

United States Court of Appeals for the Fifth Circuit

No. 24-50422

United States Court of Appeals
Fifth Circuit

FILED

November 26, 2024

Lyle W. Cayce
Clerk

JOSE FLORES HERNANDEZ,

Plaintiff—Appellant,

versus

DAVID G. GUTIERREZ, *Chair Person; Pardon & Paroles*; ERIC J. R. NICHOLS, *Chair Person; Texas Board Department of Criminal Justice*; GOVERNOR GREG ABBOTT; BRYAN COLLIER, *Executive Director, Texas Department of Criminal Justice*; PATRICK L.O. DANIEL, *Board Member; Texas Board of Criminal Justice*,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:24-CV-279

Before SMITH, GRAVES, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

Jose Flores Hernandez, Texas prisoner # 00305602, moves for leave to proceed in forma pauperis (IFP) in this appeal from the dismissal of his civil rights complaint, filed pursuant to 42 U.S.C. § 1983. The motion is a

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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challenge to the district court's certification that the appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

When his pro se filings are given liberal construction, *see Morrow v. FBI*, 2 F.3d 642, 643 n.2 (5th Cir. 1993), Hernandez contends, without citation to authority, that the district court erred in determining that the defendants are entitled to sovereign immunity as to claims for monetary damages or other retrospective relief because, as a prisoner, he is not a private citizen for purposes of the Eleventh Amendment. "The Eleventh Amendment bars suits by private citizens against a state in federal court." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). "Texas has not consented by statute, and § 1983 does not abrogate state sovereign immunity." *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 394 (5th Cir. 2015). We have affirmed the dismissal of § 1983 suits filed by Texas state prisoners as barred by the Eleventh Amendment. *See Aguilar v. Tex. Dep't of Crim. Just.*, 160 F.3d 1052, 1053-54 (5th Cir. 1998).

As to his remaining civil rights claims, Hernandez makes no effort to demonstrate error in the district court's determinations that such claims should be dismissed for failure to state a claim upon which relief could be granted because his allegations failed to establish the requisite personal involvement of the defendants, *see Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983), and because he improperly sought release from confinement in a civil rights action, *see Melot v. Bergami*, 970 F.3d 596, 599 (5th Cir. 2020). Although we liberally construe his pro se filings, *see Morrow*, 2 F.3d at 643 n.2, Hernandez still must brief arguments to preserve them, *see Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). Claims not argued in the body of the brief are deemed abandoned on appeal. *Id.*

In sum, Hernandez fails to demonstrate that "the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard*

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v. King, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citations omitted). Accordingly, the motion for leave to proceed IFP is DENIED, and the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2.

The district court's dismissal of Hernandez's action for failure to state a claim upon which relief may be granted counts as a strike under 28 U.S.C. § 1915(g), and the dismissal of the instant appeal as frivolous also counts as a strike. *See Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532, 537 (2015). Hernandez is WARNED that if he accumulates three strikes, he will not be permitted to proceed IFP in any civil action or appeal filed while incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g).