UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1389
Summary Calendar

JOE HERNANDEZ,

Plaintiff-Appellant,

versus

TOM PRICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

3:93 CV 0414 H

(August 12, 1993)

Before POLITZ, Chief Judge, JOLLY and DUHE, Circuit Judges.

PER CURIAM:*

Joe Hernandez was prosecuted in Texas state court for armed robbery and unlawful possession of a firearm. On March 1, 1993 he filed a complaint with the federal district court seeking recusal of the presiding state judge, Tom Price. He also sought punitive

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

damages against the judge for allegedly ordering that Hernandez appear in chains and leg irons. Hernandez also alleges that Judge Price threatened a 500-year prison term if he did not waive his right to a jury trial. The matter was referred to a magistrate judge who recommended that the complaint be treated as both an application for federal habeas relief and damages under 42 U.S.C. § 1983 and that both be dismissed. In his objection to the magistrate's recommendation Hernandez pointed out that the charges against him have now resulted in convictions and the imposition of two life sentences. The district court adopted the magistrate judge's recommendation; Hernandez timely appealed.

Analysis

Construing his pleading broadly, as we typically do pro se filings, we note that Hernandez seeks habeas relief and damages. We first consider whether Hernandez may seek habeas relief without first presenting his claim to the Texas state courts.

Exhaustion of adequate, available state remedies is a prerequisite to a federal habeas corpus application. The district court determined that Hernandez did not petition for collateral review in the Texas state system before filing the instant action. Hernandez does not challenge that finding nor does he assert that pursuit of state relief would be futile. Federal intervention at this point would violate the clear mandate of 28 U.S.C. § 2254(b).[1]

[1]That section provides:
An application for . . . habeas corpus . . . shall not be granted unless it appears that the applicant has

Accordingly, the district court did not err in dismissing Hernandez's claim without prejudice for want of exhaustion.

Hernandez also sought injunctive relief and a money judgment against Judge Price for ordering that he be "chained and shackled every time [he] appears in" Judge Price's courtroom. We construe this to be an action under 42 U.S.C. § 1983. The district court, in adopting the magistrate judge's recommendation, concluded that Hernandez's complaint was frivolous.[2]

A judge enjoys absolute immunity in damages for actions taken in his judicial capacity. Judge Price's decision to direct that Hernandez be restrained during any court appearance is a judicial action.[3] Hernandez's civil rights claim lacks an arguable basis in fact and law and is, therefore, properly dismissed under 28 U.S.C. § 1915(d).[4]

The question of injunctive relief poses a different inquiry. A judge, even when acting in his judicial capacity, is not immune

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> exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

[2]The district court may dismiss frivolous complaints, 28 U.S.C. § 1915(d).

[3]**See Malina v. Gonzales**, -- F.2d -- (5th Cir. June 25, 1993, No. 91-3757) (outlining relevant factors in determining whether action is judicial in nature).

[4]28 U.S.C. § 1915(d) "accords [district courts] the authority to dismiss a claim based on an indisputably meritless legal theory, [such as] . . . claims against which it is clear that the defendant[] [is] immune." **Neitzke v. Williams**, 490 U.S. 319 (1989).

from claims to prospective relief under 42 U.S.C. § 1983.[5] A review of Hernandez's filings makes clear, however, that such relief is not warranted here. Even assuming that questions with respect to prospective relief are still ripe, notwithstanding the fact that Hernandez has now been convicted and his filings do not demonstrate that he will again appear before Judge Price, he has failed to state a cogent claim for injunctive relief. There is no showing of irreparable harm or of the inadequacy of state law remedies.[6]

For the reasons assigned, the judgment of the district court is AFFIRMED.

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[5]**Pulliam v. Allen**, 466 U.S. 522 (1984).

[6]**See Pulliam**, 466 U.S. at 537. **See also Society of Separationists v. Herman**, 959 F.2d 1283 (5th Cir. 1992) (en banc) ("Principles of comity and federalism, in addition to Article III's jurisdictional bar, mandate that we intervene in the management of state courts only in the extraordinary case.").