

**FILED**

August 18, 2004

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III  
Clerk

---

No. 04-40456  
Conference Calendar

---

MARCOS ORTIZ,

Plaintiff-Appellant,

versus

DONNA BROWN; MARIA L. MERCADO,

Defendants-Appellees.

-----  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 3:02-CV-361  
-----

Before HIGGINBOTHAM, DAVIS, and PICKERING, Circuit Judges.

PER CURIAM:\*

Marcos Ortiz (Ortiz), Texas prisoner # 1049113, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint as frivolous. Ortiz was convicted of aggravated robbery and aggravated assault. He filed his 42 U.S.C. § 1983 complaint against his court-appointed attorney and investigator in that criminal proceeding. Ortiz argues that his attorney and investigator conspired to deny him due process and deprive him of equal protection by failing to investigate his case. He contends

---

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

that an investigation of the case would have shown that the charges against him were fabricated.

Ortiz's allegations are ones alleging "harm caused by actions whose unlawfulness would render a conviction or sentence invalid." See Heck v. Humphrey, 512 U.S. 477, 486 (1994). Under Heck, Ortiz's allegations are not actionable because he has not shown that his conviction has been reversed on direct appeal, expunged by the executive, invalidated by other state means, or called into question by the issuance of a federal habeas writ. Id. at 487.

Accordingly, Ortiz's appeal is dismissed as frivolous. See 5TH CIR. R. 42.2. The dismissal of his complaint and appeal in this matter each count as a "strike" under 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387-88 (5th Cir. 1996). Ortiz has accumulated at least two other "strikes." See Ortiz v. Fernald, No. 04-20186, 2004 WL 1372935 (5th Cir. June 18, 2004) (unpublished). Thus, Ortiz is BARRED from proceeding 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 AS FRIVOLOUS; 28 U.S.C. § 1915(g) SANCTIONS IMPOSED.