

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 92-3792  
Conference Calendar

---

GENE ROY HESS,

Plaintiff-Appellant,

versus

F. IVERN DYMOND, ET. AL.,

Defendants-Appellees.

- - - - -  
Appeal from the United States District Court  
for the Eastern District of Louisiana  
USDC No. CA-92-1702 J

- - - - -  
May 7, 1993

Before REAVLEY, KING, and DAVIS, Circuit Judges.

PER CURIAM:\*

Prisoners who bring § 1983 claims which actually challenge the validity of their convictions must initially pursue both state and federal habeas corpus relief. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1117, 1119 (5th Cir. 1987). Hess has not raised post-conviction claims regarding the merits of his conviction to the Louisiana Supreme Court. His claims of ineffective assistance and charges of state court improprieties pertain to the validity of his conviction; therefore, the

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court properly dismissed Hess's claims as unexhausted habeas claims.

Even if it plainly appears that Hess's § 1983 claims would be foreclosed as a matter of law, this Court may not address the issues until the state court has been afforded an opportunity to consider the merits of Hess's challenge to his state conviction. See Serio, 821 F.2d at 1114. However, because a dismissal of Hess's claim against Judge Kirby resolves none of the merits underlying Hess's state claim, there is no reason to defer decision on the absolute immunity issue. Id. at 1115.

A federal court may dismiss a claim filed in forma pauperis if satisfied that the action is frivolous or malicious. See 28 U.S.C. § 1915(d). Hess's claims against Judge Kirby lack an arguable basis in law because judges are absolutely immune from civil suit for actions taken within their judicial capacity. See Brewer v. Blackwell, 692 F.2d 387, 396 (5th Cir. 1982). This immunity shields judges unless they act either in the clear absence of all jurisdiction over the subject matter, or in a nonjudicial capacity. Id. Thus, the district court properly dismissed Hess's claims against Judge Kirby.

With respect to Hess's claims against Dymond, a public defender is not considered a state actor when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding. See Polk County v. Dodson, 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). However, private attorneys who conspire with state officials may be held liable under § 1983 even though the state officials with whom they

conspire are themselves immune from suit. Mills v. Criminal Dist. Court No. 3, 837 F.2d 677, 679 (5th Cir. 1988). Thus, the district court should have declined to address the frivolousness of Hess's claims against Dymond. See Serio, 821 F.2d at 1114.

The district court's judgment dismissing Hess's claims against Dymond is REMANDED to allow the district court to modify its judgment to provide for a dismissal without prejudice or a stay pending exhaustion of state and federal habeas relief. The district court's judgment dismissing Hess's claims against Judge Kirby is AFFIRMED.