

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20045  
Summary Calendar

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ROBERT RASBERRY, JR.,  
Plaintiff-Appellant,  
versus  
LESTER H. BEAIRD, ET AL.,  
Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CA-H-91-850)

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(September 14, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per Curiam<sup>1</sup>:

Robert Rasberry, Jr. (Rasberry) filed this civil rights case *pro se* and applied for pauper status under 28 U.S.C. § 1915. He is an inmate of the Texas Department of Criminal Justice - Institutional Division (TDCJ-ID). He sought relief under 42 U.S.C. § 1983, claiming that his constitutional rights were violated because he was not allowed to review transcripts of a federal petition for writ of habeas corpus in order to prepare an appeal

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

brief. After holding a *Spears*<sup>2</sup> hearing, the trial court granted *in forma pauperis* status and dismissed the complaint with prejudice as frivolous pursuant to 28 U.S.C. § 1915(d). We affirm.

Rasberry argues that the district court erred by using hearsay testimony and unauthenticated records at the *Spears* hearing to dismiss his suit.

The purpose of a *Spears* hearing is "to flesh out the substance of a prisoner's claims." *Wesson v. Oglesby*, 910 F.2d 278, 281 (5th Cir. 1990). However, the use of hearsay witnesses and unauthenticated records to counter a prisoner's allegations is improper. *Gilbert v. Collins*, 905 F.2d 61, 63 (5th Cir. 1990). Credibility assessments at a *Spears* hearing must be made by assessing "the inherent plausibility of a prisoner's allegations based on objective factors." *Id.* (internal quotation and citation omitted). If a prisoner's version of the facts, as contained in his complaint and elaborated upon at the *Spears* hearing "is inherently plausible and internally consistent, a court may not for purposes of a § 1915(d) dismissal simply choose to believe conflicting material facts alleged by the defendants." *Wesson*, 910 F.2d at 282.

However, Rasberry's argument is without factual foundation because the district court did not use the alleged hearsay testimony or the alleged unauthenticated records to address whether Rasberry was allowed meaningful opportunity to review his records. The court noted that it was precluded from making a "determination

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<sup>2</sup>*Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

as to the credibility of one witness over another, or of one party over another, in a *Spears* hearing," citing *Wilson v. Barrientos*, 926 F.2d 480 (5th Cir. 1991). Rather, the district court determined that the defendants' actions failed to prejudice Rasberry's legal position, and concluded that Rasberry did not state a viable denial-of-access-to-the-courts claim. Rasberry does not directly challenge this determination.

For the foregoing reasons, Rasberry's appeal is DISMISSED as frivolous. See 5th Cir. R. 42.2.