

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-60715

United States Court of Appeals
Fifth Circuit

FILED

September 10, 2018

Lyle W. Cayce
Clerk

MELVIN GRAYER,

Plaintiff-Appellant

v.

JAMES FILLIYAW, Warden, Pearl River Central Mississippi Correctional Facility; RONALD KING; JEWARSAI MALLETT; JERRY WILLIAMS; JANE AND JOHN DOES,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:16-CV-709

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Melvin Grayer, Texas prisoner # 08710, moves for leave to proceed in forma pauperis (IFP) on appeal from the dismissal of his 42 U.S.C. § 1983 complaint. The district court dismissed Grayer's § 1983 claim with prejudice as frivolous and for failure to state a claim after determining that the claim

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and the district court certified that an appeal is not taken in good faith on that basis.

By moving to proceed IFP, Grayer is challenging the district court's certification that his appeal is frivolous and not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). However, Grayer does not dispute that he sought monetary damages from the defendants, nor does he address the district court's determination that his § 1983 claim was barred by *Heck*, which was the basis for the district court's certification decision. Thus, he has not shown that "the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted).

Accordingly, his motion to proceed IFP on appeal is denied, and the appeal is dismissed as frivolous. *See Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2. The dismissal of the complaint by the district court and the dismissal of this appeal as frivolous constitute two strikes under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996). Grayer is WARNED that accumulating a third strike will preclude him from proceeding IFP in any civil action or appeal while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

IFP MOTION DENIED; APPEAL DISMISSED AS FRIVOLOUS;
SANCTION WARNING ISSUED.