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

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**No. 91-5102**
**Summary Calendar**

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**BERTRAND BROWN,**

**Plaintiff-Appellant,**

**VERSUS**

**JAMES A. LYNAUGH, Director,**
**Texas Dept. of Criminal Justice**
**Institutional Division, ET AL.,**

**Defendants-Appellees.**

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Appeal from the United States District Court
for the Eastern District of Texas
(6:90-CV-581)

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(December 10, 1992)
Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Bertrand Brown, an inmate of the Texas Department of Criminal Justice (TDCJ), appeals, *pro se*, the 28 U.S.C. § 1915(d) dismissal of his *pro se*, *in forma pauperis* civil rights complaint. We **VACATE** the dismissal in part and **REMAND** for further proceedings.

I.

Brown sued numerous TDCJ officials and employees under 42 U.S.C. § 1983, alleging, *inter alia*, two incidents of excessive use

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

of force (on August 10 and October 29, 1990) and deliberate indifference to his serious medical needs following the October 29 incident, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[2] Following a ***Spears*** hearing,[3] the district court dismissed the complaint as frivolous under § 1915(d). Adopting the reports of the magistrate judge, the district court based the dismissal on the following findings: (1) Brown's August 10 claim of excessive use of force was repetitious; (2) Brown failed to allege a significant injury to support his October 29 excessive use of force claim, as required by ***Huguet v. Barnett***, 900 F.2d 838, 841 (5th Cir. 1990); and (3) Brown's claim of inadequate medical treatment had slight chance of success and was thus frivolous under ***Wilson v. Lynaugh***, 878 F.2d 846, 849 (5th Cir.), *cert. denied*, 493 U.S. 969 (1989).[4]

I.

Brown contends that the district court erred in dismissing his complaint under § 1915(d).[5] The district court did not have the

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[2] Brown also claimed violation of his property rights, but voluntarily dismissed that claim.

[3] ***Spears v. McCotter***, 766 F.2d 179 (5th Cir. 1985).

[4] The magistrate judge issued two reports. Its original report recommended dismissing both the August 10 and October 29 excessive use of force claims as frivolous. Its supplemental report, however, recommended dismissing the August 10 claim as repetitious, because an identical claim had already been dismissed in a prior action.

[5] Brown also challenges the denial of his motion for appointment of counsel and requests this court appoint counsel. A civil rights complainant is not entitled to appointed counsel unless the case presents exceptional circumstances. *E.g.*, ***Ulmer v. Chancellor***, 691 F.2d 209, 212 (5th Cir. 1982). Because this case does not present

benefit of two recent Supreme Court decisions relevant to the issues here when it considered the complaint -- ***Hudson v. McMillian***, ___ U.S. ___, 112 S. Ct. 995 (1992), and ***Denton v. Hernandez***, ___ U.S. ___, 112 S. Ct. 1728 (1992).

A.

In ***Hudson***, the Court rejected this circuit's requirement that a plaintiff plead and prove a significant injury in order to prevail in an excessive use of force case. 112 S. Ct. at 997. It held that the extent of the injury is simply one factor to be considered, together with the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by responsible officials, and any efforts made to temper the severity of a forceful response. ***Id.*** at 999. "The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it." ***Id.***

The district court ended its inquiry with its finding that Brown had not suffered a significant injury. Its dismissal of the October 29 excessive use of force claim, therefore, must be vacated and that claim remanded for reconsideration in light of ***Hudson.***

B.

In ***Denton***, the Court clarified the legal standard for a finding of factual frivolousness under § 1915(d), which is relevant to Brown's inadequate medical treatment claim. The Court stated that an *in forma pauperis* complaint cannot be dismissed as

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such circumstances, we **AFFIRM** the district court's denial. Likewise, his request that we appoint counsel is **DENIED**.

factually frivolous under § 1915(d) simply because the court finds the plaintiff's allegations unlikely. 112 S. Ct. at 1733. Rather, the factual allegations must be "clearly baseless", a category that encompasses "fanciful", "fantastic", and "delusional" allegations. ***Id.*** Dismissal is appropriate where the facts alleged rise to the level of the irrational or the wholly incredible. ***Id.*** In sum, a complaint may be dismissed if it lacks an arguable basis in fact and law. ***ANCAR v. SARA Plasma***, 964 F.2d 465, 468 (5th Cir. 1992).

This court recently interpreted ***Denton*** to "mandat[e] that a ***Spears***-hearing record clearly distinguish between findings of factual, legal, or mixed factual and legal frivolousness". ***Moore v. Mabus***, 976 F.2d 268, 270 (5th Cir. 1992). Moreover, the district court's reasons for a § 1915(d) dismissal should reflect the ***Neitzke***[6]-***Denton*** considerations, in order to facilitate meaningful, intelligent appellate review. ***Id.***; *see* ***Denton***, 112 S. Ct. at 1734.

The district court's determination that Brown's inadequate medical treatment claim had only a slight chance of success, without more, is insufficient to support a finding of frivolousness under the ***Denton*** standards. The dismissal of Brown's medical claim, therefore, must also be vacated and remanded for application of the principles set forth in ***Denton*** and ***Moore***.

C.

Finally, Brown contests the dismissal with prejudice of his August 10 claim of excessive use of force as repetitious, asserting

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[6] ***Neitzke v. Williams***, 490 U.S. 319 (1989), addressed the standards for finding legal frivolousness.

that it should have been dismissed without prejudice, because he voluntarily dismissed it at the ***Spears*** hearing. We do not find a request for voluntary dismissal in the hearing transcript. We have reviewed the record in the prior proceedings, and find no error in the district court's determination that the claim was repetitious.

III.

For the foregoing reasons, the dismissal of the claim of excessive use of force on August 10, 1990, is **AFFIRMED**; the remainder of the order of dismissal is **VACATED**; and the case is **REMANDED** for further proceedings consistent with this opinion.

**AFFIRMED IN PART**; **VACATED IN PART**; and **REMANDED**.