

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 23 2020

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

JASON LEE HARRIS,

Plaintiff-Appellant,

v.

STATE OF ARIZONA; et al.,

Defendants-Appellees.

No. 20-16084

D.C. No.
2:20-cv-00886-JJT-MHB
District of Arizona,
Phoenix

ORDER

Before: THOMAS, Chief Judge, SCHROEDER and CALLAHAN, Circuit Judges.

On July 2, 2020, this court issued an order staying appellate proceedings pending disposition of the motion for relief from the judgment in the district court.

On July 15, 2020, the district court denied the motion. The stay order filed July 2, 2020, is lifted.

This court has reviewed the notice of appeal filed May 29, 2020 in the above-referenced district court docket pursuant to the pre-filing review order entered in docket No. 15-80223. Because the appeal is so insubstantial as to not warrant further review, it shall not be permitted to proceed. *See In re Thomas*, 508 F.3d 1225 (9th Cir. 2007). Appeal No. 20-16084 is therefore dismissed.

This order, served on the district court for the District of Arizona, shall constitute the mandate of this court.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained.

DISMISSED.

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ORDER

The court's records reflect that the notice of appeal was filed during the pendency of a timely-filed motion listed in Federal Rule of Appellate Procedure 4(a)(4), and that motion is still pending in the district court. The May 29, 2020 notice of appeal is therefore ineffective until entry of the order disposing of the last such motion outstanding. *See Fed. R. App. P. 4(a)(4).* Accordingly, proceedings in this court are held in abeyance pending the district court's resolution of the pending May 22, 2020 motion. *See Leader Nat'l Ins. Co. v. Indus. Indem. Ins. Co.*, 19 F.3d 444, 445 (9th Cir. 1994).

Within 14 days after the district court's ruling on the pending motion, appellant shall file a written notice in this court: (1) informing this court of the district court's ruling; and (2) stating whether appellant intends to prosecute this appeal.

To appeal the district court's ruling on the post-judgment motion, appellant must file an amended notice of appeal within the time prescribed by Federal Rule of Appellate Procedure 4.

The Clerk shall serve this order on the district court.

FOR THE COURT:

**MOLLY C. DWYER
CLERK OF COURT**

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

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jason Lee Harris,

No. CV 20-00886-PHX-JJT (MHB)

Plaintiff,

V.

ORDER

State of Arizona, *et al.*,

Defendants.

Plaintiff Jason Lee Harris, a prisoner confined in an MCSO jail, filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and an Application to Proceed In Forma Pauperis (Doc. 2). Because Plaintiff had accumulated more than three strikes under 28 U.S.C. § 1915(g) and did not allege an imminent threat of serious physical harm in his Complaint, the Court dismissed this case pursuant to § 1915(g) (Doc. 5). Plaintiff has filed a “Motion for Relief from Final Judgment; to Set Aside Judgment; Oversight and Omissions” (Doc. 7), a Notice of Appeal (Doc. 8) and an Amended Notice of Appeal (Doc. 10), a motion to supplement his motion for relief from judgment (Doc. 12), and a second motion to supplement his motion for relief from judgment (Doc. 13). The Court will grant the motions to supplement the motion for relief from judgment and deny the motion for relief from judgment.

I. Complaint

In his Complaint, Plaintiff named the State of Arizona, a Maricopa County Sheriff's Officer, and Maricopa County. Plaintiff purported to seek an injunction under the *Younger*

1 abstention doctrine, i.e., intervention in his pending state court criminal case; and asserted
 2 a conspiracy in violation of equal protection based on the commencement of the criminal
 3 case and a violation of the Excessive Bail Clause of the Eighth Amendment. He also
 4 asserted a violation of 28 U.S.C. § 2283.¹ Plaintiff did not allege facts to support an
 5 imminent risk of serious physical injury at the time he filed his Complaint and made only
 6 vague, conclusory, and implausible assertions of potential physical harm, without factual
 7 support, based upon his detention and indictment.² The Court dismissed the Complaint and
 8 this action pursuant to 28 U.S.C. § 1915(g) because he had accumulated three strikes for
 9 failure to state a claim in previous § 1983 cases and he did not allege an imminent risk of
 10 serious physical harm.

11 **II. Motion for Relief from Judgment**

12 Motions for reconsideration should be granted only in rare circumstances.
 13 *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). A motion for
 14 reconsideration is appropriate where the district court “(1) is presented with newly
 15 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust,
 16 or (3) if there is an intervening change in controlling law.” *Sch. Dist. No. 1J, Multnomah*
 17 *County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Such motions should not be
 18 used for the purpose of asking a court ““to rethink what the court had already thought
 19 through – rightly or wrongly.”” *Defenders of Wildlife*, 909 F. Supp. at 1351 (quoting *Above*
 20 *the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A motion
 21 for reconsideration “may not be used to raise arguments or present evidence for the first

23 ¹ Section 2283 provides that “[a] court of the United States may not grant an
 24 injunction to stay proceedings in a State court except as expressly authorized by an Act of
 25 Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its
 judgments.” A § 2283 claim has no bearing on the applicability of 28 U.S.C. § 1915(g).

26 ² Documents attached to the Complaint, and the criminal docket, reflected that
 Plaintiff was arrested and had an initial appearance on March 31, 2020, and was released
 27 subject to certain conditions as part of an effort to decrease the Jail population because of
 Covid-19. (Doc. 1-2 at 37-38); <http://www.superiorcourt.maricopa.gov/docket/Criminal.CourtCases/caseInfo.asp?caseNumber=CR2020-113551> (last accessed July 7, 2020). On
 28 May 26, 2020, Plaintiff pleaded guilty to indecent exposure and sexual abuse. *See id.*
 Sentencing appears to be scheduled for July 15, 2020.

1 time when they could reasonably have been raised earlier in the litigation.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Nor may a motion for reconsideration repeat any argument previously made in support of or in opposition to a motion. *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D. Ariz. 2003). Mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988).

8 In his motion for relief from judgment, as supplemented, Plaintiff seeks
9 reconsideration on the ground that the Court failed to consider application of the *Younger*
10 abstention doctrine. Applicability of the *Younger* abstention doctrine has no bearing on
11 whether Plaintiff has accumulated three strikes or whether he alleged an imminent risk of
12 serious physical harm, and Plaintiff does not claim that the Court clearly erred in finding
13 that he had not alleged an imminent risk of serious physical harm. Plaintiff otherwise fails
14 to show that the Court clearly erred, that its previous order was manifestly unjust, or that
15 there was an intervening change in controlling law. Plaintiff’s motion for relief from the
16 judgment will be denied.

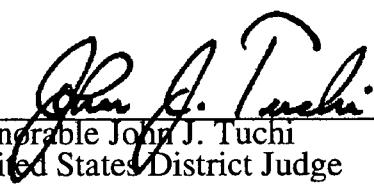
17 **IT IS ORDERED:**

18 (1) Plaintiff’s motions to supplement the motion for relief from judgment
19 (Docs. 12 & 13) are **granted**.

20 (2) The motion for relief from judgment (Doc. 7) is **denied**.

21 (3) The Clerk of Court must transmit a copy of this Order to the Ninth Circuit
22 Court of Appeals, No. 20-16084.

23 Dated this 15th day of July, 2020.

24 
25 Honorable John J. Tuchi
26 United States District Judge
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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Jason Lee Harris,

No. CV 20-00886-PHX-JJT (MHB)

10 Plaintiff,

11 v.

12 ORDER

13 State of Arizona, *et al.*,

14 Defendants.

15 Plaintiff Jason Lee Harris is a prisoner who is currently confined in an MCSO jail.
16 Plaintiff has filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and
17 an Application to Proceed In Forma Pauperis (Doc. 2). Because Plaintiff has accumulated
18 more than three strikes under 28 U.S.C. § 1915(g) and does not allege an imminent threat
19 of serious physical harm in the Complaint in this case, the Court will dismiss this case
20 pursuant to § 1915(g).

21 I. "Three Strikes" Provision of 28 U.S.C. § 1915(g)

22 A prisoner may not bring a civil action or appeal a civil judgment in forma pauperis
23 if:

24 the prisoner has, on 3 or more prior occasions, while incarcerated or detained
25 in any facility, brought an action or appeal in a court of the United States that
26 was dismissed on the grounds that it is frivolous, malicious, or fails to state
27 a claim upon which relief may be granted, unless the prisoner is under
28 imminent danger of serious physical injury.

1 28 U.S.C. § 1915(g). A prisoner barred from proceeding in forma pauperis pursuant to
2 § 1915(g) may proceed under the fee provisions of 28 U.S.C. §§ 1911-14 applicable to
3 everyone else. *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996).

4 **II. Prior Dismissals**

5 “[Section] 1915(g) should be used to deny a prisoner’s IFP status only when, after
6 careful evaluation of the order dismissing an action, and other relevant information, the
7 district court determines that the action was dismissed because it was frivolous, malicious
8 or failed to state a claim.” *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005). “In some
9 instances, the district court docket records may be sufficient to show that a prior dismissal
10 satisfies at least one of the criteria under § 1915(g) and therefore counts as a strike.” *Id.* at
11 1120. At least three of Plaintiff’s prior actions were dismissed as frivolous, malicious, or
12 as failing to state a claim. *See Harris v. Maricopa County Sheriff’s Office*, CV 09-0695-
13 PHX-SRB (D. Ariz. June 26, 2009) (failure to state a claim); *Harris v. Ariz. Dep’t of Corr.*,
14 CV 09-0841-PHX-SRB (D. Ariz. Aug. 4, 2009) (same); and *Harris v. Farrugia*, CV 09-
15 0737-PHX-SRB (D. Ariz. Sept. 8, 2009) (same); *see also Harris v. Down*, CV14-0600-
16 PHX-SRB (D. Ariz. Apr. 25, 2014); and *Harris v. Mullins*, CV16-04473-PHX-SRB (D.
17 Ariz. Jan. 18, 2017), *appeal dismissed as frivolous* (9th Cir. Apr. 18, 2017).

18 **III. Failure to Allege Imminent Danger of Serious Physical Injury**

19 If a plaintiff has three strikes, as Plaintiff does, he may bring a civil action without
20 complete prepayment of the \$350.00 filing fee and \$50.00 administrative fee only if he is
21 in imminent danger of serious physical injury. 28 U.S.C. § 1915(g). To meet the “imminent
22 danger” requirement, the “threat or prison condition [must be] real and proximate,”
23 *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003) (quoting *Lewis v. Sullivan*, 279 F.3d
24 526, 531 (7th Cir. 2002)), and the allegations must be “specific or credible.” *Kinnell v.*
25 *Graves*, 265 F.3d 1125, 1128 (10th Cir. 2001). “[T]he exception applies if the complaint
26 makes a plausible allegation that the prisoner faced ‘imminent danger of serious physical
27 injury’ at the time of filing.” *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th Cir. 2007)
28 (quoting § 1915(g)). Moreover, although a court considering a motion to proceed in forma

1 pauperis, "should not attempt to evaluate the seriousness of a plaintiff's claims[...] it has
2 never been the rule that courts must blindly accept a prisoner's allegations of imminent
3 danger." *Taylor v. Watkins*, 623 F.3d 483, 485 (7th Cir. 2010).

4 In his Complaint, Plaintiff names the State of Arizona, a Maricopa County Sheriff's
5 Officer, and Maricopa County. Plaintiff purports to seek an injunction under the *Younger*
6 Doctrine, i.e., intervention in his pending state court criminal case; and asserts a conspiracy
7 in violation of equal protection based on the commencement of the criminal case; and a
8 violation of the Excessive Bail Clause of the Eighth Amendment.

9 Plaintiff has not alleged facts to support an imminent risk of serious physical injury
10 at the time he filed his Complaint. He makes only makes vague, conclusory, and
11 implausible assertions of potential physical harm, without factual support, based upon his
12 detention and indictment.¹

13 Because Plaintiff fails to plausibly allege facts to support an imminent risk of serious
14 physical injury, the Complaint and this action will be dismissed without prejudice pursuant
15 to 28 U.S.C. § 1915(g) for failure to pre-pay the \$350.00 filing fee and \$50.00
16 administrative fee. If Plaintiff wishes to reassert his claims in a new § 1983 case in the
17 future, he must pre-pay the entire filing and administrative fees when he files the new
18 action.

19 **IT IS ORDERED:**

20 (1) The Complaint (Doc. 1) and this action are dismissed pursuant to 28 U.S.C.
21 § 1915(g) without prejudice to Plaintiff filing a complaint in a new case accompanied by
22 the full \$350.00 filing fee and \$50.00 administrative fee.

23 (2) Plaintiff's Application to Proceed In Forma Pauperis (Doc. 2) is denied.

24 (3) The docket shall reflect that the Court certifies, pursuant to 28 U.S.C.
25

26 ¹ Documents attached to the Complaint, and the criminal docket, reflect that
27 Plaintiff was arrested and had an initial appearance on March 31, 2020 and, subject to
28 conditions, was released as part of an effort to decrease the Jail population because of
Covid-19. (Doc. 1-2 at 37-38); <http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2020-113551>, last accessed May 7, 2020.
Plaintiff is represented by counsel in his criminal case.

§ 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), that any appeal of this decision would not be taken in good faith.

Dated this 13th day of May, 2020.

Honorable John J. Tuchi
United States District Judge