

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-10076  
Conference Calendar

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JIMMY L. BRUTON,

Plaintiff-Appellant,

versus

PHILLIP MORRIS, INC.; GEORGE WEISSMAN, President/CEO Phillip  
Morris, Inc.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 6:99-CV-97-C  
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June 14, 2000

Before JOLLY, DAVIS, and STEWART, Circuit Judges.

PER CURIAM:\*

Jimmy L. Bruton, Texas prisoner No. 817622, appeals the district court's dismissal of his civil rights complaint as legally frivolous. Bruton does not argue that the defendants are state actors, which is required to support a claim under § 1983, and he did not timely move to amend his complaint to seek recovery on a different theory. Polk County v. Dodson, 454 U.S. 312, 325 (1981); Travelers Ins. Co. v. Liljeberg Enters., Inc.,

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

38 F.3d 1404, 1407 n. 3 (5th Cir. 1994). Accordingly, Bruton's appeal is frivolous and it IS DISMISSED. 5TH CIR. R. 42.2.

The district court's dismissal of Bruton's complaint and this court's dismissal of the appeal as frivolous count as two "strikes" for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 385-87 (5th Cir. 1996). Bruton is CAUTIONED that if he accumulates three "strikes" under § 1915(g), he will not be able to proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. See § 1915(g). Bruton's motion for appointment of counsel is DENIED.

APPEAL DISMISSED; SANCTIONS WARNING ISSUED.