeal would not in good faith. Just as Daker's status as a three-striker prevents him from filing this action without prepaying the filing fee in this Court, it also blocks him from achieving *in forma pauperis* status on appeal. Thus, the Court should **DENY** him in *forma pauperis* status on appeal.

CONCLUSION

For the above-stated reasons, the Court **DENIES** Plaintiff's Motion for Leave to Proceed in *forma pauperis*. Doc. 2. Additionally, I **RECOMMEND** the Court **DISMISS without prejudice** Plaintiff's Complaint, **DENY as moot** Plaintiff's Motions for Preliminary Injunction or Temporary Restraining Order, docs. 6, 7, 8, 9, 10, **DENY as moot** Plaintiff's remaining Motions, docs. 11, 12, 13, 14, 15, 17, **DIRECT** the Clerk of Court to close this case and enter the appropriate judgment of dismissal, and **DENY** Plaintiff *in forma pauperis* status on appeal.

The Court **ORDERS** any party seeking to object to this Report and Recommendation to file specific written objections within 14 days of the date on which this Report and Recommendation is entered. Any objections asserting that the Magistrate Judge failed to address any contention raised in the Complaint must also be included. Failure to do so will bar any later challenge or review of the factual findings or legal conclusions of the Magistrate Judge. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140 (1985). A copy of the objections must be served upon all other parties to the action.

Upon receipt of Objections meeting the specificity requirement set out above, a United States District Judge will make a de novo determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the Magistrate Judge. Objections not meeting the specificity requirement set out above will not be considered by a District Judge. A party may not appeal a Magistrate Judge's report and recom-

mendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a District Judge. The Court **DIRECTS** the Clerk of Court to serve a copy of this Report and Recommendation upon Plaintiff.

SO ORDERED and REPORTED and RECOMMENDED, this 7th day of March, 2019.

/s/ Benjamin W. Cheesbro
BENJAMIN W. CHEESBRO
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11723-GG

D.C. Docket No. 6:18-cv-00032-JRH-BWC

WASEEM DAKER,

Plaintiff-Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

TIMOTHY WARD, et al.,
Assistant Commissioner,

Defendants.

No. 19-11849-GG

D.C. Docket No. 6:18-cv-00073-RSB-BWC

WASEEM DAKER,

Plaintiff-Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
HOMER BRYSON,
Former GDC Commissioner,
ASSISTANT COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
WARDEN,
Facilities Director,
STEVE UPTON,
Deputy Facilities Director, et al.,

Defendants-Appellees

Appeals from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, JILL PRYOR, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

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