IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10085-B

FREDERICK DWIGHT GREEN,

Plaintiff - Appellant,

versus

DOOLY SP WARDEN,
LT FUDGE,
REGIONAL DIRECTOR SOUTHWEST REGION FOR GEORGIA DEPARTMENT OF CORRECTIONS,
DEPUTY WARDEN OF SECURITY AT DOOLY STATE PRISON,
OFFICER ADAMS,
Floor Officer at Dooly State Prison, et al.,

Defendants - Appellees.

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

ORDER: Pursuant to the 11th Cir. R. 42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Frederick Dwight Green has failed to pay the filing and docketing fees to the district court within the time fixed by the rules.

Effective February 21, 2023.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

FREDERICK DWIGHT GREEN, *Plaintiff,* v. Warden AIMEE SMITH, *et al.*, *Defendants.*	CIVIL ACTION NO. 5:22-cv-00298-TES-CHW

ORDER ADOPTING THE UNITED STATES MAGISTRATE JUDGE'S RECOMMENDATION

Before the Court is the United States Magistrate Judge's Recommendation to deny Plaintiff Frederick Dwight Green leave to proceed *in forma pauperis* and dismiss this action without prejudice. *See generally* [Doc. 16]. Plaintiff filed an Objection. [Doc. 17]. Therefore, the Court must make a de novo determination of the portions of the Recommendation to which he objected. 28 U.S.C. § 636(b)(1)(C). Notwithstanding Plaintiff's Objection, the Court agrees with and **ADOPTS** the United States Magistrate Judge's Recommendation [Doc. 16] and **MAKES IT THE ORDER OF THE COURT**.

Accordingly, the Court **DENIES** Plaintiff's Motion to Proceed *In Forma Pauperis* [Doc. 2] and **DISMISSES** this action **without prejudice**. Plaintiff may refile with pre-payment of the Court's full filing fee. *See Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002) (per curiam) ("[T]he proper procedure is for the district court to dismiss the

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complaint without prejudice when it denies the prisoner leave to *proceed in forma pauperis* pursuant to the three strikes provision of [28 U.S.C.] § 1915(g).").

SO ORDERED, this 20th day of December, 2022.

S/ Tilman E. Self, III
TILMAN E. SELF, III, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

FREDERICK DWIGHT GREEN,	:	
	:	
Plaintiff,	:	
VS.	:	**CASE NO.: 5:22-CV-298-TES-CHW**
	:	
Warden AIMEE SMITH, *et al.*,	:	
	:	
Defendants.	:	
	:	

ORDER AND RECOMMENDATION

Presently pending before the Court are the claims of *pro se* Plaintiff Frederick Dwight Green, an inmate who is presently incarcerated at the Valdosta State Prison in Valdosta, Georgia. In accordance with the Court's previous orders and instructions, Plaintiff has now filed a Recast Complaint (ECF No. 13), and the claims asserted therein are now ripe for review. For the following reasons, it is found that Plaintiff has failed to allege facts sufficient to show that he was in imminent danger at the time he filed this case. It is therefore **RECOMMENDED** that Plaintiff's motion for leave to proceed *in forma pauperis* (ECF No. 2) be **DENIED** and that Plaintiff's Recast Complaint be **DISMISSED without prejudice.** Because Plaintiff has had the opportunity to recast his Complaint to include all possible claims of imminent danger, and pursuant to the Court's previous orders and instructions, Plaintiff's pending motions to amend (ECF Nos. 4, 6, 8) are **DENIED as moot.**

APPENDIX C

MOTION TO PROCEED IN FORMA PAUPERIS

As the Court previously observed, federal law bars a prisoner from bringing a civil action in federal court *in forma pauperis*

> if [he] 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). This is known as the "three strikes provision." Under § 1915(g), a prisoner incurs a "strike" any time he has a federal lawsuit or appeal dismissed on the grounds that it is (1) frivolous, (2) malicious, or (3) fails to state a claim. *See Medberry v. Butler*, 185 F.3d 1189, 1192 (11th Cir. 1999); *see also Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1283-84 (11th Cir. 2016) (confirming that "these three grounds are the *only* grounds that can render a dismissal a strike"). Once a prisoner incurs three strikes, his ability to proceed *in forma pauperis* in federal court is greatly limited: leave to proceed *in forma pauperis* may not be granted unless the prisoner is under imminent danger of serious physical injury. *Medberry*, 185 F.3d at 1192.

The Court has again confirmed that Plaintiff has filed multiple federal lawsuits and that at least three of his complaints or appeals have been dismissed as frivolous, malicious, or for failure to state a claim. *See, e.g.,* Order Dismissing Compl., *Green v. Rockdale Cnty.*, ECF No. 9 in Case No. 1:21-cv-03377-ELR (N.D. Ga. Nov. 4, 2021) (adopting recommendation to dismiss pursuant to 28 U.S.C. § 1915A); Order Dismissing Compl., *Green v. Blair*, ECF No. 17 in Case No. 3:18-cv-00013-DHB-BKW (S.D. Ga. Apr. 23, 2018) (adopting recommendation to dismiss as a sanction for abuse of the judicial process);

Order Dismissing Compl., *Green v. Owens*, 4:14-cv-00201-HLM (N.D. Ga. Oct. 8, 2014) (adopting recommendation to dismiss as frivolous). Plaintiff is accordingly barred from prosecuting this action *in forma pauperis* unless he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

To qualify for this exception, a prisoner must allege specific facts that describe an "ongoing serious physical injury," or "a pattern of misconduct evidencing the likelihood of imminent serious physical injury." *Sutton v. Dist. Attorney's Office*, 334 F. App'x 278, 279 (11th Cir. 2009) (per curiam) (internal quotation marks omitted). Complaints of past injuries are not sufficient. *See Medberry*, 185 F.3d at 1193. Vague and unsupported claims of possible dangers likewise do not suffice. *See White v. State of Colo.*, 157 F.3d 1226, 1231 (10th Cir. 1998). The exception to § 1915(g) is to be applied only in "genuine emergencies," when (1) "time is pressing," (2) the "threat or prison condition is real and proximate," and (3) the "potential consequence is serious physical injury." *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002).

Most of Plaintiff's claims appear to have arisen while he was confined in the Dooly County Prison ("DSP"), where he was attacked by more than a dozen inmates at knifepoint during what evolved into a "major disturbance/riot." *See, e.g.*, Recast Compl. 20, ECF No. 13. Plaintiff generally claims that the Defendant prison officials failed to prevent this attack, placed him in Tier II segregation without due process after the attack, and have been deliberately indifferent to his safety at the prison to which he was transferred after the attack, Valdosta State Prison ("VSP"). But because Plaintiff was transferred to VSP after

the riot (and before he filed his Complaint in this case), he must establish that he is in imminent danger of serious physical injury at VSP. *See Medberry*, 185 F.3d at 1193.

When Plaintiff's Recast Complaint is construed liberally, there are at least four allegations that could support Plaintiff's belief that he is in some danger at VSP. First, Plaintiff contends there has been one murder and at least two incidents where inmates attacked staff members at VSP since June 2022. Recast Compl. 30, ECF No. 13. Second, Plaintiff contends VSP is understaffed in the same manner as DSP—i.e., one officer must "monitor and secure four units"—and that similar levels of understaffing contributed to the prison riot at DSP. *Id.* Third, Plaintiff alleges that the prisoners who attacked Plaintiff at DSP are "affiliated GDC offenders." *Id.* at 31. According to Plaintiff, "'affiliated' prisoners communicate with each other from prison to prison using cellphones to notify their members to be on the lookout for enemies who may arrive at the new location." *Id.* Plaintiff contends that because he was attacked by "affiliated" prisoners at DSP, it is likely that he will be attacked by "affiliated" prisoners in general population at VSP. *Id.*[1] Fourth, Plaintiff contends he is "exposed to dangerous weather conditions" on Tier II because the cells do not have electrical outlets. *Id.* at 19.

Plaintiff's allegations are not sufficient to show that he is entitled to the § 1915(g) exception. The gist of the Recast Complaint is that Plaintiff is concerned for his safety

[1] It is unclear why Plaintiff believes "affiliated" offenders would consider him to be their "enemy." At most, Plaintiff alleges that prison officials conducted a shakedown of his housing unit shortly after the June riot at DSP and uncovered a significant amount of contraband. Recast Compl. 31, ECF No. 13. But Plaintiff's connection to this contraband—or even to the "affiliated offenders"—is not clearly described in the Recast Complaint.

once he is *released* from Tier II administrative segregation and placed back in general population. Recast Compl. 31, ECF No. 13 ("I know that it's more likely than not that I'll be walking into an ambush whenever I'm released to general population whether here at VSP or another facility."); *see also id.* ("My situation is pressing and must be addressed immediately because Mr. Ford has allowed this staffing crisis to continue and I could be released to general population any day now as a result of this present litigation.").

Plaintiff acknowledges that he will be housed in Tier II "for a mandatory-minimum of 10 months," *id.* at 20, and most of his allegations do not relate to his safety in Tier II at all. None of the attacks referenced by Plaintiff appears to have occurred in the Tier II segregation unit at VSP, and two of the three incidents did not involve inmate-on-inmate violence. It is also unclear from the Recast Complaint whether Tier II is subject to the same level of alleged understaffing as the other areas of the prison. Plaintiff also acknowledges that prison officials are aware that he was previously attacked by "affiliated" offenders, and he does not suggest that prison officials failed to consider this fact when determining the propriety of Plaintiff's current placement on Tier II.

The Recast Complaint is likewise devoid of any allegation that these "affiliated" offenders have threatened Plaintiff's life since he has been at VSP, have attempted to cause him harm at that facility, or would even have access to Plaintiff on Tier II. In short, Plaintiff's concern about danger that will only occur months from now—if at all—does not provide an adequate basis for finding that he is presently in imminent danger of serious physical injury. *See, e.g., Sanders v. Melvin*, 873 F.3d 957, 960 (7th Cir. 2017) ("If fears about the future made for an 'imminent danger of serious physical injury,' [§ 1915(g)]

would not serve to curtail litigation by those who have demonstrated a propensity to make baseless or malicious claims.").

The only allegation in the Recast Complaint that directly relates to Plaintiff's current confinement on Tier II at VSP is that he is "exposed to dangerous weather conditions" because his cell does not have an electrical outlet. Recast Compl. 19, ECF No. 13. More specifically, Plaintiff alleges he is unable to have a personal fan, and "the extreme heat" in his cell "is especially dangerous because [he] take[s] mental health medications." *Id.* Plaintiff states he has "already blacked out once" from the heat but was saved from injury because his "cellmate caught [him] in mid-fall." *Id.* Plaintiff has experienced only one heat-related incident since he has been incarcerated at VSP, however, and he did not seek medical attention for it because he has learned "it is better to just lie down until [he] feel[s] better." *Id.* Plaintiff also alleges that he notified prison officials of this incident, *id.* at 19-20, and he does not allege any facts indicating that prison officials would not provide him accommodations, such as ice water, if he felt poorly in the future. Plaintiff has therefore failed to plead facts sufficient to show that the condition of his cell places him in imminent danger of serious physical injury. *See, e.g., Sanders*, 873 F.3d at 960 (holding that prisoner's "contention that heat and restricted ventilation aggravate his asthma alleges a risk of physical injury, but not an 'imminent one'"); *Thompson v. Allred Unit*, No. 22-10641, 2022 WL 14461808, at *1 (5th Cir. Oct. 25, 2022) (unpublished opinion) (per curiam) (denying leave to proceed *in forma pauperis* on appeal where prisoner's allegations that "cold temperatures in his cell block put him in imminent danger of serious physical injury" were "conclusory and speculative").

Perhaps more importantly, Plaintiff's allegations about exposure to "extreme" weather conditions "are too attenuated from the crux of the [recast] complaint" to serve as the basis for his entitlement to the § 1915(g) exception. *Daker v. Robinson*, 802 F. App'x 513, 515 (11th Cir. 2020) (per curiam). Plaintiff's Recast Complaint focuses almost exclusively on two issues: (1) that Plaintiff was not afforded due process before being placed in Tier II segregation and (2) that prison officials have been deliberately indifferent to the threat posed to Plaintiff by other inmates at both DSP and VSP. Section 1915(g) "requires that the prisoner's complaint seek to redress an imminent danger of serious physical injury and that this danger must be fairly traceable to a violation of law alleged in the complaint." *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009). Any relief this Court could provide concerning the heat in Plaintiff's cell would do nothing to address the alleged due process and deliberate indifference claims at issue in the Recast Complaint. For this reason as well, Plaintiff's allegations concerning the heat in his cell fail to establish that he is entitled to the § 1915(g) exception.

Based on the foregoing, it is **RECOMMENDED** that Plaintiff's motion to proceed *in forma pauperis* (ECF No. 2) be **DENIED** and that this action be **DISMISSED without prejudice** to his right to refile with pre-payment of the full $400 filing fee. *See Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002) (per curiam) ("[T]he proper procedure is for the district court to dismiss the complaint without prejudice when it denies the prisoner leave to proceed *in forma pauperis* pursuant to the three strikes provision of § 1915(g)."). Plaintiff's motions to amend (ECF Nos. 4, 6, 8) are **DENIED as moot.**

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to these recommendations with the Honorable Tilman E. Self, III, United States District Judge, **WITHIN FOURTEEN (14) DAYS** after being served with a copy of this Recommendation. Any objection is limited in length to **TWENTY (20) PAGES**. *See* M.D. Ga. L.R. 7.4. The parties may seek an extension of time in which to file written objections, provided a request for an extension is filed prior to the deadline for filing written objections. Failure to object in accordance with the provisions of § 636(b)(1) waives the right to challenge on appeal the district judge's order based on factual and legal conclusions to which no objection was timely made. *See* 11th Cir. R. 3-1.

SO ORDERED AND RECOMMENDED, this 29th day of November, 2022.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

FREDERICK DWIGHT GREEN, *Plaintiff,* v. Warden AIMEE SMITH, *et al.*, *Defendants.*	CIVIL ACTION NO. 5:22-cv-00298-TES-CHW

ORDER ADOPTING IN PART THE UNITED STATES MAGISTRATE JUDGE'S RECOMMENDATION

Before the Court is the United States Magistrate Judge's Recommendation [Doc. 10] to deny Plaintiff Frederick Dwight Green leave to proceed *in forma pauperis* and dismiss his Complaint [Doc. 1] because Plaintiff "has three strikes under the Prison Litigation Reform Act[,]" 28 U.S.C. § 1915(g). [Doc. 10, p. 1]. Specifically, the magistrate judge relies on three cases as "strikes"—*Green v. Owens*, *Green v. Rockdale County*, and *Green v. Blair*—to support his recommendation that Plaintiff should not be allowed to proceed *in forma paurperis* for the above-captioned case and that the claims in Plaintiff's Complaint [Doc. 1] should be dismissed without prejudice. *See generally* [*id.*].

A. Plaintiff's "Strikes"

Plaintiff timely filed an Objection [Doc. 11]. In it, he argues that this case "cannot be dismissed under the 'three[-]strikes provision'" of the PLRA. [Doc. 11, p. 2]. In light

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of Plaintiff's Objection, the Court "make[s] a de novo determination of those portions of the . . . recommendation[] to which objection was made." 28 U.S.C. § 636(b)(1)(C).

Specifically, Plaintiff contends that he "count[s] one, possibly two strikes under the PLRA[]"—not three. [Doc. 11, p. 1]. To be sure, as part of its de novo review, the undersigned conducted his own search (separate and in addition to the one conducted by the magistrate judge) of the Federal Judiciary's Public Access to Court Electronic Records ("PACER") and reviewed each alleged "strike."

1. *Green v. Owens*

Consistent with the magistrate judge's PACER search, Green admits that he's "had one case"—*Green v. Owens*—"dismissed as frivolous" back in 2014. [Doc. 11, p. 1]; *see also* [Doc. 10, p. 2 (citing Order, *Green v. Owens*, No. 4:14-cv-00201-HLM (N.D. Ga. Oct. 8, 2014), ECF No. 10 ("The Court consequently adopts the Order and Final Report and Recommendation[] and dismisses this case without prejudice *because it is frivolous*.")]. With respect to *Green v. Owens*, the undersigned found that case on PACER as well, and it was, in fact, dismissed as "frivolous." Order, *Green v. Owens*, No. 4:14-cv-00201-HLM (N.D. Ga. Oct. 8, 2014), ECF No. 10.

Green v. Owens is, as Plaintiff "accept[s]," "strike one." [Doc. 11, p. 1].

2. *Green v. Rockdale County*

The next case relied upon by the magistrate judge is *Green v. Rockdale County* which was dismissed pursuant to 28 U.S.C. § 1915A back in 2021. [Doc. 10, p. 2 (citing

Order, *Green v. Rockdale Cnty.*, No. 1:21-cv-003377-ELR (N.D. Ga. Nov. 4, 2021) ECF No. 9, ("Accordingly, the R&R, [Doc. 5], is hereby adopted as the order of this Court, and the complaint is dismissed pursuant to 28 U.S.C. § 1915A.") (emphasis omitted)]. With respect to *Green v. Rockdale County*, the undersigned, in his independent search, found that case on PACER as well.

In his Objection, Plaintiff claims that he does "not know if" *Green v. Rockdale County*'s dismissal under § 1915A "would also entail the provisions of § 1915(g)[.]" [Doc. 11, p. 2]. Plaintiff's concerns obviously come from the Eleventh Circuit's ruling in *Daker v. Commissioner, Georgia Department of Corrections*, 820 F.3d 1278, 1283–84 (11th Cir. 2016). In *Daker*, the Eleventh Circuit confirmed that "a strike" is limited to the "[t]hree specific grounds" listed in § 1915(g). *Id.* That is, *only* when the complaint is "'frivolous,' 'malicious,' or 'fails to state a claim upon which relief may be granted.'" *Id.* (quoting 28 U.S.C. § 1915(g)). Since the district court dismissed *Green v. Rockdale County* under § 1915A, Plaintiff says that he is "confused as to whether th[at] dismissal counts as a strike." [Doc. 11, p. 2].

Section 1915A states that courts "shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). Section 1915A also states that

> [o]n review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

> (1) is *frivolous, malicious,* or *fails to state a claim upon which relief may be granted;* or
> (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(b) (emphasis added). Clearly, the three specific grounds—"frivolous," "malicious," or "fail[ure] to state a claim upon which relief may be granted"—listed in § 1915A(a)(1) are the grounds same as those listed in § 1915(g). In other words, either § 1915(g) or § 1915A "may be used to dismiss a complaint." *Schmidt v. Navarro*, 576 F. App'x 897, 899–900 (11th Cir. 2014) (per curiam) (citing *Brown v. Johnson*, 387 F.3d 1344, 1347–48 (11th Cir. 2004)).

The magistrate judge's recommendation in *Green v. Rockdale County* recommended dismissal of Plaintiff's claims "pursuant to 28 U.S.C. § 1915A(b)." Final Report and Recommendation, *Green v. Rockdale Cnty.*, No. 1:21-cv-003377-ELR (N.D. Ga. Sept. 15, 2021), ECF No. 5. After discussing that Plaintiff failed to state a claim because his claims were "barred" by *Heck v. Humphrey*, 512 U.S. 477 (1994), and "untimely" based on statute-of-limitations grounds, the district judge adopted the recommendation and dismissed Plaintiff's claims in *Green v. Rockdale County* "pursuant to 28 U.S.C. § 1915A." Order, *Green v. Rockdale Cnty.*, No. 1:21-cv-003377-ELR (N.D. Ga. Nov. 4, 2021), ECF No. 9. The district judge's ultimate dismissal "pursuant to 28 U.S.C. § 1915A[,]" instead of "28 U.S.C. § 1915A(b)[,]" specifically, does not extract the dismissal of Plaintiff's claims in *Green v. Rockdale County* from § 1915(g)'s "strike" label. *See Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998), *abrogated on other grounds by Jones v. Bock*, 549

U.S. 199, 214 (2007). Thus, the dismissal from *Green v. Rockdale County* counts as strike two.

3. *Green v. Blair*

Finally, Plaintiff takes issue with the magistrate judge's reliance on the dismissal from *Green v. Blair* to constitute Plaintiff's third strike. According to the undersigned's PACER search, Plaintiff filed *Green v. Blair* in February 2018, and the district court dismissed it "as a sanction for . . . abuse of the judicial process" because Plaintiff "provid[ed] dishonest information about his filing history." *See* Complaint & Order, *Green v. Blair*, No. 3:18-cv-00013-DHB-BKE, (S.D. Ga. Feb. 6, 2018 & Apr. 23, 2018), ECF Nos. 1 & 17.

Since the district court dismissed *Green v. Blair* for "abuse of the judicial process," Plaintiff (relying on *Daker, supra*) says that he "cannot accept" that dismissal as a "strike" since it is "not a ground that renders a dismissal a strike." [Doc. 11, p. 2 (citing *Daker*, 820 F.3d at 1283–84)]. However, a district judge's determination that a prisoner is "abusing the judicial process" and that his claims should be dismissed as a sanction—and therefore, count as a "strike"—has been upheld by the Eleventh Circuit. *Attwood v. Singletary*, 105 F.3d 601, 613 (11th Cir. 1997) (per curiam) (applying prior version of § 1915(e)(2)(B)(1), then codified as § 1915(d), and affirming a dismissal with prejudice) ("We find that the district court properly imposed sanctions pursuant to 28 U.S.C. § 1915(d) in light of Attwood's false claims of indigency and his history of abusing the

judicial process.").

To that end, the Eleventh Circuit has specifically "determined that a dismissal based on a [prisoner's] abuse of the judicial process may be properly considered a strike even if the dismissal fails to state expressly that the claim was frivolous or malicious[.]" *Allen v. Clark*, 266 F. App'x 815, 817 (11th Cir. 2008) (quoting *Rivera*, 144 F.3d at 731). "[D]ismissal for abuse of the judicial process is precisely the type of strike that Congress envisioned when drafting [§] 1915(g)." *Id.* In sum, Plaintiff's Objection regarding the magistrate judge's reliance on *Green v. Blair* as a "strike" is without merit. [Doc. 11, p. 2]. The district court's dismissal in *Green v. Blair* for "abuse of the judicial process" equates to a dismissal under the current version of § 1915(e)(2)(B)(i) on grounds that Plaintiff's dishonesty was "malicious." 28 U.S.C. § 1915(e)(2)(B)(i).

Green v. Blair is strike three.

B. Imminent Danger

Having independently confirmed that each of the cases relied upon by the magistrate judge are, in fact, "strikes" as Congress contemplated when it passed § 1915(g), the only way Plaintiff can proceed *in forma pauperis* in this case is if he can allege that he is in imminent danger of serious physical injury. [Doc. 10, p. 3 (quoting *Sutton v. Dist. Attorney's Office*, 334 F. App'x 278, 279 (11th Cir. 2009) (per curiam)].

In his Objection, Plaintiff clearly argues that he "alleges a wide range of security breaches by [prison] staff at Dooly [State Prison]" and that his allegations based on

"staff shortages" "show[] 'a pattern of misconduct evidencing the likelihood of imminent serious physical injury.'" [Doc. 11, p. 2 (quoting *Sutton*, 334 F. App'x at 279)]. However, at the time Plaintiff filed his Complaint, he was confined at Valdosta State Prison, not Dooly State Prison. [Doc. 1, p. 1].

As the magistrate judge noted in his Recommendation, past dangers—Plaintiff's alleged conditions at Dooly State Prison—have no bearing on whether Plaintiff is in imminent danger at Valdosta State Prison. [Doc. 10, p. 5 (citing *Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999))]; *see also Barber*, *infra*. In other words, Plaintiff's allegations concerning his confinement at Dooly State Prison are non-starters for the "imminent danger" inquiry for § 1915(g) determinations. However, Plaintiff has three motions pending, each seeking leave to amend his Complaint. When a prisoner files a motion to amend *before* dismissal and *before* any responsive pleading is filed, that prisoner has the right to amend his complaint under Federal Rule of Civil Procedure 15(a). *Brown*, 387 F.3d at 1349. "Nothing in the language of the PLRA repeals Rule 15(a)." *Id.*

Although many of Plaintiff's allegations scattered throughout his efforts to amend concern his confinement at Dooly State Prison, some of his proposed (amended) allegations do, in fact, concern confinement at Valdosta State Prison. *See, e.g.*, [Doc. 6, pp. 4, 8–11]; [Doc. 8]; *see also* [Doc. 11, p. 4]. Given the procedural history of this case and some of the allegations made throughout Plaintiff's "various filings," binding

Eleventh Circuit precedent requires the Court to **RECOMMIT** this case back to the United States Magistrate Judge. *See Barber v. Krepp*, 680 F. App'x 819, 821 (11th Cir. 2017) (per curiam) (noting that "[w]hile simply recounting past injuries is not sufficient to establish an 'imminent danger of physical injury' under § 1915(g), a prisoner can establish it by recounting recent injuries that reveal an 'ongoing pattern of acts' as well as threats of future harm[]"); *Sutton*, 334 F. App'x at 279 (noting that a prisoner can allege "a pattern of misconduct" that evidences the likelihood of imminent serious physical injury).

C. **Order to Recast**

However, so that the magistrate judge can consider whether Plaintiff's allegations concerning the conditions at Valdosta State Prison satisfy the "imminent danger" exception to § 1915(g), Plaintiff must file a recast complaint (which will constitute his operative pleading) and assert all of his pertinent allegations in *one* document by ***November 10, 2022***.[1] Upon Plaintiff's submission of his recast complaint, the Court will terminate his pending Motions to Amend as moot. [Doc. 4]; [Doc. 6]; [Doc. 8]. Nothing from those motions will be considered by the Court in its determination of whether Plaintiff as adequately alleged that he is in "imminent

[1] A recast complaint takes the place of and supersedes the original complaint. *Harris v. Sproul*, No. 1:13-cv-53 (WLS), 2013 WL 6198199, at *2–3 (M.D. Ga. Nov. 26, 2013); *Jamison v. Long*, No. 5:19-cv-000457-TES-MSH, 2021 WL 2936132, at *2–4 (M.D. Ga. July 13, 2021) (citing *Dresdner Bank AG v. M/V Olympia Voyager*, 463 F.3d 1210, 1215 (11th Cir. 2006) ("An amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary.")).

danger" of a serious physical injury.

If Plaintiff's allegations in his recast complaint show that he "face[s] imminent danger[,]" the Court must allow him to proceed *in forma pauperis*. *Medberry*, 185 F.3d at 1193. That is, the Court will allow Plaintiff to "pay the filing fee on [an] installment plan" as opposed to the one-time payment up front. *Id.*; *Barber*, 680 F. App'x at 822 (citation omitted) (noting that § 1915(g) "concerns only a threshold procedural question—whether the filing fee must be paid up front or later[]"). The Court provides the following instructions in the hope that they will assist Plaintiff is drafting his recast complaint.

Plaintiff is **ORDERED** to entirely recast his Complaint to include all amendments and facts he wishes to make a part of this case. The recast complaint must contain a caption that clearly identifies, by name, each individual that Plaintiff has a claim against and wishes to include as a defendant in the present lawsuit. Plaintiff is to name only the individuals associated with the claim or related claims that he is pursuing in this action. Plaintiff must provide enough facts to plausibly demonstrate that each defendant's actions or omissions may be resulting in the violation of his constitutional rights.

To that end, it is recommended that, when drafting his statement of claims on the Court's form, Plaintiff list numbered responses to the following questions (to the extent possible) along with the name of each defendant:

(1) What did this defendant do (or not do) to violate your rights? In other words: What was the extent of this defendant's role in the unconstitutional conduct other than being in a supervisory role? Was the defendant personally involved in the constitutional violation? If not, did his actions otherwise cause the unconstitutional action? How do you know?

(2) When and where did each action occur (to the extent memory allows)?

(3) How were you injured as a result of this defendant's actions or decisions? If you have been physically injured, explain the extent of your injuries and any medical care requested or provided.

(4) How and when did this defendant learn of your injuries or otherwise become aware of a substantial risk that you could suffer a serious injury?

(5) What did this defendant do (or not do) in response to this knowledge?

(6) What relief you seek from this defendant?

Plaintiff should state his claims as simply as possible referring only to the relevant allegations against the named defendants in this case; he need not attach supporting documents to his recast complaint, use legal terminology, or cite any specific statute or case law to state a claim, although the Court will presume that Plaintiff's claims are brought under 42 U.S.C. § 1983 unless otherwise specified. *See* Fed. R. Civ. P. 8. If, in his recast complaint, Plaintiff fails to link a named defendant to a claim, the claim will be dismissed. Likewise, if Plaintiff makes no allegations in the body of his recast complaint against a named defendant, that defendant will be dismissed.

Once again, the recast complaint will supersede (take the place of) the original

Complaint and all other documents mentioned above that appear to contain factual allegations that may be relevant to this action. [Doc. 1]; [Doc. 4]; [Doc. 6]; [Doc. 8]; [Doc. 11]. The Court will not look back to the factual allegations in any previously filed document to determine whether Plaintiff has shown an imminent danger of serious physical injury. Accordingly, any fact that Plaintiff deems necessary to his lawsuit should be clearly stated in his recast complaint, even if Plaintiff has previously alleged it in another filing. The Clerk is **DIRECTED** to forward a copy of the § 1983 form marked with the case number of the above-captioned action to Plaintiff at the address provided on the last page of his Objection. *See* [Doc. 11, p. 5].

D. **Conclusion**

With respect to the United States Magistrate Judge's finding that Plaintiff has incurred three strikes under the PLRA, the Court **ADOPTS** that portion of his Recommendation. However, in light of the contents of Plaintiff's pending Motions to Amend, the Court **RECOMMITS** this matter to the United States Magistrate Judge so he can review Plaintiff's forthcoming recast complaint and determine whether his *present*—"as opposed to . . . past"—conditions at Valdosta State Prison show imminent danger of serious *physical* injury. 28 U.S.C. § 636(b)(1)(C); *Brown*, 387 F.3d at 1349.

SO ORDERED, this 21st day of October, 2022.

S/ Tilman E. Self, III
TILMAN E. SELF, III, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

FREDERICK DWIGHT GREEN,	:	
	:	
Plaintiff,	:	
VS.	:	**CASE NO.: 5:22-CV-298-TES-CHW**
	:	
Warden AIMEE SMITH, *et al.*,	:	
	:	
Defendants.	:	
	:	

RECOMMENDATION OF DISMISSAL

Presently pending before the Court is a Complaint filed by *pro se* Plaintiff Frederick Dwight Green, an inmate who is presently incarcerated at the Valdosta State Prison in Valdosta, Georgia (ECF No. 1). Plaintiff has also filed three motions for leave to amend his original Complaint (ECF Nos. 4, 6, 8), and he seeks leave to proceed in this case *in forma pauperis* (ECF No. 2). As discussed below, Plaintiff has three strikes under the Prison Litigation Reform Act. It is therefore **RECOMMENDED** that Plaintiff be **DENIED** leave to proceed *in forma pauperis*, that this action be **DISMISSED without prejudice**, and that Plaintiff's remaining pending motions be **DENIED as moot.**

ANALYSIS

Federal law bars a prisoner from bringing a civil action in federal court *in forma pauperis*

> if [he] 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.

APPENDIX E

28 U.S.C. § 1915(g). This is known as the "three strikes provision." Under § 1915(g), a prisoner incurs a "strike" any time he has a federal lawsuit or appeal dismissed on the grounds that it is (1) frivolous, (2) malicious, or (3) fails to state a claim. *See Medberry v. Butler*, 185 F.3d 1189, 1192 (11th Cir. 1999); *see also Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1283-84 (11th Cir. 2016) (confirming that "these three grounds are the *only* grounds that can render a dismissal a strike"). Once a prisoner incurs three strikes, his ability to proceed *in forma pauperis* in federal court is greatly limited: leave to proceed *in forma pauperis* may not be granted unless the prisoner is under imminent danger of serious physical injury. *Medberry*, 185 F.3d at 1192.

A review of court records on the Federal Judiciary's Public Access to Court Electronic Records ("PACER") database reveals that Plaintiff has filed multiple federal lawsuits and that at least three of his complaints or appeals have been dismissed as frivolous, malicious, or for failure to state a claim. *See, e.g.,* Order Dismissing Compl., *Green v. Rockdale Cnty.*, ECF No. 9 in Case No. 1:21-cv-03377-ELR (N.D. Ga. Nov. 4, 2021) (adopting recommendation to dismiss pursuant to 28 U.S.C. § 1915A); Order Dismissing Compl., *Green v. Blair*, ECF No. 17 in Case No. 3:18-cv-00013-DHB-BKW (S.D. Ga. Apr. 23, 2018) (adopting recommendation to dismiss as a sanction for abuse of the judicial process); Order Dismissing Compl., *Green v. Owens*, 4:14-cv-00201-HLM (N.D. Ga. Oct. 8, 2014) (adopting recommendation to dismiss as frivolous). Plaintiff is accordingly barred from prosecuting this action *in forma pauperis* unless he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

To qualify for this exception, a prisoner must allege specific facts that describe an "ongoing serious physical injury," or "a pattern of misconduct evidencing the likelihood of imminent serious physical injury." *Sutton v. Dist. Attorney's Office*, 334 F. App'x 278, 279 (11th Cir. 2009) (per curiam) (internal quotation marks omitted). Complaints of past injuries are not sufficient. *See Medberry*, 185 F.3d at 1193. Vague and unsupported claims of possible dangers likewise do not suffice. *See White v. State of Colo.*, 157 F.3d 1226, 1231 (10th Cir. 1998). The exception to § 1915(g) is to be applied only in "genuine emergencies," when (1) "time is pressing," (2) the "threat or prison condition is real and proximate," and (3) the "potential consequence is serious physical injury." *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002).

Plaintiff's claims arise from a prison riot that occurred on June 14, 2022, at the Dooly State Prison ("DSP"), where Plaintiff was previously incarcerated. Compl. 6, ECF No. 1. According to the Complaint, Plaintiff and other individuals were attacked by knife-wielding inmates, and several inmates were seriously injured. *Id.* Once prison officials regained control of the facility, Plaintiff was "identified" as being part of the group of inmates who initiated the disturbance. *Id.* at 9. Plaintiff was accordingly placed in segregation at DSP and later transferred to Valdosta State Prison ("VSP"), where he was involuntarily assigned to Tier II Administrative Segregation. Compl. 10, ECF No. 1. Plaintiff states that this assignment was made because Plaintiff had "'direct involvement . . . in a major disturbance with affiliated GDC offenders, which was a result of several offenders needing outside medical treatment.'" *Id.* Plaintiff raises claims against Defendants, contending that they failed to prevent the June 14, 2022 riot, failed to provide

him adequate medical treatment for injuries suffered in the riot, and improperly identified him as having participated in the riot (and punished him accordingly). *Id.* at 10-11.

Plaintiff has also filed three additional motions to amend. In the first of these motions, Plaintiff contends that Defendants generally failed to control increasing levels of inmate-on-inmate violence at DSP and failed to promptly initiate lockdown protocols during the riot. 1st Mot. Am. 2, ECF No. 4. He further contends that while he has been assigned to Tier II segregation, he has not been given proper access to his legal materials, the law library, or indigent legal supplies. *Id.* at 4. Plaintiff's second motion primarily complains about additional alleged breaches of security that led to the June 14, 2022 riot, and it also suggests that various Defendants engaged in a conspiracy and violated his due process rights when they assigned him to Tier II Segregation. *See generally* 2d Mot. Am., ECF No. 6. Plaintiff further claims that Defendants lost or disposed of his personal property when he was transferred from DSP to VSP and improperly handled his related grievances. *Id.* at 10-11. Plaintiff also contends Defendants violated the Americans with Disabilities Act by discriminating against him in disciplinary and grievance proceedings. *Id.* at 11. Finally, in his third motion, Plaintiff seeks leave to add Georgia Department of Corrections Commissioner Timothy Ward as a Defendant on grounds that Defendant Ward's policies and procedures concerning Tier II segregation are unconstitutional. *See generally* 3d Mot. Am., ECF No. 8.

Plaintiff's allegations are not sufficient to show that he is entitled to the § 1915(g) exception. Even if Plaintiff was in imminent danger of serious physical injury while he was at DSP, Plaintiff was housed in Tier II Administrative Segregation at VSP when he

Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002) (per curiam) ("[T]he proper procedure is for the district court to dismiss the complaint without prejudice when it denies the prisoner leave to proceed *in forma pauperis* pursuant to the three strikes provision of § 1915(g)."). It is also **RECOMMENDED** that Plaintiff's pending motions to amend (ECF Nos. 4, 6, 8) be **DENIED as moot.**

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to these recommendations with the Honorable Tilman E. Self, III, United States District Judge, **WITHIN FOURTEEN (14) DAYS** after being served with a copy of this Recommendation. Any objection is limited in length to **TWENTY (20) PAGES**. *See* M.D. Ga. L.R. 7.4. The parties may seek an extension of time in which to file written objections, provided a request for an extension is filed prior to the deadline for filing written objections. Failure to object in accordance with the provisions of § 636(b)(1) waives the right to challenge on appeal the district judge's order based on factual and legal conclusions to which no objection was timely made. *See* 11th Cir. R. 3-1.

SO RECOMMENDED, this 30th day of September, 2022.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge