

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

United States Court of Appeals
Fifth Circuit

FILED

April 10, 2014

Lyle W. Cayce
Clerk

No. 13-10185

DANIEL GOMEZ,

Plaintiff-Appellant

v.

EDDIE WHEELER, Warden; JIMMY BETCHER, Assistant Warden;
RICHARD LEAL, Assistant Warden,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:12-CV-84

Before OWEN, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:*

Daniel Gomez, Texas prisoner # 1589930, moves for leave to proceed in forma pauperis (IFP) on appeal from the dismissal of his 42 U.S.C. § 1983 complaint as frivolous. He also moves for the appointment of counsel. Gomez's claims in his § 1983 suit related to whether prison officials failed to protect him against sexual assault, violence, and extortion in his unit.

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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The magistrate judge (MJ), before whom Gomez consented to proceed, denied his motion for leave to proceed IFP on appeal and certified that this appeal was not taken in good faith. By moving to proceed IFP here, Gomez is challenging the MJ's certification decision. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Gomez's bare assertions that the MJ was prejudiced against him and that the records of his offender protection investigations constituted clear and convincing evidence of the merits of his claims are insufficient to show that the MJ's certification decision was erroneous. *See id.*; *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). Although pro se briefs are liberally construed, even pro se litigants must brief arguments in order to preserve them. *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). The instant appeal is without arguable merit and is dismissed as frivolous. *See Baugh*, 117 F.3d at 202 n.24; *Howard*, 707 F.2d at 219-20; 5TH CIR. R. 42.2.

Gomez filed a prior civil suit that was dismissed as frivolous, a decision for which his appeal has been dismissed. *Gomez v. Richey*, No. 1:13-CV-12 (N.D. Tex. July 26, 2013), *appeal dismissed*, No. 13-10837 (5th Cir. Sept. 26, 2013). That prior dismissal counts as one strike under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996). Based on the district court's dismissal of this instant complaint and our dismissal of this appeal as frivolous, Gomez has accumulated two additional strikes, for a total of at least three strikes under § 1915(g). *See id.* at 388. Thus, Gomez may not 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).

Additionally, we warn Gomez that frivolous, repetitive, or otherwise abusive filings will invite the imposition of sanctions, which may include dismissal, monetary sanctions, and restrictions on his ability to file pleadings

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in this court and any court subject to this court's jurisdiction. Gomez is further warned that he should review any pending appeals and actions and move to dismiss any that are frivolous.

MOTION FOR LEAVE TO PROCEED IFP DENIED; MOTION FOR APPOINTMENT OF COUNSEL DENIED; APPEAL DISMISSED; 28 U.S.C. § 1915(g) BAR IMPOSED; SANCTION WARNING ISSUED.