

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 22 2019

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

CRAIG K GARRETT,

Plaintiff-Appellant,

v.

JOSEPH MADDER, Deputy Public
Defender, individual and official capacity; et
al.,

Defendants-Appellees.

No. 19-55860

D.C. No. 2:19-cv-05206-AB-KES
Central District of California,
Los Angeles

ORDER

Before: CANBY, TASHIMA, and CHRISTEN, Circuit Judges.

The district court denied appellant leave to proceed in forma pauperis because it found that the action was frivolous. *See* 28 U.S.C. § 1915(a). On August 5, 2019, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record and response to the court's August 5, 2019 order, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 3 and 4) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

DISMISSED.

* I filed statement
and opening brief
and record NO 11-32-19

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AUG 5 2019

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Central District of California,
Los Angeles

ORDER

A review of the district court's docket reflects that the district court denied appellant leave to proceed in forma pauperis because it found that the action was frivolous. This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

- (1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), or
- * (2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant files a statement that the appeal should go forward, appellant also must:

- (1) file in this court a motion to proceed in forma pauperis, OR

(2) pay to the district court \$505.00 for the filing and docketing fees for this appeal AND file in this court proof that the \$505.00 was paid.

If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. *See* 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice. If the court dismisses the appeal as frivolous, this appeal may be counted as a strike under 28 U.S.C. § 1915(g).

The briefing schedule for this appeal is stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, (2) a form statement that the appeal should go forward, and (3) a Form 4 financial affidavit. Appellant may use the enclosed forms for any motion to dismiss the appeal, statement that the appeal should go forward, and/or motion to proceed in forma pauperis.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Corina Orozco
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INMATE # CDC K-95956

CASE NUMBER

Craig K. Garrett,

2:19-cv-05206-AB-KES

PLAINTIFF(S)

v.

ORDER RE REQUEST TO PROCEED WITHOUT
PREPAYMENT OF FILING FEES

Joseph Madder, et al.,

DEFENDANT(S)

IT IS ORDERED that the Request to Proceed Without Prepayment of Filing Fees is hereby GRANTED.**IT IS FURTHER ORDERED** that, in accordance with 28 U.S.C. § 1915, the prisoner-plaintiff owes the Court the total filing fee of \$350.00. An initial partial filing fee of \$ _____ must be paid within thirty (30) days of the date this order is filed. Failure to remit the initial partial filing fee may result in dismissal of the case. Thereafter, monthly payments shall be forwarded to the Court in accordance with 28 U.S.C. § 1915(b)(2).

Date

United States Magistrate Judge

IT IS RECOMMENDED that the Request to Proceed Without Prepayment of Filing Fees be **DENIED** for the following reason(s):

- ☐ Inadequate showing of indigency.
- ☐ Failure to authorize disbursements from prison trust account to pay the filing fees.
- ☒ Failure to provide certified copy of trust fund statement for the last six (6) months.
- ☐ District Court lacks jurisdiction.
- ☐ Other _____

- ☒ Frivolous, malicious, or fails to state a claim upon which relief may be granted.
- ☒ Seeks monetary relief from a defendant immune from such relief.
- ☒ Leave to amend would be futile.
- ☒ This denial may constitute a strike under the "Three Strikes" provision governing the filing of prisoner suits. See *O'Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008).

Comments:
See attached.

June 20, 2019

/s/ Karen E. Scott

Date

United States Magistrate Judge

IT IS ORDERED that the Request to Proceed Without Prepayment of Filing Fees is:

- ☐ **GRANTED. IT IS FURTHER ORDERED** that, in accordance with 28 U.S.C. § 1915, the prisoner-plaintiff owes the Court the total filing fee of \$350.00. An initial partial filing fee of \$ _____ must be paid within thirty (30) days of the date this order is filed. Failure to remit the initial partial filing fee may result in dismissal of the case. Thereafter, monthly payments shall be forwarded to the Court in accordance with 28 U.S.C. § 1915(b)(2).
- ☐ **DENIED.** Plaintiff SHALL PAY THE FILING FEES IN FULL within 30 days or this case will be dismissed.
- ☒ **DENIED**, and this case is hereby DISMISSED immediately.
- ☐ **DENIED, with leave to amend within 30 days.** Plaintiff may re-submit the IFP application and Complaint to this Court, if submitted with the Certified Trust Account Statement and Disbursement Authorization. Plaintiff shall utilize the same case number. If plaintiff fails to submit the required documents within 30 days, this case shall be DISMISSED.

6/25/2019

Date

United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:19-cv-05206-AB-KES

Date: June 21, 2019

Title: CRAIG K. GARRETT v. JOSEPH MADDER, et al.

PRESENT:

THE HONORABLE KAREN E. SCOTT, U.S. MAGISTRATE JUDGE

Jazmin Dorado
Courtroom Clerk

Not Present
Court Reporter

ATTORNEYS PRESENT FOR
PLAINTIFF:
None Present

ATTORNEYS PRESENT FOR
DEFENDANTS:
None Present

PROCEEDINGS (IN CHAMBERS):

**Attachment to Order Recommending
Denial of Request to Proceed IFP**

On June 5, 2019, pro se Plaintiff Craig K. Garrett (“Plaintiff”) constructively filed a civil rights complaint under 42 U.S.C. § 1983, against the following five Defendants in their individual and official capacities: (1) Joseph Madder, Deputy Public Defender; (2) Brock (or John) Lewis, Deputy District Attorney; (3) Jerry Sies, Plaintiff’s appointed appellate counsel; (4) Sarah Langston (or Davis), Deputy Public Defender; and (5) Marta Stanton, Plaintiff’s appointed appellate counsel. (Dkt. 7.) Plaintiff requests to proceed in forma pauperis (“IFP”). (Dkts. 3, 8.) The Court recommends denying this request because the Complaint is frivolous.

The Complaint is frivolous because it names only public defenders and prosecutors as Defendants and the factual allegations concern only the Defendants’ roles as legal advocates. When public defenders are acting in their role as advocate, they are not acting under color of state law for § 1983 purposes. See Georgia v. McCollum, 505 U.S. 42, 53 (1992); Polk County v. Dodson, 454 U.S. 312, 320-25 (1981). Prosecutors are entitled to immunity when they are acting pursuant to their official role as advocate for the state performing functions “intimately associated with the judicial phase of the criminal process.” Imbler v. Pachtman, 424 U.S. 409, 430 (1976). Alternatively, Plaintiff’s claims are barred by Heck v. Humphrey, 512 U.S. 477, 483-87 (1994), because he alleges constitutional violations that would necessarily imply the invalidity of two of his convictions, both of which have not been invalidated.

This is Plaintiff’s third strike under 28 U.S.C. § 1915(g). The Court finds that Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:19-cv-05206-AB-KES

Date: June 21, 2019
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has accrued the following two prior strikes:

1. 2:02-cv-01923, Craig K. Garrett v. William Duncan (Central District of California): This case was dismissed without prejudice because Plaintiff admitted in the complaint that he failed to exhaust administrative remedies. See O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (“[W]hen a district court disposes of an in forma pauperis complaint ‘on the grounds that [the claim] is frivolous, malicious, or fails to state a claim upon which relief may be granted,’ such a complaint is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such dismissal as denial of the prisoner’s application to file the action without prepayment of the full filing fee.”); El-Shaddai v. Zamora, 833 F.3d 1036, 1043-45 (9th Cir. 2016) (dismissal for failure to exhaust counts as a strike when the failure is clear from the face of the complaint).¹
2. 3:19-cv-00510, Garrett v. Diaz, et al. (Southern District of California): In this case, the complaint was dismissed with leave to amend on screening because Plaintiff failed to state a claim. Plaintiff chose to appeal to the Ninth Circuit instead of filing an amended complaint. See Harris v. Mangum, 863 F.3d 1133 (9th Cir. 2017) (holding that dismissal with leave to amend for failure to state a claim constituted a strike, where the plaintiff failed to amend so the case was involuntarily dismissed under Rule 41(b)); Windham v. Franklin, No. CV 16–5888, 2018 WL 1626250, at *3 (C.D. Cal. Jan. 25, 2018) (applying Harris to voluntary dismissals). This case counts as a strike despite the fact that the appeal is pending (Dkt. 19-55638). See Coleman v. Tollefson, __ U.S. __, 135 S.Ct. 1759, 1763 (2015) (“A prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of an appeal.”).

Initials of Deputy Clerk JD

¹ The Court notes that case no. 2:16-cv-00784, Craig Kaiser Garrett v. J. Gastelo, et al. (Central District of California) may also count as a strike. That case was dismissed on a motion for summary judgment for failure to exhaust. Washington v. LASD, 833 F.3d 1048 (9th Cir. 2016) and El-Shaddai distinguish that dismissals for a defect apparent on the face of the complaint count as a strike, while dismissals requiring consideration of documents outside the four corners of the complaint do not (unless the order explicitly states that summary judgment is proper because the complaint is frivolous, malicious, or fails to state a claim). Following this reasoning, however, means that litigants could make false allegations in the complaint to survive screening and thus avoid a strike, a result at odds with the purposes of the Prison Litigation Reform Act. Here, Plaintiff first alleged that he did not exhaust his claims because he was denied access to the grievance process; in both of his amended complaints, however, he alleged that he exhausted the grievance process. On summary judgment, the Court found that Plaintiff neither exhausted the grievance process nor adduced evidence of any facts (including his own declaration) from which the Court could infer that administrative remedies were unavailable to him.