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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HARVEY E. LARSON,
CDCR #P-82258,

Plaintiff,

vs.

BARBARA J. WALLACE, Polygraph
Examiner; FRED SMALL, Deputy Public
Defender; STAN JONES, Deputy Public
Defender,

Defendants.

Case No.: 3:17-cv-01135-JAH-JLB

ORDER:

**1) DENYING MOTIONS TO
PROCEED IN FORMA PAUPERIS
AND TO APPOINT COUNSEL AS
BARRED BY 28 U.S.C. § 1915(g)
[ECF Nos. 2, 3]**

AND

**(2) DISMISSING CIVIL ACTION
WITHOUT PREJUDICE FOR
FAILURE TO PAY FILING FEE
REQUIRED BY 28 U.S.C. § 1914(a)**

HARVEY E. LARSON (Plaintiff), a prisoner incarcerated at California Correctional Institution (“CCI”) in Tehachapi, California, and proceeding pro se, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1).

Plaintiff claims a polygraph examiner and two deputy public defenders appointed to represent him in San Diego Superior Court Criminal Case No. SCE 195230 violated his Fourteenth Amendment rights during his 1999 trial and pre-trial proceedings. See

1 ECF No. at 2-4; & Exs. A & B at 8-32. He seeks an injunction preventing the polygraph
2 examiner from “using incorrect scoring method[s],” as well as \$60 million in general,
3 punitive and “nominal” damages. *Id.* at 7.

4 Plaintiff has not prepaid the civil filing fee required by 28 U.S.C. § 1914(a);
5 instead, he has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28
6 U.S.C. § 1915(a) (ECF No. 2), together with a Motion to Appoint Counsel pursuant to 28
7 U.S.C. § 1915(e)(1) (ECF No. 3).

8 **I. Motion to Proceed IFP**

9 **A. Standard of Review**

10 “All persons, not just prisoners, may seek IFP status.” *Moore v. Maricopa County*
11 *Sheriff’s Office*, 657 F.3d 890, 892 (9th Cir. 2011). Prisoners like Plaintiff, however,
12 “face ... additional hurdle[s].” *Id.*

13 Specifically, in addition to requiring prisoners to “pay the full amount of a filing
14 fee,” in “monthly installments” or “increments” as provided by 28 U.S.C.
15 § 1915(a)(3)(b), *Bruce v. Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016); *Williams v.*
16 *Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), the Prison Litigation Reform Act
17 (“PLRA”) amended section 1915 to preclude the privilege to proceed IFP:

18 . . . if [a] prisoner has, on 3 or more prior occasions, while
19 incarcerated or detained in any facility, brought an action or
20 appeal in a court of the United States that was dismissed on the
21 grounds that it is frivolous, malicious, or fails to state a claim
22 upon which relief can be granted, unless the prisoner is under
imminent danger of serious physical injury.

23 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’
24 provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005).

25 “Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed IFP.”
26 *Id.*; see also *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter
27 “*Cervantes*”) (under the PLRA, “[p]risoners who have repeatedly brought unsuccessful
28 suits may entirely be barred from IFP status under the three strikes rule[.]”). The

1 objective of the PLRA is to further “the congressional goal of reducing frivolous prisoner
2 litigation in federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).
3 “[S]ection 1915(g)’s cap on prior dismissed claims applies to claims dismissed both
4 before and after the statute’s effective date.” *Id.* at 1311.

5 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner,
6 which were dismissed on the ground that they were frivolous, malicious, or failed to state
7 a claim,” *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the
8 district court styles such dismissal as a denial of the prisoner’s application to file the
9 action without prepayment of the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153
10 (9th Cir. 2008); see also *El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016)
11 (noting that when court “review[s] a dismissal to determine whether it counts as a strike,
12 the style of the dismissal or the procedural posture is immaterial. Instead, the central
13 question is whether the dismissal ‘rang the PLRA bells of frivolous, malicious, or failure
14 to state a claim.’”) (quoting *Blakely v. Wards*, 738 F.3d 607, 615 (4th Cir. 2013)).

15 Once a prisoner has accumulated three strikes, he is simply prohibited by section
16 1915(g) from pursuing any other IFP civil action or appeal in federal court unless he
17 alleges he is facing “imminent danger of serious physical injury.” See 28 U.S.C.
18 § 1915(g); *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception for IFP
19 complaints which “make[] a plausible allegation that the prisoner faced ‘imminent danger
20 of serious physical injury’ at the time of filing.”).

21 B. Application to Plaintiff

22 As an initial matter, the Court has carefully reviewed Plaintiff’s Complaint and has
23 ascertained that it does not contain any “plausible allegations” to suggest he “faced
24 ‘imminent danger of serious physical injury’ at the time of filing.” *Cervantes*, 493 F.3d at
25 1055 (quoting 28 U.S.C. § 1915(g)). Instead, as noted above, Plaintiff’s Complaint seeks
26 injunctive relief and money damages against a polygraph examiner and two public
27 defenders for allegedly violating his Fourteenth Amendment rights during a 1999
28 criminal trial. (ECF No. 1 at 2-5). These claims are not only insufficient to plausibly

1 show ongoing or “imminent” danger of any serious physical injury, they are insufficient
2 as a matter of law to support any viable claim for relief under § 1983 whatsoever. See
3 *Ouzts v. Maryland Nat’l Ins. Co.*, 505 F.2d 547, 550 (9th Cir. 1974) (“[P]urely private
4 conduct, no matter how wrongful, is not within the protective orbit of section 1983.”);
5 *Miranda v. Clark County*, 319 F.3d 465, 468 (9th Cir. 2003) (en banc) (finding that
6 public defender was not a state actor subject to suit under § 1983 because, so long as he
7 performs a traditional role of an attorney for a client, “his function,” no matter how
8 ineffective, is “to represent his client, not the interests of the state or county.”); *Heck v.*
9 *Humphrey*, 512 U.S. 477, 486-87 (1994) (“[I]n order to recover damages for allegedly
10 unconstitutional conviction or imprisonment, or for other harm caused by actions whose
11 unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove
12 that the conviction or sentence has been reversed on direct appeal, expunged by executive
13 order, declared invalid by a state tribunal authorized to make such determination, or
14 called into question by a federal court’s issuance of a writ of habeas corpus.”).

15 And while Defendants typically carry the burden to show that a prisoner is not
16 entitled to proceed IFP, *Andrews*, 398 F.3d at 1119, “in some instances, the district court
17 docket may be sufficient to show that a prior dismissal satisfies at least one on the criteria
18 under § 1915(g) and therefore counts as a strike.” *Id.* at 1120. That is the case here.

19 A court may take judicial notice of its own records, see *Molus v. Swan*, Civil Case
20 No. 3:05-cv-00452-MMA-WMc, 2009 WL 160937, *2 (S.D. Cal. Jan. 22, 2009) (citing
21 *United States v. Author Services*, 804 F.2d 1520, 1523 (9th Cir. 1986)); *Gerritsen v.*
22 *Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1034 (C.D. Cal. 2015), and ““may take
23 notice of proceedings in other courts, both within and without the federal judicial system,
24 if those proceedings have a direct relation to matters at issue.”” *Bias v. Moynihan*, 508
25 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803
26 n.2 (9th Cir. 2002)); see also *United States ex rel. Robinson Rancheria Citizens Council*
27 *v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

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1 Here, Plaintiff Harvey E. Larson, identified as California Department of
2 Corrections and Rehabilitation (“CDCR”) Inmate #P-82258, admits in his pleading that
3 he is a “vexatious litigant,” see ECF No. 1 at 1, 6, and court records confirm that he has,
4 indeed has had at least seven prior prisoner civil actions dismissed on the grounds that
5 they were frivolous, malicious, or failed to state a claim upon which relief may be
6 granted. They are:

7 1) Larson v. Schwarzenegger, et al., Civil Case No. 2:06-cv-0940-GEB-GGH-
8 P (E.D. Cal. Oct. 31, 2006) (Findings and Recommendations [“F&Rs”] to dismiss civil
9 action with prejudice as duplicative pursuant to 28 U.S.C. § 1915A(b)(1), (2))¹ (ECF No.
10 7); (E.D. Cal. Jan. 9, 2007) (Order adopting F&R in full and dismissing action with
11 prejudice) (ECF No. 8) (“strike 1”);

12 2) Larson v. Patton, et al., Civil Case No. 2:07-cv-1043-FCD-JFM (E.D. Cal.
13 Sept. 5, 2007) (Order and F&Rs to dismiss action for failing to state a claim pursuant to
14 28 U.S.C. § 1915A(b)(1), (2)) (ECF No. 12); (E.D. Cal. Oct. 15, 2007) (Order adopting
15 F&Rs “in full” and dismissing action for “failure to state a claim.”) (ECF No. 14) (“strike
16 2”);

17 3) Larson v. Runnels, et al., Civil Case No. 2:07-cv-0806-FCD-DAD (E.D.
18 Cal. Dec. 21, 2007) (Order and F&Rs to dismiss action for failure to state a cognizable
19 claim pursuant to 28 U.S.C. § 1915A(b)(1)) (ECF No. 5); (E.D. Cal. Feb 4, 2008) (Order
20 adopting F&Rs “in full” and dismissing action for “failure to state a cognizable claim”
21 pursuant to 28 U.S.C. § 1915A(b)(1)) (ECF No. 8) (“strike 3”);

22 4) Larson v. Runnels, et al., Civil Case No. 2:08-cv-00348-MCE-KJM (E.D.
23 Cal. Feb. 22, 2008) (F&Rs to dismiss complaint sua sponte “as frivolous”) (ECF No. 5);
24 (E.D. Cal. March 20, 2008) (Order adopting F&Rs “in full” and dismissing action) (ECF
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27 ¹ A prisoner’s complaint is considered frivolous under 28 U.S.C. § 1915A(b)(1) if it “merely repeats
28 pending or previously litigated claims.” *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995)
(construing former 28 U.S.C. § 1915(d)) (citations and internal quotations omitted).

1 No. 7) (“strike 4”);

2 5) Larson v. McDonald, Civil Case No. 2:07-cv-00512-FCD-GGH (E.D. Cal.
3 April 2, 2008) (Order and F&Rs to dismiss action “with prejudice as both duplicative and
4 frivolous” pursuant to 28 U.S.C. § 1915A(b)(1)) (ECF No. 17); (E.D. Cal. June 25, 2008)
5 (Order adopting F&Rs “in full” and dismissing action for “with prejudice as both
6 duplicative and frivolous”) (ECF No. 25) (“strike 5”);

7 6) Larson v. McDonald, et al., Civil Case No. 2:07-cv-01955-HDM-RAM
8 (E.D. Cal. July 22, 2008) (F&Rs to dismiss action sua sponte for failure “to state a
9 colorable claim for relief”) (ECF No. 25); (E.D. Cal. Jan. 8, 2009) (Order adopting F&Rs
10 and “dismissing this action with prejudice.”) (ECF No. 29) (“strike 6”); and

11 7) Larson v. Williams, et al., Civil Case No. 2:07-cv-00631-RLH-VPC (E.D.
12 Cal. Feb. 27, 2009) (Report and Recommendation [“R&R”] of U.S. Magistrate Judge to
13 dismiss amended complaint sua sponte for “fail[ure] to state a claim upon which relief
14 can be granted”) (ECF No. 22); (E.D. Cal. March 13, 2009) (Order affirming, accepting,
15 and adopting R&R and dismissing amended complaint) (ECF No. 23) (“strike 7”).²

16 Accordingly, because Plaintiff has, while incarcerated, accumulated more than
17 three “strikes” pursuant to § 1915(g), and he fails to make a “plausible allegation” that he
18 faced imminent danger of serious physical injury at the time he filed his Complaint, he is
19 not entitled to the privilege of proceeding IFP in this action. See Cervantes, 493 F.3d at
20 1055; Rodriguez v. Cook, 169 F.3d 1176, 1180 (9th Cir. 1999) (finding that 28 U.S.C.
21 § 1915(g) “does not prevent all prisoners from accessing the courts; it only precludes
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24 ² In fact, Plaintiff has previously been denied leave to proceed IFP pursuant to 28 U.S.C. § 1915(g) in
25 both the Southern, as well as in the Eastern District of California, where he originally “struck out.” See,
26 e.g., Larson v. Rhodes, Civil Case No. 1:09-cv-00342-OWW-YNP SMS (E.D. Cal. Sept. 14, 2009)
27 (Order re F&Rs denying application to proceed IFP pursuant to 28 U.S.C. § 1915(g)) (ECF No. 7);
28 Larson v. Hanoian, et al., Civil Case No. 3:13-cv-01654-GPC-NLS (S.D. Cal. Oct. 7, 2013) (Order
Denying Motion to Proceed IFP as Barred by 28 U.S.C. § 1915(g)) (ECF No. 8); Larson v. Brown, et
al., Civil Case No. 3:16-cv-01188-AJB-RBB (S.D. Cal. May 20, 2016) (Order Denying Motion to
Proceed IFP as Barred by 28 U.S.C. § 1915(g)) (ECF No. 4).

1 prisoners with a history of abusing the legal system from continuing to abuse it while
2 enjoying IFP status”); see also Franklin v. Murphy, 745 F.2d 1221, 1231 (9th Cir. 1984)
3 (“[C]ourt permission to proceed IFP is itself a matter of privilege and not right.”).

4 **II. Motion to Appoint Counsel**

5 In addition, Plaintiff has filed a Motion to Appoint Counsel pursuant to 28 U.S.C.
6 § 1915(e)(1) (ECF No. 3). However, a motion to appoint counsel pursuant to 28 U.S.C.
7 § 1915(e)(1) necessarily depends upon Plaintiff’s ability to proceed IFP. See 28 U.S.C.
8 § 1915(e)(1) (“The court may request an attorney to represent any person unable to afford
9 counsel.”). It requires that Plaintiff has been determined eligible to proceed pursuant to
10 the IFP statute due to indigence, is within “the sound discretion of the trial court[,] and is
11 granted only in exceptional circumstances.” Agyeman v. Corr. Corp. of Am., 390 F.3d
12 1101, 1103 (9th Cir. 2004).

13 Because Plaintiff is not entitled to proceed IFP pursuant to 28 U.S.C. § 1915(a) in
14 this case, he is also not entitled to the appointment of counsel under § 1915(e)(1).

15 **III. Conclusion and Order**

16 For the reasons discussed, the Court:

17 1) **DENIES** Plaintiff’s Motions to Proceed IFP (ECF No. 2) and to Appoint
18 Counsel pursuant to 28 U.S.C. § 1915(e)(1) (ECF No. 3) as barred by 28 U.S.C.
19 § 1915(g);

20 2) **DISMISSES** this civil action action without prejudice for failure to pay the
21 full statutory and administrative \$400 civil filing fee required by 28 U.S.C. § 1914(a);

22 3) **CERTIFIES** that an IFP appeal from this Order would be frivolous and
23 therefore, would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3); and

24 4) **DIRECTS** the Clerk of Court to enter judgment and close the file.

25 **IT IS SO ORDERED.**

26 Dated: August 29, 2017

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28 _____
HON. JOHN A. HOUSTON
United States District Judge