

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 27 2021

FOR THE NINTH CIRCUIT

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

IAN LAMONTE CORMIER,

Plaintiff-Appellant,

v.

RIVERSIDE COUNTY DISTRICT
ATTORNEY OFFICE; et al.,

Defendants-Appellees.

No. 19-56269

D.C. No. 5:19-cv-01151-SVW-
AFM

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted January 20, 2021**

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

California state prisoner Ian LaMonte Cormier appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action for failure to pay the filing fee after denying Cormier leave to proceed in forma pauperis ("IFP"). We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(Appendix-A)

court's interpretation and application of 28 U.S.C. § 1915(g), *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007), and for an abuse of discretion its denial of leave to proceed IFP, *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990). We affirm.

The district court did not abuse its discretion by denying leave to proceed IFP and properly dismissed Cormier's action after he failed to pay the filing fee because at least three of Cormier's prior federal actions or appeals qualified as "strikes" under the Prison Litigation Reform Act ("PLRA") and Cormier failed to allege that he was "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g) (requiring a prisoner who is otherwise barred from proceeding IFP under the PLRA's "three strikes" provision to show that he faces an imminent danger or pay the filing fee); *Andrews*, 493 F.3d at 1055 (discussing imminent danger exception).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or documents and facts not presented to the district court. See *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009); *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

The Clerk will provide Cormier with courtesy copies of his filings at Docket Entry Nos. 16, 17, 20. All other pending motions and requests are denied.

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

IAN LaMONTE CORMIER,

Plaintiff,

v.

RIVERSIDE COUNTY DISTRICT
ATTORNEY'S OFFICE, *et al.*,

Defendants.

Case No. 5:19-cv-01151-SVW (AFM)

**ORDER RE DISMISSAL
(FAILURE TO PAY THE FILING
FEE)**

Plaintiff, a state prisoner presently held at Patton State Hospital, lodged for filing a *pro se* civil rights action pursuant to 42 U.S.C. § 1983 on June 21, 2019, while he was being held at the Robert Presley Detention Center ("RPDC") in Riverside, California. (ECF No. 1 at 1.)

A review of past civil actions filed by plaintiff in this Court, other District Courts in the Southern and Northern Districts of California, and in the Ninth Circuit Court of Appeals reflects that plaintiff is subject to the provisions of 28 U.S.C. § 1915(g). Pursuant to § 1915(g), a prisoner may not "bring a civil action or appeal a judgment in a civil action or proceeding" without prepayment of the filing fee "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any

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1 facility, brought an action or appeal in a court of the United States that was dismissed
 2 on the grounds that it is frivolous, malicious, or fails to state a claim upon which
 3 relief may be granted, unless the prisoner is under imminent danger of serious
 4 physical injury." 28 U.S.C. §1915(g). Such dismissal is deemed a "strike."

5 The Ninth Circuit has held that the phrase "fails to state a claim on which relief
 6 may be granted" as used in §1915, parallels the language of Fed. R. Civ. P. 12(b)(6)
 7 and carries the same interpretation; that the word "frivolous" refers to a case that is
 8 "of little weight or importance; having no basis in law or fact"; and the word
 9 "malicious" refers to a case "filed with the intention or desire to harm another." See
 10 *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (explaining the terms used in
 11 §1915(g)); see also *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (defining
 12 when a case is frivolous, malicious, or duplicative). In addition, the Ninth Circuit
 13 has held that the prior denial of *in forma pauperis* ("IFP") status on the basis of
 14 frivolity or failure to state a claim constitutes a strike for purposes of §1915(g). See
 15 *O'Neal v. Price*, 531 F.3d 1146, 1153-54 (9th Cir. 2008) (also stating that a dismissal
 16 without prejudice may count as a strike). Further, a dismissal may constitute a strike
 17 for failure to state a claim if it is obvious from the face of the pleading that the claims
 18 are barred by *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), and the entire action
 19 is dismissed for a reason that qualifies as a strike under §1915(g). *Washington v.*
 20 *Los Angeles Cty. Sheriff's Dep't*, 833 F.3d 1048, 1055 (9th Cir. 2016) (holding that
 21 "a dismissal may constitute a PLRA strike . . . when *Heck*'s bar to relief is obvious
 22 from the face of the complaint, and the entirety of the complaint is dismissed for a
 23 qualifying reason under the PLRA"). Further, appellate affirmances do not count as
 24 strikes when the appeal affirms the decision of the district court, but an appeal will
 25 count as a separate strike if the appellate court "expressly states that the appeal itself
 26 was frivolous, malicious or failed to state a claim." *El-Shaddai v. Zamora*, 833 F.3d
 27 1036, 1045-46 (9th Cir. 2016).

28 Once plaintiff has accumulated three strikes, he is prohibited from pursuing

any subsequent civil action without prepayment of the filing fee, unless he makes a showing that he faced "imminent danger of serious physical injury" based on the "circumstances at the time of the filing of the complaint." *Andrews v. Cervantes*, 493 F.3d 1047, 1052-53, 1056-57 (9th Cir. 2007).

Finally, the Ninth Circuit has held that, pursuant to the language of the statute and other relevant definitions of "prisoner," "a court may screen a complaint pursuant to 28 U.S.C. §1915A only if, at the time the plaintiff files the complaint, he is 'incarcerated or detained in any facility [because he] is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.'" *Olivas v. Nev. ex rel. Dep't of Corr.*, 856 F.3d 1281, 1284 (9th Cir. 2017) (alteration in original). This definition of "prisoner" applies to §1915. *See Page v. Torrey*, 201 F.3d 1136, 1139-40 (9th Cir. 2000).

In light of the foregoing standards, the Court takes judicial notice of the following prior civil actions filed by plaintiff in the District Courts of California or in the Ninth Circuit Court of Appeal that qualify as strikes for purposes of §1915(g). *See Fed. R. Evid.* 201(b)(2), (c)(1).

(1) *Cormier v. Liggins*, Case No. CV 01-0364-K (LSP), in the Southern District of California, in which the case was dismissed on May 8, 2001, for failure to state a claim and as barred by *Heck*. (No. 01-0364, ECF No. 2 at 4-7, No. 3.) The district court also found in *Liggins* that plaintiff already had three prior strikes within the meaning of §1915(g). (No. 01-0364, ECF No. 2 at 4.) On Appeal, in Case No. 01-55857, the Ninth Circuit affirmed the district court's dismissal in *Liggins*. (No. 01-0364, ECF Nos. 15-16.) The *Liggins* case, as well as the three earlier cases cited in that case (see below), all count as separate strikes, constituting four prior strikes.

a. *Cormier v. People of the State of California*, Case No. CV 00-0249-L (RBB), in the Southern District of California, in which the case

1 was dismissed on March 21, 2000, for failure to state a claim and as
2 barred by *Heck*. The district court indicated that the dismissal may
3 be considered as a strike. (No. 00-0249, ECF No. 7 at 10-11, No. 8.)
4 The district court's decision was affirmed on appeal. (No. 00-0249,
5 ECF No. 18.)

6 b. *Cormier v. Manny*, Case No. CV 00-0025-W (CGA), in the Southern
7 District of California, in which the case was dismissed on May 1,
8 2000, for failure to state a claim. Further, the district court indicated
9 that the dismissal may count as a strike. (No. 00-0025, ECF No. 16.)

10 c. *Cormier v. California*, Case No. CV 00-0004-L (RBB), in the
11 Southern District of California, in which the case was dismissed on
12 May 11, 2000, for failure to state a claim and as barred by *Heck*. (No.
13 00-0004, ECF No. 14 at 7-8, No. 15.)

14 (2) *Cormier v. Suter*, Case No. EDCV 11-0801-UA (MLG), in the Central
15 District of California, in which plaintiff's IFP Request was denied and the
16 case dismissed as frivolous on June 3, 2011. (No. 11-0801, ECF No. 2.)
17 In addition, the Ninth Circuit affirmed the district court's dismissal and
18 found that plaintiff's appeal was frivolous. (No. 11-0801, ECF Nos. 9, 12.)

19 (3) *Cormier v. Siegler*, Case No. CV 11-4907-ABC (MLG), in the Central
20 District of California, in which, on July 22, 2011, plaintiff's IFP Request
21 was denied as frivolous, malicious, or fails to state a claim, and the District
22 Judge indicated that the dismissal may count as a strike. (No. 11-4907,
23 ECF No. 4 at 1). On Appeal, the Ninth Circuit affirmed the district court
24 and found that the appeal was frivolous. (See No. 11-4907, ECF Nos. 10,
25 16; 530 Fed. Appx. 624 (9th Cir. 2013).)

26 Because plaintiff had already accumulated significantly more than three strikes
27 (at least six) before he initiated this action, plaintiff is precluded from proceeding IFP
28 herein unless and until he can show that, at the time this action was initiated, he was

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(APPENDIX-B)

1. "under imminent danger of serious physical injury." 28 U.S.C. §1915(g). The
2. availability of the "imminent danger" exception "turns on the conditions a prisoner
3. faced at the time the complaint was filed, not at some earlier or later time." See
4. *Andrews*, 493 F.3d at 1053 (emphasis added). Further, plaintiff "bears the ultimate
5. burden of persuading the court that §1915(g) does not preclude IFP status." *Richey*
6. *v. Dahne*, 807 F.3d 1202, 1206 (9th Cir. 2015). Here, plaintiff was detained at the
7. RPDC at the time that he initiated this action, but plaintiff does not name as
8. defendants any officials at the RPDC in this case. Nor does the Complaint in this
9. action raise allegations concerning the conditions that plaintiff faced at the RPDC at
10. the time that he filed the Complaint. Accordingly, nothing in the factual allegations
11. in the Complaint raises a reasonable inference that plaintiff faced "imminent danger
12. of serious physical injury" at the time that he initiated this action. 28 U.S.C.
13. §1915(g).

14. On August 8, 2019, plaintiff was ordered to pay the filing fee in this action or
15. show cause in writing why he should not be denied leave to proceed IFP and why
16. this action should not be dismissed pursuant to 28 U.S.C. §1915(g), no later than
17. August 23, 2019. Plaintiff was admonished that failure to comply with this Order
18. will be deemed by the Court as plaintiff's consent to the dismissal of this action. On
19. September 3, 2019, plaintiff submitted his debit card information for payment of the
20. filing fee. On September 10, 2019, plaintiff was advised that the Court accepts only
21. cashier's checks, certified bank checks, business or corporate checks, government
22. issued checks, or money orders drawn on a major American bank or the United States
23. Postal Service. Plaintiff's deadline for payment was extended to October 1, 2019. A
24. review of the docket as of the date of this Order indicates that the filing fee has not
25. been paid by plaintiff.

26. In addition, plaintiff's September 3 response claims that Riverside County
27. Deputy Sheriff Ibarra placed an edible item on his dinner tray on Easter, which
28. prompted severe diarrhea. The Complaint alleges that plaintiff's interactions with

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(APPENDIX-B)

1 Deputy Ibarra took place at Moreno Valley Community Hospital. At the time he
2 filed the Complaint, however, plaintiff was being held at the RPDC, and he does not
3 name as defendants any officials at that facility. Moreover, the alleged events on
4 Easter were months before the filing of the Complaint on June 21, 2019. Thus,
5 plaintiff's allegations do not give rise to a showing of an "imminent danger of serious
6 physical injury" at the time the Complaint was filed.

7 Accordingly, this case is hereby dismissed without prejudice due to plaintiff's
8 failure to pay the filing fee.

9 IT IS SO ORDERED.

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11 DATED: October 17, 2019

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14 _____
15 STEPHEN V. WILSON
16 UNITED STATES DISTRICT JUDGE
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(APPENDIX-B)

**Additional material
from this filing is
available in the
Clerk's Office.**