

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

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No. 94-20875

(Summary Calendar)

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BERTRAND J. TUCKER,

Plaintiff-Appellant,

versus

CALVIN TUCKER, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
For the Southern District of Texas  
(92 CV 2975)

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June 21, 1995

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

PER CURIAM:\*

Bertrand Tucker, an inmate of the Texas Department of Criminal Justice, appeals from the district court's dismissal, under 28 U.S.C. § 1915(d) (1988), of his pro se, in forma pauperis civil rights suit. We vacate and remand because the district court record is incomplete. Although the *Spears*<sup>1</sup> hearing transcript shows that Tucker was sworn prior to testifying, it does not show

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\* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

<sup>1</sup> *Spears v. McCotter*, 766 F.2d 179, 181 (5th Cir. 1985).

that the physician who testified, Dr. Custer, was similarly sworn. In addition, Dr. Custer's statements at the *Spears* hearing suggest that he based his testimony on Tucker's medical records, but there is no evidence that those records were authenticated. In *Wilson v. Barrientos*, 926 F.2d 480 (5th Cir. 1991), we held that a magistrate judge abused her discretion in dismissing an in forma pauperis complaint after a *Spears* hearing because the witnesses who testified at the *Spears* hearing were not sworn and because the witnesses relied on unauthenticated documents. *Id.* at 483. On petition for rehearing in *Wilson*, we amended our opinion because the Attorney General of the State of Texas had supplemented the record to show that (1) all witnesses were sworn at the beginning of the day's series of *Spears* hearings, and (2) the records had been authenticated pursuant to a longstanding agreement between the Attorney General's office and the district court. *Id.* If in this case the Attorney General, in a petition for rehearing, supplements the record on appeal to show that Dr. Custer was sworn at some earlier point in the day's proceedings and that Tucker's medical records were properly authenticated, we will decide on rehearing the merits of Tucker's appeal.