

APPENDIX A

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

DEC 12 2022

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

MOSES CLARK,

Plaintiff-Appellant,

v.

GLEN E., PRATT, Warden, individual and
official capacity,

Defendant-Appellee.

No. 22-55948

D.C. No.

2:22-cv-05763-FWS-PD

Central District of California,
Los Angeles

ORDER

Before: TASHIMA and CLIFTON, Circuit Judges.

Appellant's motions to proceed in forma pauperis (Docket Entry Nos. 3 and 4) are denied because appellant has had three or more prior actions or appeals dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted, and appellant has not alleged imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g); *Clark v. Romero*, No. 10-55783 (9th Cir. Aug. 24, 2010) (dismissed for failure to pay fees after denial of in forma pauperis status on frivolity grounds); *Clark v. Gambale*, No. 22-55251 (9th Cir. May 27, 2022) (appeal dismissed as frivolous); *Clark v. Gambale*, No. 2:22-cv-00641-JVS-PD (C.D. Cal. Feb. 7, 2022) (dismissed for failure to state a claim).

Within 21 days after the date of this order, appellant shall pay \$505.00 to the district court as the docketing and filing fees for this appeal and file proof of

payment with this court. Failure to pay the fees will result in the automatic dismissal of the appeal by the Clerk for failure to prosecute, regardless of further filings. *See* 9th Cir. R. 42-1.

No motions for reconsideration, clarification, or modification of the denial of appellant's in forma pauperis status shall be entertained.

If the appeal is dismissed for failure to comply with this order, the court will not entertain any motion to reinstate the appeal that is not accompanied by proof of payment of the docketing and filing fees.

Briefing is suspended pending further order of this court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: 2:22-cv-5763-FWS-PD
Title: Moses Clark v. Glen E. Pratt

Date: September 19, 2022

Present: **HONORABLE FRED W. SLAUGHTER, UNITED STATES DISTRICT JUDGE**

Melissa H. Kunig
Deputy Clerk

N/A
Court Reporter

Attorneys Present for Plaintiff:

Attorneys Present for Defendant:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER DENYING PLAINTIFF’S PETITION TO
PROCEED IN FORMA PAUPERIS [2]**

Before the court is Plaintiff Moses Clark’s (“Plaintiff”) Petition to Proceed In Forma Pauperis (“Petition”). (Dkts. 2, 4.) The court finds this matter appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78(b) (“By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.”); L.R. 7-15 (authorizing courts to “dispense with oral argument on any motion except where an oral hearing is required by statute”). Based on the record, as applied to the applicable law, the court **DENIES** the Petition **WITH PREJUDICE**.

I. Background

Plaintiff is a prisoner at the California Rehabilitation Center in Norco, California. (Dkt. 1 (“Compl.”) at 1.) On August 12, 2022, Plaintiff filed a Complaint pursuant to 42 U.S.C. § 1983, alleging violations of his First Amendment right to free exercise of religion and requesting monetary and injunctive relief. (Id. at 5-6.) In the Complaint, Plaintiff also checked the box indicating he had not brought any other lawsuits in federal court while a prisoner. (Compl. at 2.) Plaintiff filed the Petition the same day. (Dkt. 2.)

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II. Legal Standard

The Prison Litigation Reform Act of 1995 (“PLRA”) (codified in part at 28 U.S.C. § 1915) restricts prisoners’ ability to “avail themselves of IFP status when filing certain federal lawsuits.” *Washington v. L.A. Cnty. Sheriff’s Dept.*, 833 F.3d 1048, 1054 (9th Cir. 2016). “Specifically, § 1915(g) contains the PLRA’s ‘three-strikes’ rule”, which “bars prisoners from proceeding IFP if they have accrued ‘three strikes’ under the statute.” *Id.* Section 1915(g) provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner 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).

However, the Ninth Circuit has cautioned that “[n]ot all unsuccessful cases qualify as a strike under § 1915(g).” *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005). Instead, “§ 1915(g) should be used to deny a prisoner’s IFP status only when, after careful evaluation of the order dismissing an action, and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious, or failed to state a claim.” *Id.* In assessing a dismissal to determine whether it counts as a strike the core inquiry is “whether the dismissal ‘rang the PLRA bells of frivolous, malicious or failure to state a claim.’” *El-Shaddai v. Zamora*, 833 F.3d 1036, 1041 (9th Cir. 2016) (quoting *Blakely v. Wards*, 738 F.3d 607, 615 (4th Cir. 2013)). Thus, “when 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.” *O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008)

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(alteration omitted). Additionally, an appellate decision to dismiss an appeal based on a “statutorily enumerated ground” may also constitute a strike. Cf. *El-Shaddai*, 833 F.3d at 1046 (“Appellate affirmances do not count as strikes unless the court expressly states that the appeal itself was frivolous, malicious or failed to state a claim”) (quoting *Thompson v. Drug Enf’t Admin.*, 492 F.3d 428, 436 (D.C. Cir. 2007)).

III. Discussion

A. Plaintiff Has Accrued Three Strikes Under the PLRA

On August 12, 2022, Plaintiff filed the Complaint and Petition. (Dkts. 1, 2.) The court notes that in the Complaint, Plaintiff indicated he had not brought any other lawsuits in federal court while he was a prisoner. (Dkt. 1 at 2.) However, the court finds that Plaintiff has already accrued five strikes under the PLRA. The court briefly discusses each strike.

1. Strike 1: Clark v. Romero, No. 5:10-cv-538-UA-AN

In *Clark v. Romero*, Plaintiff brought a civil suit pursuant to 42 U.S.C. § 1983. The district court judge summarized Plaintiff’s complaint as follows:

Plaintiff alleges he asked to be served with a vegetarian lunch for religious reasons and in response he was provided with a peanut butter sandwich. The gravamen of the allegations in the complaint establish Plaintiff is claiming the defendants’ refusal to provide jelly for his peanut butter sandwich violated his First Amendment right to free exercise of religion, his Fourteenth Amendment right to equal protection, and his rights under the Religious Land Use and Institutionalized Persons Act.

Order Denying Motion for Reconsideration at 3, *Clark v. Romero*, No. 5:10-cv-538-UA-AN (C.D. Cal. June 2, 2010), Dkt. No. 12.

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On April 23, 2010, the court denied the Plaintiff's petition to proceed in forma pauperis, indicating Plaintiff failed to attach the required prison trust account statement for the preceding six months and that Plaintiff's complaint was frivolous, malicious, and failed to state a claim. *See* Order Denying Request for Leave to Proceed Without Prepayment of Filing Fee, *Clark v. Romero*, No. 5:10-cv-538-UA-AN (C.D. Cal. April 23, 2010), Dkt. No. 2. On June 2, 2010, in an order denying Plaintiff's motion for reconsideration, the court explicitly stated that all three of Plaintiff's claims for relief were "frivolous, malicious, and failed to state a claim." Order Denying Motion for Reconsideration at 4, *Clark v. Romero*, No. 5:10-cv-538-UA-AN (C.D. Cal. June 2, 2010), Dkt. No. 12. The court also amended nunc pro tunc its previous order "to reflect the denial also constitutes a strike under the 'Three Strikes' provision governing filing of prisoner suits." *Id.*

In this case, the court finds both the original order denying Plaintiff's IFP application and the order denying Plaintiff's motion for reconsideration and amending nunc pro tunc the prior order explicitly labeled Plaintiff's IFP application frivolous. Accordingly, the court concludes this dismissal constitutes a strike under the PLRA. *See O'Neal*, 531 F.3d at 1153.

1. Strike 2: *Clark v. Romero*, No. 2:10-cv-03129-UA-AN

On April 27, 2010, Plaintiff filed a duplicate of the complaint in *Clark v. Romero*, in which the defendant's name was spelled differently. *See* Complaint, *Clark v. Romero*, No. 2:10-cv-03129-UA-AN, (C.D. Cal. April 27, 2010), Dkt. No. 1-1. On May 13, 2010, the district judge denied the petition, found the complaint was "frivolous, malicious, or fails to state a claim upon which relief may be granted," and dismissed the case. Order Denying Request for Leave to Proceed Without Prepayment of Filing Fee, *Clark v. Romero*, No. 2:10-cv-03129-UA-AN, (C.D. Cal. May 13, 2010), Dkt. No. 2. The judge also indicated that the complaint was a duplicate of the complaint filed at case No. 10-cv-538. *Id.*

Here, the district court again explicitly labeled Plaintiff's IFP application as frivolous and dismissed it on that basis. Thus, the court concludes this dismissal constitutes Plaintiff's second strike under the PLRA. *See O'Neal*, 531 F.3d at 1153.

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2. Strike 3: Clark v. Romero, No. 10-55783

On May 24, 2010, Plaintiff appealed the order denying his IFP application in case No. 5:10-cv-00538-UA-AN. In reviewing Plaintiff's application, the Ninth Circuit stated:

Appellant's motion to proceed in forma pauperis is denied because we find that the appeal is frivolous. Within 21 days after the date of this order, appellant shall pay \$455.00 to the district court as the docketing and filing fees for this appeal and file proof of payment with this court. Failure to pay the fees will result in the automatic dismissal of the appeal by the Clerk for failure to prosecute, regardless of further filings. See 9th Cir. R. 42-1.

Order Denying Appellant Motion to Proceed In Forma Pauperis at 1, Clark v. Romero, No. 10-55783 (9th Cir. Aug. 24, 2010), Dkt. 12. The Circuit later dismissed Plaintiff's appeal for failure to prosecute. Order Dismissing Case for Failure to Prosecute at 1, Clark v. Romero, No. 10-55783 (9th Cir. Sept. 21, 2010), Dkt. 13.

Here, the Ninth Circuit explicitly labeled Plaintiff's appeal frivolous and denied his IFP application on that basis. The court concludes that this denial of Plaintiff's IFP application constitutes Plaintiff's third strike. Cf. El-Shaddai, 833 F.3d at 1046 ("[W]here the appellate decision does not conclude that the appeal itself is frivolous or malicious, it does not count as a separate strike.").

3. Strike 4: Clark v. Gambale, No. 2:22-cv-00641-JVS-PD

In Clark v. Gambale, Plaintiff brought an action pursuant to 42 U.S.C. § 1983 alleging the defendant, a California Appellate Project public defender representing Plaintiff on direct appeal, sent him altered transcripts from his criminal trial. See Order Re Request To Proceed Without Prepayment of Filing Fees at 2, Clark v. Gambale, No. 2:22-cv-00641-JVS-PD (C.D. Cal. Feb. 7, 2022), Dkt. No. 5-1. Plaintiff requested relief in the form of the original transcripts from his trial and \$200,000 in damages. Complaint at 6, Clark v. Gambale, No. 2:22-cv-00641-

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JVS-PD (C.D. Cal. Jan. 24, 2022), Dkt. No. 1. The court held Plaintiff failed to state a claim upon which relief can be granted under section 1983 because a public defender is not a state actor and there is no constitutional right to an accurate transcript from trial. Order Re Request To Proceed Without Prepayment of Filing Fees at 2, *Clark v. Gambale*, No. 2:22-cv-00641-JVS-PD (C.D. Cal. Feb. 7, 2022), Dkt. No. 5-1.

The court finds that this dismissal constitutes Plaintiff's fourth strike because the district court dismissed Plaintiff's Complaint for failure to state a claim.¹

4. Strike 5: *Clark v. Gambale*, No. 22-55251

Plaintiff appealed the district court's order denying his IFP application in *Clark v. Gambale*, No. 2:22-cv-00641-JVS-PD. The Ninth Circuit dismissed the appeal as frivolous, stating:

Upon a review of the record and the response to the court's April 7, 2022 order, we conclude this appeal is frivolous. We therefore deny appellant's supplemented motion to proceed in forma pauperis (Docket Entry Nos. 3 and 5), see 28 U.S.C. § 1915(a), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

¹ The court does not construe Plaintiff's Complaint as barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L.Ed.2d 383 (1994), because Plaintiff's success (i.e., obtaining the requested transcripts) would not imply that his conviction was invalid. See *Ray v. Lara*, 31 F.4th 692, 697 (9th Cir. 2022) ("In *Heck*, the Court held that a § 1983 damages claim is not cognizable when success on the action would imply the invalidity of a conviction or sentence that has not been reversed or otherwise invalidated."). The court also notes that although the Complaint alleged the trial judge "erroneously" failed to recuse after making biased statements, Plaintiff did not challenge the judge's failure to recuse or argue that the judge's failure to recuse resulted in his conviction in this subsequent action. See generally Complaint, *Clark v. Gambale*, No. 2:22-cv-00641-JVS-PD (C.D. Cal. Jan. 24, 2022), Dkt. No. 1.

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Order at 1, *Clark v. Gambale*, No. 22-55251 (9th Cir. May 27, 2022), Dkt. 10.

Here, the court finds that this dismissal of Plaintiff's appeal constitutes his fifth strike because the Ninth Circuit explicitly labeled it as frivolous and dismissed the appeal on that basis. Cf. *El-Shaddai*, 833 F.3d at 1046 (“[W]here the appellate decision does not conclude that the appeal itself is frivolous or malicious, it does not count as a separate strike.”).

B. The Imminent Danger Exception Does Not Apply

The court also finds that § 1915(g)'s imminent danger exception does not apply. “[I]n order to qualify for the § 1915(g) exception, a three-strikes prisoner must allege imminent danger of serious physical injury that is both fairly traceable to unlawful conduct alleged in [their] complaint and redressable by the court.” *Ray v. Lara*, 31 F.4th 692, 701 (9th Cir. 2022); *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th Cir. 2007) (stating a prisoner with three prior strikes under the PLRA may proceed in forma pauperis “if the complaint makes a plausible allegation that the prisoner faces ‘imminent danger of serious physical injury’ at the time of filing”). Alternatively, “it is sufficient for the prisoner to allege that [they] face[] ‘ongoing danger,’ even if [they] [are] not ‘directly exposed to the danger at the precise time [they] filed the complaint.’” *Williams v. Paramo*, 775 F.3d 1182, 1189 (9th Cir. 2015) (quoting *Andrews*, 493 F.3d at 1056). “[A] prisoner who alleges that prison officials continue with a practice that has injured him or others similarly situated in the past will satisfy the ‘ongoing danger’ standard.” *Andrews*, 493 F.3d at 1056-57.

Here, Plaintiff does not sufficiently allege in the Complaint or Petition that he currently faces any imminent or ongoing danger of serious physical injury. (See generally Compl. & Pet.) The court concludes that the imminent danger exception does not apply, and thus Plaintiff is barred from proceeding in forma pauperis by § 1915(g)'s three-strike provision. See *Andrews*, 493 F.3d at 1055.

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IV. Disposition

For the reasons set forth above, the Petition is **DENIED WITH PREJUDICE**. The court **ORDERS** Plaintiff to file the filing fee in full, in the amount of \$402.00, within **thirty (30) days** or this case will be dismissed.

The Clerk shall serve this minute order on the parties.

Initials of Deputy Clerk: mku