

August 19, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-20329
Conference Calendar

JULIUS DANIEL JOSEPH,

Plaintiff-Appellant,

versus

GARY JOHNSON; JOHNNY B. HOLMES;
JAMES PATTON,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-02-CV-4844

Before JONES, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Julius Daniel Joseph, Texas prisoner # 617774, appeals the district court's dismissal with prejudice of his 42 U.S.C. § 1983 complaint as time-barred and therefore frivolous, and for failure to state a claim for relief under 28 U.S.C. § 1915(e)(2). The district court also determined that Joseph's complaint was barred by Heck v. Humphrey, 512 U.S. 477 (1994).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

The district court did not err in concluding that Joseph's claims are barred by Heck. Joseph has failed to show that his sentence on a 1991 conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. See Heck, 512 U.S. at 486-87.

Joseph has previously filed a 42 U.S.C. § 1983 complaint which the district court dismissed with prejudice as time-barred and as frivolous under 28 U.S.C. § 1915(e)(2). The district court's dismissal counts as one strike for purposes of 28 U.S.C. § 1915(g). Because Joseph's claims in the instant complaint lack legal merit, his appeal is dismissed as frivolous. See Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983); 5TH CIR. R. 42.2. The district court's dismissal of the present case and our dismissal of this appeal count as two strikes against Joseph for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996). Joseph has accrued three strikes, therefore, he may not proceed in forma pauperis 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 28 U.S.C. § 1915(g).

APPEAL DISMISSED; 28 U.S.C. § 1915(g) BAR IMPOSED