

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

\_\_\_\_\_  
No. 19-40242  
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United States Court of Appeals  
Fifth Circuit

**FILED**

December 12, 2019

Lyle W. Cayce  
Clerk

BILLY RAY BUTLER,

Plaintiff–Appellant,

v.

YOUNG; LONG; R. CARRWAY; MEDICAL STAFF, Smith County Jail;  
SERGEANT YOUNG; JOHN DOE,

Defendants–Appellees.

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Appeals from the United States District Court  
for the Eastern District of Texas  
USDC No. 6:18-CV-154  
\_\_\_\_\_

Before HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:\*

Billy Ray Butler, Texas prisoner # 2098961, moves for leave to proceed in forma pauperis (IFP) in his appeal from the district court’s dismissal of his 42 U.S.C. § 1983 complaint on summary judgment based on failure to exhaust his administrative remedies. By seeking leave to proceed IFP in this court, Butler is challenging the district court’s denial of leave to proceed IFP and certification that his appeal would be frivolous and not taken in good faith. *See*

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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*Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into an appellant's good faith "is limited to whether 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).

Having reviewed his submissions, we are not persuaded that Butler has identified a nonfrivolous issue for appeal with respect to the district court's grant of summary judgment based on the failure to exhaust, *see Wilson v. Epps*, 776 F.3d 296, 299-300 (5th Cir. 2015); *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012), denial of discovery, *see Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 720 (5th Cir. 1999), or denial of his motion for appointment of counsel, *see Naranjo v. Thompson*, 809 F.3d 793, 799 (5th Cir. 2015). The appeal therefore lacks arguable merit and is frivolous. *See Howard*, 707 F.2d at 220.

Accordingly, Butler's request for leave to proceed IFP on appeal is DENIED, and the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 n.24; *see also* 5TH CIR. R. 42.2. His motion for appointment of counsel on appeal is likewise DENIED. *See Cooper v. Sheriff, Lubbock Cty., Tex.*, 929 F.2d 1078, 1084 (5th Cir. 1991).

The dismissal of this appeal as frivolous counts as a "strike" under 28 U.S.C. § 1915(g). Butler is WARNED that if he accumulates three strikes he may not thereafter 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).