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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MICHAEL DEWAYNE ALLEN,
12 CDCR #T-55834,

13 Plaintiff,

14 vs.

15 VINCENT VILLANUEVA,
16

17 Defendant.

Case No.: 3:20-cv-02334-WQH-WVG

ORDER:

18 **1) DENYING MOTION TO**
19 **PROCEED IN FORMA PAUPERIS**
20 **AS BARRED BY 28 U.S.C. § 1915(g)**
21 **[ECF No. 2]**

AND

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

26 Plaintiff, Michael Dewayne Allen, currently incarcerated at Richard J. Donovan
27 Correctional Facility (“RJD”), in San Diego, California, has filed a civil rights Complaint
28 pursuant to 42 U.S.C. § 1983. (*See* Compl., ECF No. 1.)

Plaintiff claims RJD Correctional Officer Villanueva came to his cell on November
7, 2020, handcuffed him, and “grabbed [his] right butt cheek.” (*Id.* at 3.) Plaintiff seeks
\$17.2 million in compensatory and punitive relief. (*Id.* at 7.)

1 Plaintiff did not pay the full civil filing fee required by 28 U.S.C. § 1914(a) at the
2 time he filed suit; instead, he filed a Motion to Proceed *In Forma Pauperis* (“IFP”). (*See*
3 ECF No. 2.)

4 **I. Motion to Proceed IFP**

5 A. Standard of Review

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

9 In addition to requiring prisoners to “pay the full amount of a filing fee,” in “monthly
10 installments” or “increments” as provided by 28 U.S.C. § 1915(a)(3)(b), the Prison
11 Litigation Reform Act (“PLRA”) amended section 1915 to preclude the privilege to
12 proceed IFP in cases where the prisoner:

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

17 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’
18 provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005). “Pursuant to
19 § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.*; *see also Andrews*
20 *v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter “*Cervantes*”) (under the
21 PLRA, “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred
22 from IFP status under the three strikes rule[.]”). The objective of the PLRA is to further
23 “the congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney*
24 *v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).

25 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which
26 were dismissed on the ground that they were frivolous, malicious, or failed to state a claim,”
27 *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the district court
28 styles such dismissal as a denial of the prisoner’s application to file the action without

1 prepayment of the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008).
2 When courts “review a dismissal to determine whether it counts as a strike, the style of the
3 dismissal or the procedural posture is immaterial. Instead, the central question is whether
4 the dismissal ‘rang the PLRA bells of frivolous, malicious, or failure to state a claim.’” *El-*
5 *Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016) (quoting *Blakely v. Wards*, 738
6 F.3d 607, 615 (4th Cir. 2013)). “When ... presented with multiple claims within a single
7 action,” however, courts may “assess a PLRA strike only when the case as a whole is
8 dismissed for a qualifying reason under the Act.” *Hoffman v. Pulido*, 928 F.3d. 1147, 1152
9 (9th Cir. 2019) (citing *Washington v. L.A. Cty. Sheriff’s Dep’t*, 833 F.3d 1048, 1057 (9th
10 Cir. 2016)).

11 Once a prisoner has accumulated three strikes, section 1915(g) prohibits his pursuit
12 of any subsequent IFP civil action or appeal in federal court unless he faces “imminent
13 danger of serious physical injury.” See 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at 1051-
14 52 (noting § 1915(g)’s exception for IFP complaints which “make[] a plausible allegation
15 that the prisoner faced ‘imminent danger of serious physical injury’ at the time of filing.”).

16 B. Discussion

17 The Court has reviewed Plaintiff’s Complaint and finds it contains no “plausible
18 allegations” to suggest he “faced ‘imminent danger of serious physical injury’ at the time
19 of filing.” *Cervantes*, 493 F.3d at 1055 (quoting 28 U.S.C. § 1915(g)). Plaintiff claims
20 Defendant “grabbed [his] right butt cheek,” see Compl. at 3. but offers no other factual
21 allegations of any concerns of future harm. Such conclusory references to a past incident
22 of force, without more, are insufficient to plausibly suggest Plaintiff faced an “imminent
23 danger of serious physical injury” at the time he filed his Complaint. See *Cervantes*, 493
24 F.3d at 1055-56 (plaintiff must allege to face a real, proximate and/or ongoing danger at
25 the time of filing); *Cohea v. Davey*, No. 1:19-CV-01281-LJO-SAB (PC), 2019 WL
26 5446490, at *1 (E.D. Cal. Oct. 24, 2019) (finding prisoner’s allegations of past assaults
27 insufficient to show “imminent danger” under 1915(g)), *reconsideration denied*, No. 1:19-
28 CV-01281-NONE-SAB (PC), 2020 WL 5763929 (E.D. Cal. Sept. 28, 2020).

1 “Although prison can undoubtedly be a dangerous place, incarceration alone does
2 not satisfy the requirement of ‘imminent danger of serious physical injury’” for purposes
3 of § 1915(g). *Parker v. Montgomery Cty. Corr. Facility/Bus. Office Manager*, 870 F.3d
4 144, 154 n.12 (3d Cir. 2017). “Indeed, if it did, every prisoner would be entitled to IFP
5 status and the exception would swallow the rule.” *Id.* (citation omitted); *see also Patrick v.*
6 *Altshuler*, No. 2:17-CV-1046 AC P, 2017 WL 4539273, at *5 (E.D. Cal. Oct. 11, 2017)
7 (finding prisoner’s claims of “[f]ear with trust issues” and “painful” “[a]buse[s] of power”
8 were insufficient to demonstrate he was “under imminent danger of serious physical
9 injury” under § 1915(g)).

10 And while Defendants typically carry the initial burden to produce evidence
11 demonstrating a prisoner is not entitled to proceed IFP, *Andrews*, 398 F.3d at 1119, “in
12 some instances, the district court docket may be sufficient to show that a prior dismissal
13 satisfies at least one on the criteria under § 1915(g) and therefore counts as a strike.” *Id.* at
14 1120.

15 That is the case here.

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

24 Based on a review of its own dockets and other court proceedings publicly available
25 on PACER, the Court finds that Plaintiff Michael Dewayne Allen, identified as CDCR
26 Inmate #T-55834, while incarcerated, has had three prior civil actions dismissed on the
27 grounds that they were frivolous, malicious, or failed to state a claim upon which relief
28 may be granted.

1 They are:

2 1) *Allen v. Social Security Administration*, Civil Case No. 2:11-cv-04253-
3 UA-E (C.D. Cal. June 22, 2011) (Order Denying Leave to File Action Without
4 Prepayment of Full Filing Fee and dismissing Complaint as frivolous,
5 malicious, or for failing to state a claim upon which relief may be granted)
(ECF No. 2 at 1) (strike one);

6 2) *Allen v. CSP – Los Angeles Count, et al.*, Civil Case No. 2:12-cv-08338-
7 DMG-E (C.D. Cal. Dec. 12, 2012) (Order Dismissing Complaint for failing
8 to state a claim) (ECF No. 7); and (C.D. Cal. May 1, 2013) (Order Accepting
9 Findings, Conclusions and Recommendations of United States Magistrate
10 Judge and dismissing civil action based on Plaintiff’s failure to amend)¹ (ECF
11 No. 12) (strike two); and

12 3) *Allen v. Masemeno, et al.*, Civil Case No. 2:12-cv-09981-DMG-E (C.D.
13 Cal. Nov. 26, 2013) (Order Dismissing First Amended Complaint for failing
14 to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)) (ECF No. 15); and (C.
15 D. Cal. Feb. 20, 2014) (Order Accepting Findings, Conclusions and
16 Recommendations of United States Magistrate Judge and dismissing civil
17 action based on Plaintiff’s failure to amend) (ECF No. 19) (strike three).

18 Accordingly, because Plaintiff has, while incarcerated, accumulated at least three
19 “strikes” as defined by § 1915(g), and he fails to make a “plausible allegation” that he faced
20 imminent danger of serious physical injury at the time he filed his Complaint, he is not
21 entitled to the privilege of proceeding IFP in this action. *See Cervantes*, 493 F.3d at 1055;
22 *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999) (finding that 28 U.S.C. § 1915(g)
23 “does not prevent all prisoners from accessing the courts; it only precludes prisoners with
24 a history of abusing the legal system from continuing to abuse it while enjoying IFP
25 status”); *see also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“[C]ourt

26 ¹ *See Harris v. Mangum*, 863 F.3d 1133, 1143 (9th Cir. 2017) (“[W]hen (1) a district court
27 dismisses a complaint on the ground that it fails to state a claim, (2) the court grants leave
28 to amend, and (3) the plaintiff then fails to file an amended complaint, the dismissal counts
as a strike under § 1915(g).”).

1 permission to proceed IFP is itself a matter of privilege and not right.”).²

2 **II. Conclusion and Orders**

3 For the reasons discussed, the Court:

4 (1) **DENIES** Plaintiff’s Motion to Proceed IFP (ECF No. 2) as barred by 28
5 U.S.C. § 1915(g);

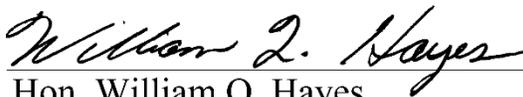
6 (2) **DISMISSES** this civil action sua sponte without prejudice for failing to
7 prepay the \$400 civil and administrative filing fees required by 28 U.S.C. § 1914(a);

8 (3) **CERTIFIES** that an IFP appeal from this Order would be frivolous pursuant
9 to 28 U.S.C. § 1915(a)(3); and

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

11 **IT IS SO ORDERED.**

12 Dated: February 16, 2021


13 Hon. William Q. Hayes
14 United States District Court

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24 ² In fact, Plaintiff has been denied leave to proceed IFP pursuant to 28 U.S.C. § 1915(g) in
25 this Court, as well as in the Eastern District of California, on at least four previous
26 occasions. *See, e.g., Allen v. Associate Warden, et al.*, S.D. Cal. Civil Case No. 3:20-cv-
27 02188-GPC-BLM (ECF No. 5); *Allen v. Quillen, et al.*, S.D. Cal. Civil Case No. 3:20-cv-
28 02192-MMA-DEB (ECF No. 7); *Allen v. Wells, et al.*, E.D. Cal. Civil Case No. 2:17-cv-
01793-MCE-EFB (ECF Nos. 11, 12, 13); and *Allen v. Perez*, E.D. Cal. Civil Case No.
2:17-cv-01384-TLN-EFB (ECF Nos. 14, 15, 16).