

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-4621
Summary Calendar

JAMES RILEY LEMONS,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(CA6 91 459)

(March 9, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge:¹

Appellant appeals the denial of his petition for habeas relief. We affirm.

I.

James Riley Lemons is in the custody of the State of Texas following his conviction for burglary of a habitation. He does not

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

challenge his conviction but appeals from the denial of a federal habeas corpus petition challenging the proceedings in two prison disciplinary incidents.

The record does not contain copies of the disciplinary reports, but the following undisputed facts are stated in the magistrate judge's report.

On June 26, 1990, petitioner threw a cup of liquid on Officer D. Sanders. Petitioner states he threw the liquid because he had not been given a meal at meal time. Sergeant DuWayne Berding witnessed the incident and initiated disciplinary actions against petitioner for striking an officer, report number 423905.

On June 27, 1990, petitioner threw a cup of liquid on Officers Wendell B. Warren and Robert Phillips for failing to provide him coffee and milk at breakfast. Disciplinary records indicate the officers believed the liquid was urine. Officer Phillips initiated disciplinary proceedings for striking an officer, report number 229961.

In his pleadings, the petitioner states that on June 27, 1990, eight officers in riot gear threatened him with bodily injury, forced him from his cell, and confiscated his property for throwing water on officers. The disciplinary hearings were conducted later and plaintiff was found guilty in both cases. On July 24, 1990, case number 229961 was heard. He was punished with a reduction in good time status from Line Class II to Line Class III, forfeiture of 365 days good time, and 15 days commissary restrictions and 15 days cell restriction. Case number 423905 was heard on July 30, 1990. Petitioner was punished by the loss of 325 days good time.

After exhausting state remedies, Lemons filed a federal habeas corpus petition, alleging that his property was taken without due process and that his punishment following the incidents constituted double jeopardy. He sought restoration of good time credits, class status, and any relief deemed appropriate by the district court.

After **de novo** review, the district court adopted the recommendation of the magistrate judge to grant the respondent's motion for summary judgment and dismissed the petition with prejudice. The district court granted a certificate of probable cause.

II.

A.

On October 23, 1991, five days after the expiration of the extension of time the court granted the respondent to answer, the respondent filed a motion for summary judgment. Then, on November 1, 1991, Lemons filed a "motion for default and oppose summary judgment," arguing that the respondent's time for answering had expired when the motion for summary judgment was filed. The magistrate judge denied Lemons' motion as moot.

Default judgments are not appropriate in habeas corpus cases. **See** 7 Moore's Federal Practice, ¶81.05[4] at 81-55 and n. 14. A habeas petitioner is not entitled to release because of the state's tardiness in responding to the petition. **See Broussard v. Lippman**, 643 F.2d 1131, 1134 (5th Cir.), **cert. denied**, 452 U.S. 920 (1981); **U.S. ex rel. Mattox v. Scott**, 507 F.2d 919, 924 (7th Cir. 1974). The magistrate judge did not abuse his discretion. **See Mason v. Lister**, 562 F.2d 343, 345 (5th cir. 1977).

B.

Lemons asserts that prison officials entered his cell and confiscated his property without affording him due process. He

contends that the district court's dismissal of his claim was improper.

"Summary judgment is reviewed de novo, under the same standards the district court applies to determine whether summary judgment is appropriate." **Amburgey v. Corhart Refractories Corp.**, 936 F.2d 805, 809 (5th Cir. 1991). Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.'" **Id.** (quoting Fed. R. Civ. P. 56(c)). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. **Hanchey v. Energas Co.**, 925 F.2d 96, 97 (5th Cir. 1990).

"Neither habeas nor civil rights relief can be had . . . absent the allegation by a plaintiff that he has been deprived of some right secured to him by the United States Constitution or laws." **Thomas v. Torres**, 717 F.2d 248, 249 (5th Cir. 1983), **cert. denied**, 465 U.S. 1010 (1984). In his complaint, Lemons alleged that prison officials violated due process when they entered his cell and committed an "unauthorized" taking of his property. However, due process is not violated by a random, unauthorized deprivation "if the state furnished an adequate post-deprivation remedy." **Caine v. Hardy**, 943 F.2d 1406, 1412 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 1474 (1992) (citations omitted). If there is an adequate remedy, even intentional destruction does not raise

a constitutional claim. **Simmons v. Poppell**, 837 F.2d 1243, 1244 (5th Cir. 1988). Texas provides such a remedy. Lemons's claim is therefore facially frivolous. **See Meyers v. Adams**, 728 S.W. 2d 771, 772 (Tex. 1987).

C.

Lemons contends that he was subjected to "repeated and multiple" punishments for the "water incidents on June 26 and 27, 1990." He was first disciplined for throwing water when his personal property was confiscated and again at the disciplinary proceeding. He argues that these multiple punishments violate the Double Jeopardy Clause.

"The guarantee against double jeopardy protects against multiple punishments for the same offense and against a second prosecution for the same offense after either an acquittal or conviction." **Showery v. Samaniego**, 814 F.2d 200, 202 (5th Cir. 1987) (citations omitted). "The risk against which double jeopardy protects is not present in proceedings that are not `essentially criminal.'" **Id.** (citations omitted). "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." **Wolff v. McDonnell**, 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Therefore, the Double Jeopardy Clause does not apply, and Lemons' claim fails.

D.

Lemons also seeks the disqualification of ten judges from this circuit. He alleges that the panel judges conspired with Judge

Parker and his court reporter by considering a false and altered evidentiary hearing transcript in affirming an earlier unrelated appeal. He further asserts that the panel judges are corrupt and have "no respect for the oath of judicial office, or, for the integrity of the Appeals Court." He argues that he will suffer prejudice and bias if the panel judges preside over the present appeal.

In his motion to disqualify panel judges, Lemons fails to support his charge of conspiracy with factual specificity. **See Holdiness v. Stroud**, 808 F.2d 417, 425 (5th Cir. 1987). Rather, he makes unfounded allegations and insulting remarks about Judge Parker and the judges of this court and their bias toward him. His motion is frivolous and is stricken. **See Vinson v. Heckmann**, 940 F.2d 114, 116 (5th Cir. 1991) (citing **Theriault v. Silber**, 579 F.2d 302, 302-03 (per curiam), **cert. denied**, 440 U.S. 917 (1979)).

In addition, we impose sanctions of \$50 against Lemons for his lack of respect toward this court. We direct Lemons to pay this sum to the Clerk of this court. Lemons may file no further action or appeal in any court in this circuit until he has satisfied the sanctions.

E.

Finally, Lemons raises an issue he did not present to the district court. He contends that prison officials are depriving him of his First Amendment right of access to this court. He asks this court to issue a "contempt order" instructing the prison staff to provide him with paper, cartons, and legal envelopes. The

motion for contempt is not properly before this court. We do not consider arguments or requests made for the first time on appeal.

CONCLUSION

Accordingly, the judgment of the district court dismissing Lemons's habeas corpus petition is affirmed; the motion to disqualify the panel judges is stricken; and the motion for contempt is denied. For the reasons stated above, we also impose sanctions against Lemons and prohibit him from filing any action or appeal in any court in this circuit until he has satisfied the sanction.

AFFIRMED. Motion denied. Sanctions imposed.