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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

E.J. McELROY, aka Latwhan McElroy,
aka Jabbari McElroy, aka Jarbor McElroy,
CDCR #P-71922,

Plaintiff,

vs.

RN/DA DOES & Supervisors, et al.,

Defendants.

Case No.: 3:17-cv-01593-DMS-WVG

ORDER

**1) DENYING MOTION TO
PROCEED IN FORMA PAUPERIS
AS BARRED BY 28 U.S.C. § 1915(g)
[ECF No. 4]**

AND

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

E.J. McELROY, aka Lathan McElroy, Jabbari McElroy, and Jarbor McElroy (“Plaintiff”), currently incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, and proceeding pro se, has filed this civil rights action pursuant to 42 U.S.C. § 1983.

Plaintiff, who claims to require mobility modifications and rehabilitative services related to his “back issues,” contends a host of unidentified RJD “Medical Administrators,” “Supervisors,” “Release & Receiving” (“R&R”) officials, and prison

1 librarians have, since his transfer there on or about July 28, 2017, violated his rights to
2 due process, equal protection, access to the court, and to be free from cruel and unusual
3 punishment. Specifically, Plaintiff claims Defendants failed to promptly process 7 or 8
4 boxes or bags of his legal property and “medical hygienic items,” failed to provide him
5 with a sufficient “intake kit” and instructions for using the law library, failed to assign
6 him to a “medical cell” that would guarantee him a “personal means of storage,” and
7 failed to provide “medicinal[ly] therapeutic meals.” Plaintiff further alleges Defendants
8 have denied his access to “enhanced privilege programs,” including the use of
9 microwaves for popcorn, “compatible” television sets,” “crush[ed]/bag ice throughout the
10 day” when temperatures reach over 88° F, and a “personal resistance band” for his use
11 outside RJD’s “therapeutic center.” *See* ECF No. 3 at 1-18.

12 Plaintiff did not pay the civil filing fee required to commence a civil action when
13 he filed suit; instead, he has filed a Motion to Proceed In Forma Pauperis (“IFP”)
14 pursuant to 28 U.S.C. § 1915(a) (ECF No. 4).

15 **I. Motion to Proceed IFP**

16 “All persons, not just prisoners, may seek IFP status.” *Moore v. Maricopa County*
17 *Sheriff’s Office*, 657 F.3d 890, 892 (9th Cir. 2011). Prisoners like Plaintiff, however,
18 “face an additional hurdle.” *Id.* In addition to requiring prisoners to “pay the full amount
19 of a filing fee,” in “monthly installments” or “increments” as provided by 28 U.S.C.
20 § 1915(a)(3)(b), *Bruce v. Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016); *Williams v.*
21 *Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), the Prison Litigation Reform Act
22 (“PLRA”) amended section 1915 to preclude the privilege to proceed IFP:

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

28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’

1 provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005).

2 “Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed IFP.”
3 *Id.*; *see also Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter
4 “*Cervantes*”) (under the PLRA, “[p]risoners who have repeatedly brought unsuccessful
5 suits may entirely be barred from IFP status under the three strikes rule[.]”). The
6 objective of the PLRA is to further “the congressional goal of reducing frivolous prisoner
7 litigation in federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).
8 “[S]ection 1915(g)’s cap on prior dismissed claims applies to claims dismissed both
9 before and after the statute’s effective date.” *Id.* at 1311.

10 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner,
11 which were dismissed on the ground that they were frivolous, malicious, or failed to state
12 a claim,” *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the
13 district court styles such dismissal as a denial of the prisoner’s application to file the
14 action without prepayment of the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153
15 (9th Cir. 2008); *see also El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016)
16 (noting that when court “review[s] a dismissal to determine whether it counts as a strike,
17 the style of the dismissal or the procedural posture is immaterial. Instead, the central
18 question is whether the dismissal ‘rang the PLRA bells of frivolous, malicious, or failure
19 to state a claim.’”) (quoting *Blakely v. Wards*, 738 F.3d 607, 615 (4th Cir. 2013)).

20 Once a prisoner has accumulated three strikes, he is prohibited by section 1915(g)
21 from pursuing any other IFP civil action or appeal in federal court unless he alleges he is
22 facing “imminent danger of serious physical injury.” *See* 28 U.S.C. § 1915(g); *Cervantes*,
23 493 F.3d at 1051-52 (noting § 1915(g)’s exception for IFP complaints which “make[] a
24 plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’
25 at the time of filing.”).

26 **II. Discussion**

27 As an initial matter, the Court has carefully reviewed Plaintiff’s Complaint, and
28 has ascertained that it does not contain any “plausible allegations” to suggest he “faced

1 ‘imminent danger of serious physical injury’ at the time of filing.” *Cervantes*, 493 F.3d at
2 1055 (quoting 28 U.S.C. § 1915(g)). Instead, as noted above, Plaintiff seeks to sue
3 various unnamed RJD prison officials as a group for allegedly failing to quickly or
4 sufficiently provide him access to the amenities and rehabilitative programs he claims his
5 limited mobility requires for the 2-week period immediately following his transfer there
6 on or about July 28, 2017. While Plaintiff is dissatisfied with the speed at which he has
7 been processed, classified, and accommodated at RJD, none of his allegations plausibly
8 suggest he faced any “imminent danger of serious physical injury” at the time of filing.
9 *See* 28 U.S.C. § 1915(g); *Ellington v. Clark*, No. 1:09-CV-02141-AWI, 2011 WL
10 3500970, at *5 (E.D. Cal. Aug. 8, 2011) (finding prisoner’s pre-existing medical
11 conditions and his claimed denial of ambulatory devices did not “rise to the level of
12 imminent danger”); *report and recommendation adopted*, No. 1:09-CV-02141-AWI,
13 2011 WL 6780910 (E.D. Cal. Dec. 27, 2011); *Byrd v. Dir. of Corr.*, No. 3:15-CV-2339-
14 GPC-KSC, 2016 WL 773229, at *2 (S.D. Cal. Feb. 29, 2016) (finding prisoner’s
15 allegations of having been denied access to court and discriminated against based on race
16 and religion insufficient to invoke § 1915(g)’s imminent danger exception); *Weaver v.*
17 *Mailroom Staff*, No. 1:06-CV-01439-AWI-LJO-P, 2006 WL 3028411, at *1 (E.D. Cal.
18 Oct. 24, 2006) (finding prisoner’s allegations that mailroom staff refused to pick up mail
19 insufficient to satisfy § 1915(g)’s imminent danger exception).

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

24 A court may take judicial notice of its own records, *see Molus v. Swan*, Civil Case
25 No. 3:05-cv-00452–MMA-WMc, 2009 WL 160937, *2 (S.D. Cal. Jan. 22, 2009) (citing
26 *United States v. Author Services*, 804 F.2d 1520, 1523 (9th Cir. 1986)); *Gerritsen v.*
27 *Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1034 (C.D. Cal. 2015), and ““may take
28 notice of proceedings in other courts, both within and without the federal judicial system,

1 if those proceedings have a direct relation to matters at issue.” *Bias v. Moynihan*, 508
2 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803
3 n.2 (9th Cir. 2002)); *see also United States ex rel. Robinson Rancheria Citizens Council*
4 *v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

5 Therefore, this Court takes judicial notice that Plaintiff, E.J. McElroy, also known
6 as Latwahn McElroy, Jabbari McElroy, and/or Jarbor McElroy, and identified as CDCR
7 Inmate #P-71922, has had at least five prior prisoner civil actions dismissed on the
8 grounds that they were frivolous, malicious, or failed to state a claim upon which relief
9 may be granted.

10 They are:

11 1) *McElroy v. Gebbmedin, et al.*, Civil Case No. 1:08-cv-00124-LJO-
12 GSA (E.D. Cal. Sept. 2, 2008) (Order dismissing complaint for failure to state a
13 claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1) with leave to
14 amend) (ECF No. 9); (E.D. Cal. Nov. 4, 2008) (Findings and Recommendations
15 [“F&R’s”]) to Dismiss Civil Action for Failure to State a Claim) (ECF No. 10);
16 (E.D. Cal. Dec. 11, 2008) (Order Adopting F&Rs and Dismissing Civil Action
17 with Prejudice for Failure to State a Claim) (ECF No. 11)¹ (strike one);

18 2) *McElroy v. Schultz, et al.*, Civil Case No. 1:08-cv-00179-OWW-MJS
19 (E.D. Cal. Feb. 25, 2010) (Order Dismissing First Amended Complaint for failure
20 to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(ii) and § 1915A(b)(1), (2) with
21 leave to amend) (ECF No. 21); (E.D. Cal. March 31, 2010) (F&Rs to Dismiss Civil
22 Action for Failure to State a Claim) (ECF No. 22); (E.D. Cal. April 30, 2010)
23 (Order re F&Rs and dismissing civil action for failure to state a claim upon which
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26 ¹ “[W]hen (1) a district court dismisses a complaint on the ground that it fails to state a
27 claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an amended
28 complaint, the dismissal counts as a strike under § 1915(g).” *Harris v. Mangum*, 863 F.3d
1131, 1143 (9th Cir. 2017).

1 relief can be granted) (ECF No. 24) (strike two);

2 3) *McElroy v. Cal. Dept. of Corr., et al.*, Civil Case No. 2:08-cv-00733-
3 HWG (E.D. Cal. April 16, 2009) (Order dismissing complaint for failing to state a
4 claim and with leave to amend pursuant to 28 U.S.C. § 1915A(b)(1)) (ECF No.
5 10); (June 3, 2009) (Minute Order dismissing civil action for failure to state a
6 claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and §1915A(b)(1)) (ECF No. 11)
7 (strike three);

8 4) *McElroy v. Institutional Head Ground, et al.*, Civil Case No. 1:13-cv-
9 00483-MJS (E.D. Cal. Nov. 1, 2013) (Order dismissing civil action for “failure to
10 state any claim under § 1983” pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and
11 § 1915A(b)(1), (2)) (ECF No. 21) (strike four); and

12 5) *McElroy v. CDC, et al.*, Civil case No. 2:15-cv-02271-KJM-EFB
13 (E.D. Cal. Feb. 6, 2017) (Order dismissing complaint for failing to “state a
14 cognizable claim for relief” pursuant to 28 U.S.C. § 1915A) (ECF No. 12); (E.D.
15 Cal. April 3, 2017) (F&Rs to dismiss for failure to amend) (ECF No. 19); (June 21,
16 2017) (Order adopting F&Rs and dismissing civil action) (ECF No. 20) (strike
17 five).²

18 Accordingly, because Plaintiff has, while incarcerated, accumulated more than
19 three “strikes” pursuant to § 1915(g), and he fails to make a “plausible allegation” that he
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21 ² Plaintiff has also been barred from proceeding IFP pursuant to 28 U.S.C. § 1915(g) in
22 the Eastern District of California, *see McElroy v. Asad, et al.*, Civil Case No. 2:15-cv-
23 00904-JAM-EFB (Sept. 24, 2015) (Order denying IFP pursuant to 28 U.S.C. § 1915(g))
24 (ECF No. 12); *McElroy v. CDCR, et al.*, Civil Case No. 2:17-cv-00485-WBS-CKD (April
25 27, 2017) (Order denying IFP as barred by 28 U.S.C. § 1915(g), and had his IFP status
26 revoked in the Northern District as well. *See McElroy v. Ikegbu, et al.*, Civil Case No. 5:15-
27 cv-01599-EJD (N.D. Cal. Feb. 22, 2016) (Order granting Defendants’ Motion to Revoke
28 Plaintiff’s IFP Status pursuant to 28 U.S.C. § 1915(g)) (ECF No. 33); *McElroy v. Muniz,*
et al., Civil case No. 5:15-cv-00042-EJB (N.D. Cal. May 26, 2016) (Order granting
Defendants’ Motion to Revoke Plaintiff’s IFP status pursuant to 28 U.S.C. § 1915(g)) (ECF
No. 118).

1 faced imminent danger of serious physical injury at the time he filed his Complaint, he is
2 not entitled to the privilege of proceeding IFP in this civil action. *See Cervantes*, 493 F.3d
3 at 1055; *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999) (finding that 28 U.S.C.
4 § 1915(g) “does not prevent all prisoners from accessing the courts; it only precludes
5 prisoners with a history of abusing the legal system from continuing to abuse it while
6 enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984)
7 (“[C]ourt permission to proceed IFP is itself a matter of privilege and not right.”).

8 **III. Conclusion and Order**

9 For the reasons set forth above, the Court:

10 1) **DENIES** Plaintiff’s Motion to Proceed IFP [ECF No. 4] as barred by 28
11 U.S.C. § 1915(g);


12 2) **DISMISSES** this civil action without prejudice based on Plaintiff’s failure
13 to pay the full statutory and administrative \$400 civil filing fee required by 28 U.S.C.
14 § 1914(a);

15 3) **CERTIFIES** that an IFP appeal from this Order would be frivolous and
16 therefore, would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). *See*
17 *Coppedge v. United States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548,
18 550 (9th Cir. 1977) (indigent appellant is permitted to proceed IFP on appeal only if
19 appeal would not be frivolous); and

20 4) **DIRECTS** the Clerk of Court to close the file.

21 **IT IS SO ORDERED.**

22 Dated: October 31, 2017

23 
24 Hon. Dana M. Sabraw
25 United States District Judge
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