

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1765  
Conference Calendar

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BILLY W. HORTON,

Plaintiff-Appellant,

versus

KENNETH P. STRIPLING  
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:92-CV-178-P  
- - - - -

August 17, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:\*

Horton argues on appeal that the clerk of court of a Texas state court cannot legally refuse to file a pro se brief.

The dismissal of a complaint pursuant to 28 U.S.C. § 1915(d) is reviewed for an abuse of discretion. Denton v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1728, 1734, 118 L.Ed.2d 340 (1992). A complaint may be dismissed as frivolous if it lacks an arguable basis in law or in fact. Id. at 1733.

If Horton's complaint can be construed as an application for habeas relief, he would be required to exhaust his state and

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\* Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

federal habeas remedies prior to the federal court's consideration of the § 1983 claims. Serio v. Members of the La. State Bd. of Pardons, 821 F.2d 1112, 1114-15 (5th Cir. 1987). However, if Horton has failed to allege the deprivation of a right secured to him by the Constitution or laws of the United States, he has failed to state a claim for either habeas corpus or § 1983 relief, and the complaint is subject to dismissal. Thomas v. Torres, 717 F.2d 248, 249 (5th Cir. 1983), cert. denied, 465 U.S. 1010 (1984).

A criminal defendant has the right to represent himself or to have the assistance of counsel at his criminal trial, but there is no right to hybrid representation. Smith v. Collins, 977 F.2d 951, 962 (5th Cir. 1992), petition for cert. filed, (U.S. March 31, 1993) (No. 92-8174). The Texas courts have held that because there is no right to hybrid representation, a pro se brief filed by a defendant represented by counsel "present[s] nothing for review." Id. (citation omitted). Horton does not have a constitutional right to file his own brief or to raise issues that his counsel has failed to raise on appeal. Id.

The district court did not abuse its discretion in dismissing the § 1983 claim as frivolous. However, because there is no constitutional basis for a habeas claim, the portion of the district court's order directing Horton to pursue his habeas remedies is modified to be a dismissal with respect to the § 1983 and habeas claims.

AFFIRMED, as modified.