

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY 31 2022

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

IAN LAMONTE CORMIER,

No. 21-55308

Plaintiff-Appellant,

D.C. No. 5:20-cv-01877-SVW-AFM

v.

LYNN E. WILLIAMS, Correctional Officer
in official capacity; KENNETH SELPH,
Correctional Officer, in official capacity; J.
PERRY, Control Booth Officer, in official
capacity; NYGENE, Acting Defense
Attorney, in official capacity; RIVERSIDE
SUPERIOR COURTHOUSE CLAIMS
PROCESSING OFFICE,

MEMORANDUM*

Defendants-Appellees.

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

Submitted May 17, 2022**

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

Ian LaMonte Cormier appeals pro se from the district court's order

* 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"

dismissing his action alleging various claims for failure to pay the filing fee after denying Cormier's motion to proceed in forma pauperis ("IFP"). We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's interpretation and application of 28 U.S.C. § 1915(g). *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007). We affirm.

 The district court properly denied Cormier's motion to proceed IFP because Cormier had filed at least three prior actions that were dismissed as frivolous, malicious, or for failure to state a claim, and Cormier did not plausibly allege that he was "under imminent danger of serious physical injury" at the time he lodged the complaint. *See* 28 U.S.C. § 1915(g); *Andrews*, 493 F.3d at 1052-53, 1055-56 (discussing the imminent danger exception to § 1915(g)).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Cormier's request to submit the case for decision without oral argument (Docket Entry No. 5) is granted. All other pending motions and requests are denied.

AFFIRMED.

(2)
(APPENDIX A CONT'D)

21-55308

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

IAN LaMONTE CORMIER,

Plaintiff,

1

LYNNE E. WILLIAMS, *et al.*,

Defendants.

Case No. 5:20-cv-01877-SVW (AFM)

**ORDER DENYING LEAVE TO
PROCEED WITHOUT
PREPAYMENT OF FILING FEES
AND DISMISSING ACTION
PURSUANT TO 28 U.S.C. § 1915(g)**

Plaintiff, a prisoner who is presently being held at the Larry D. Smith Correctional Facility (“SCF”), in Banning, California, filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983 on September 8, 2020. (ECF No. 1.) Plaintiff did not prepay the filing fees. Instead, plaintiff filed a request to proceed in this action without prepayment of the filing fees (“IFP”), which did not include a completed prisoner authorization form including the required certified prisoner trust account statement. (See ECF No. 2.)

Pursuant to the provisions of the Prison Litigation Reform Act (“PLRA”), in particular 28 U.S.C. § 1915(e)(2)(B) and § 1915A, the Court screened the Complaint to determine whether plaintiff’s action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is

"Appendix B"

1 immune from such relief. Section 1915A requires the Court to screen any “complaint
 2 in a civil action” if, at the time the plaintiff files the complaint, he or she is a prisoner
 3 seeking “redress from a governmental entity or officer.” *See, e.g., Olivas v. Nev.*
 4 *ex rel. Dep’t of Corr.*, 856 F.3d 1281, 1283 (9th Cir. 2017).¹ In connection with the
 5 initial screening, the Court considered the PLRA’s “three-strikes rule” as set forth in
 6 28 U.S.C. § 1915(g).

7 As set forth below, a review of past civil actions filed by plaintiff while a
 8 prisoner reflects that plaintiff is subject to the provisions of 28 U.S.C. §1915(g).
 9 Additionally, the Court takes judicial notice of other recent actions plaintiff filed in
 10 the Central District of California. Plaintiff filed *Cormier v. Cooper*, Case No. 5: 20-
 11 cv-01722-SVW (AFM), on August 25, 2020. Plaintiff’s request to process without
 12 prepayment of filing fees therein was denied upon a finding that plaintiff had already
 13 accumulated more than three strikes before he initiated that action. On October 20,
 14 2020, plaintiff’s Case No. 5:20-cv-01722 was dismissed without prejudice by this
 15 Court pursuant to 28 U.S.C. §1915(g) after plaintiff failed to pay the filing fees. (No.
 16 5:20-cv-01722, ECF No. 8.) In that action, plaintiff’s request to proceed IFP in an
 17 appeal was denied by the Ninth Circuit pursuant to 28 U.S.C. §1915(g) on
 18 January 15, 2021. (No. 5:20-cv-01722, ECF No. 14.) Further, the Ninth Circuit
 19 recently denied plaintiff’s appeal of another civil action that plaintiff filed in this
 20 court, *Cormier v. Riverside Cnty. DA Office*, Case No. 5:19-cv-01151-SVW (AFM).
 21 The Ninth Circuit held that the Court did not abuse its discretion in denying plaintiff
 22 leave to proceed IFP pursuant to 28 U.S.C. § 1915(g) and dismissing plaintiff’s action

23
 24 ¹ Plaintiff appears to have been a prisoner at the time that he filed this action because he entered a
 25 prison number on his Complaint, he stated in his Complaint that he resided at that time at the Robert
 26 Presley Detention Center (“RPDC”), and he filed an IFP Request stating that he was a “prisoner-
 27 plaintiff” who was then housed at the RPDC. (ECF No. 1 at 1-2; ECF No. 2 at 1.) Section 1915A,
 28 is applicable to this action because, at the time plaintiff filed his complaint, he was “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*, 856 F.3d at 1284 (alteration in original); *see also Page*
v. Torrey, 201 F.3d 1136, 1139-40 (9th Cir. 2000).

1 after he failed to pay the filing fees or show that he was “under imminent danger of
 2 serious physical injury” at the time that he initiated Case No. 5:19-cv-01151 in June
 3 2019. *See Cormier v. Riverside Cnty. DA Office*, 2021 U.S. App. Lexis 2265, at *1-
 4 *2 (9th Cir. Jan. 27, 2021).

5 Pursuant to §1915(g), a prisoner may not “bring a civil action or appeal a
 6 judgment in a civil action or proceeding” without prepayment of the filing fees “if
 7 the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any
 8 facility, brought an action or appeal in a court of the United States that was dismissed
 9 on the grounds that it is frivolous, malicious, or fails to state a claim upon which
 10 relief may be granted, unless the prisoner is under imminent danger of serious
 11 physical injury.” 28 U.S.C. §1915(g). Such dismissal is deemed a “strike.” The
 12 Ninth Circuit has held that the phrase “fails to state a claim on which relief may be
 13 granted” as used in §1915(g), parallels the language of Fed. R. Civ. P. 12(b)(6) and
 14 carries the same interpretation; that the word “frivolous” refers to a case that is “of
 15 little weight or importance: having no basis in law or fact”; and the word “malicious”
 16 refers to a case “filed with the ‘intention or desire to harm another.’” *See Andrews*
 17 *v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (explaining the terms used in §1915(g)).
 18 In addition, the Ninth Circuit has held that the prior denial of IFP status on the basis
 19 of frivolity or failure to state a claim constitutes a strike for purposes of §1915(g).
 20 *See O’Neal v. Price*, 531 F.3d 1146, 1153-55 (9th Cir. 2008) (also stating that a
 21 dismissal without prejudice may count as a strike). Appellate affirmances, however,
 22 do not count as strikes when the appeal merely affirms the decision of the district
 23 court, but an appeal of a dismissal will count as a separate strike if the appellate court
 24 “expressly states that the appeal itself was frivolous, malicious or failed to state a
 25 claim.” *El-Shaddai v. Zamora*, 833 F.3d 1036, 1045-46 (9th Cir. 2016). Finally, the
 26 Supreme Court has confirmed that Section 1915(g) applies “to any dismissal for
 27 failure to state a claim, whether with prejudice or without.” *Lomax v. Ortiz-Marquez*,
 28 140 S. Ct. 1721, 1722 (2020).

1 Once plaintiff has accumulated three strikes, he is prohibited from pursuing
 2 any subsequent civil action without prepayment of the filing fees, unless he makes a
 3 showing that he was “under imminent danger of serious physical injury” based on
 4 the circumstances “at the time the complaint was filed, not at some earlier or later
 5 time.” *Andrews v. Cervantes*, 493 F.3d 1047, 1052-53 (9th Cir. 2007); 28 U.S.C.
 6 § 1915(g). A “prisoner bears the ultimate burden of persuading the court that
 7 § 1915(g) does not preclude IFP status.” *Richey v. Dahne*, 807 F.3d 1202, 1206 (9th
 8 Cir. 2015).

9 In light of the foregoing standards, the Court has taken judicial notice of the
 10 following prior civil actions filed by plaintiff in the district courts of California or in
 11 the Ninth Circuit Court of Appeal that qualify as strikes for purposes of §1915(g).
 12 *See* Fed. R. Evid. 201(b)(2), (c)(1):

13 (1) *Cormier v. Liggins*, Case No. CV 01-00364-K (LSP), in the Southern
 14 District of California, in which the case was dismissed on May 8, 2001, for
 15 failure to state a claim. (No. 01-00364, ECF No. 2 at 4-7; No. 3.) The
 16 district court also found in *Liggins* that plaintiff already had three prior
 17 strikes within the meaning of §1915(g). (No. 01-00364, ECF No. 2 at 4.)
 18 On Appeal, in Case No. 01-55857, the Ninth Circuit affirmed the district
 19 court’s dismissal in *Liggins*. (No. 01-00364, ECF Nos. 15-16.) The
 20 *Liggins* case, as well as the three earlier cases cited in that case (*see* below),
 21 all count as separate strikes, constituting four prior strikes.

22 a. *Cormier v. People of the State of California*, Case No. CV 00-00249-
 23 L (RBB), in the Southern District of California, in which the case
 24 was dismissed on March 21, 2000, for failure to state a claim and as
 25 barred by *Heck*. The District Court indicated the dismissal may
 26 count as a strike. (No. 00-00249, ECF No. 7 at 10-11, No. 8.) The
 27 District Court’s dismissal was affirmed on appeal. (No. 00-00249,
 28 ECF No. 18.)

b. *Cormier v. Manny*, Case No. CV 00-00025-W (CGA), in the Southern District of California, in which the case was dismissed on May 1, 2000, for failure to state a claim. The District Court indicated the dismissal may count as a strike. (No. 00-00025, ECF No. 16.)

c. *Cormier v. California*, Case No. CV 00-00004-L (RBB), in the Southern District of California, in which the case was dismissed on May 11, 2000, for failure to state a claim and as barred by *Heck*. (No. 00-00004, ECF No. 14 at 7-8, No. 15.)

(2) *Cormier v. Suter*, Case No. EDCV 11-00801-UA (MLG), in the Central District of California, in which plaintiff's request to proceed IFP was denied and the case was dismissed as frivolous on June 3, 2011. (No. 11-00801, ECF No. 2.) In addition, the Ninth Circuit affirmed the district court's dismissal and found that plaintiff's appeal was frivolous. (No. 11-00801, ECF Nos. 9, 12.)

(3) *Cormier v. Siegler*, Case No. CV 11-04907-ABC (MLG), in the Central District of California, in which, on July 22, 2011, plaintiff's request to proceed IFP was denied as frivolous, malicious, or for failing to state a claim, and the district judge indicated the dismissal may count as a strike. (No. 11-04907, ECF No. 4 at 1). On Appeal, the Ninth Circuit affirmed the district court and found that the appeal was frivolous. (See No. 11-04907, ECF Nos. 10, 16; 530 Fed. Appx. 624 (9th Cir. 2013).)

(4) *Cormier v. Comey*, Case No. 20-55320, in the Ninth Circuit, in which plaintiff's request to proceed IFP was denied and the appeal was dismissed on August 21, 2020, "as frivolous pursuant to 28 U.S.C. § 1915(e)(2)." (See Case No. EDCV 19-01198 SVW (AFM), ECF Nos. 26, 29, 31.)

26 Accordingly, plaintiff had already accumulated more than three strikes before he
27 filed this action in September 2020. Because plaintiff had accumulated more than
28 three strikes before he initiated this action, plaintiff is precluded from proceeding IFP

1 herein unless and until he can show that, at the time he initiated this action, he was
 2 “under imminent danger of serious physical injury.” 28 U.S.C. §1915(g).

3 The availability of the “imminent danger” exception “turns on the conditions
 4 a prisoner faced at the time the complaint was filed, not at some earlier or later time.”
 5 *See Andrews*, 493 F.3d at 1053. A prisoner, however, must be provided with the
 6 opportunity to be heard on the matter before denying a request to proceed IFP or
 7 dismissing an action pursuant to 28 U.S.C. §1915(g). The assigned magistrate judge
 8 issued an Order to Pay the Filing Fees or Show Cause (“OSC”) why plaintiff should
 9 not be denied leave to proceed IFP and why this action should not be dismissed
 10 pursuant to 28 U.S.C. §1915(g). (ECF No. 4.) Plaintiff was admonished in the OSC
 11 that he would be precluded from proceeding IFP in this action unless he can show in
 12 writing that, at the time he initiated this action, he was “under imminent danger of
 13 serious physical injury.” (*Id.* at 4-5, citing 28 U.S.C. §1915(g).) Plaintiff also was
 14 explicitly informed that the action would be dismissed if he did not either pay the full
 15 filing fees or show cause why he should not be denied leave to proceed IFP on or
 16 before October 15, 2020. (*Id.* at 5.)

17 Plaintiff was detained at the Robert Presley Detention Center (“RPDC”) in
 18 Riverside at the time that he initiated this action in September 2020. (ECF No. 1.)
 19 Plaintiff’s claims in this action are raised against officials at the Salinas Valley State
 20 Prison, the Riverside District Attorney’s Office, and the Riverside Superior Court.
 21 (*Id.* at 3-4.) No claims in this action are raised against any official at the RPDC or at
 22 the SCF, plaintiff’s present facility, and the Complaint does not raise allegations
 23 concerning the conditions that plaintiff faced at the RPDC at the time that he filed
 24 the Complaint. Thus, nothing in the factual allegations in the Complaint raises a
 25 reasonable inference that plaintiff faced “imminent danger of serious physical injury”
 26 at the time that he initiated this action. 28 U.S.C. §1915(g).

27 On September 29, 2020, plaintiff filed a Response to the OSC. (ECF No. 5.)
 28 In his Response, plaintiff discussed factual allegations concerning his claims and

1 referenced an Order to Show Cause in one of plaintiff's other civil actions filed in
2 this Court, *Cormier v. Cooper*, Case No. 5:20-cv-01722. Plaintiff additionally
3 discusses various financial difficulties that he has encountered and health issues that
4 his mother has faced. (*Id.* at 3-4.) Plaintiff appears to argue that he has no means to
5 pay the required filing fees. To date, plaintiff has failed to pay the filing fees in this
6 action. Plaintiff does not dispute the Court's findings in the OSC that plaintiff is
7 subject to the provisions of 28 U.S.C. §1915(g) and that plaintiff had already
8 accumulated more than three strikes before he initiated this action.

9 It is plaintiff's burden to persuade the Court that he should not be precluded
10 from proceeding IFP in this action despite having previously accumulated more than
11 three strikes pursuant to Section 1915(g). *See, e.g., Richey*, 807 F.3d at 1206.
12 Plaintiff's factual allegations in the Complaint, together with his arguments in his
13 Response, fail to raise a reasonable or plausible inference that plaintiff faced
14 imminent danger of serious injury in September 2020 when he initiated this action.
15 The Court therefore finds that plaintiff has failed to show that, at the time he initiated
16 this action, he was "under imminent danger of serious physical injury." 28 U.S.C.
17 § 1915(g).

18 On January 29, 2021, plaintiff filed a document entitled "Plaintiffs [sic]
19 Motion (Demand) for Summary Judgment with Exh-A Grievance 1/21/21." (ECF
20 No. 6; "Motion.") Plaintiff attached a one-page exhibit to his Motion that appears to
21 be a copy of a Riverside County Jail Inmate Grievance Form dated January 21, 2021,
22 in which plaintiff complains about the processing of outgoing legal mail on that date.
23 (*Id.* at 3.) The grievance does not reference any threat of harm to plaintiff. In the
24 body of the Motion, plaintiff discusses some of his earlier litigation in state and
25 federal court, and he complains that deputies at the SCF "are refusing to pick up"
26 plaintiff's legal mail. (*Id.* at 1-2.) Plaintiff does not reference his failure to pay the
27 required filing fees in this action, he does not purport to dispute the Court's finding
28 that he had already accumulated more than three strikes before he initiated this action,

1 and he does not purport to state any new facts to show that he faced “imminent danger
2 of serious physical injury” when he initiated this action in September 2020. Finally,
3 although plaintiff was advised that he could avoid dismissal of the action if he paid
4 the full filing fees, plaintiff does not state that he intends to pay the filing fees, and
5 his deadline by which to do so passed nearly five months ago.

6 The Court concludes that plaintiff’s Response and Motion have completely
7 failed to show cause why plaintiff’s request to proceed IFP should not be denied or
8 why this action should not be dismissed pursuant to 28 U.S.C. §1915(g).

9 IT THEREFORE IS ORDERED that: (1) leave to proceed IFP is denied (ECF
10 No. 2), and (2) this action is dismissed without prejudice pursuant to 28 U.S.C.
11 § 1915(g).

12
13 DATED: March 11, 2021

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16 STEPHEN V. WILSON
17 UNITED STATES DISTRICT JUDGE
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 22 2022

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

IAN LAMONTE CORMIER,
Plaintiff - Appellant,
v.
LYNN E. WILLIAMS, Correctional
Officer in official capacity; et al.,
Defendants - Appellees.

No. 21-55308

D.C. No. 5:20-cv-01877-SVW-AFM
U.S. District Court for Central
California, Riverside

MANDATE

The judgment of this Court, entered May 31, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: David J. Vignol
Deputy Clerk
Ninth Circuit Rule 27-7

"Appendix C"