UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-41335

(Summary Calendar)

CHARLES LEWIS HATCHER,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, DIRECTOR OF TDCJ-ID, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
(6:94 CV 30)

August 23, 1995

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

PER CURIAM:*

Charles Lewis Hatcher filed suit against James A. Collins, Director of the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID"), and other TDCJ-ID officials (collectively, "TDCJ-ID officials") under 42 U.S.C. § 1983 (1988), complaining of constitutional violations during his confinement in prison. After

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

a *Spears* hearing, the magistrate judge dismissed the lawsuit without prejudice as frivolous and premature under 28 U.S.C. § 1915(d) (1988). We affirm.

I

In 1985, a Tarrant County jury convicted Hatcher of burglary and sentenced him to forty years' imprisonment. The United States District Court for the Northern District of Texas denied his request for habeas corpus relief. In 1991, this Court reversed the district court's judgment and remanded the cause to the district court, which ordered the State of Texas to retry Hatcher, or the writ would be granted. The State initiated a retrial, and Hatcher, on parole since 1988, pled guilty to the charge. He again received a forty-year sentence with credits for good time served.

At the time of his retrial, Hatcher had other criminal cases pending against him. The State tried all of these cases simultaneously, resulting in an additional twenty-year sentence. Because Hatcher incurred this new conviction while ostensibly on parole, the TDCJ-ID processed him as a parole violator based on his 1985 conviction, rather than as a new offender, based on his new 1991 conviction. Accordingly, the TDCJ-ID denied him his good-time credits.[1] Hatcher attempted to correct his records for twenty-two months, finally filing an application for a writ of habeas corpus in the 297th District Court of Tarrant County, Texas. According to Hatcher, in the State of Texas' reply to the writ, Helena F.

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[1] A parolee returned from parole under a new conviction is not eligible for credit restorations.

Faulkner, Tarrant County Assistant Criminal District Attorney, spoke to Mr. Charley Valdez, TDCJ-ID's Classification and Treatment Receiving Office Supervisor, about Hatcher's claim. Mr. Valdez informed Ms. Faulkner that the Institutional Division records had been changed to reflect the sentence date of 1991, rather than 1985. Four months later, for unknown reasons, Hatcher's records were changed back to reflect the sentence date of 1985 rather than 1991.[2]

Because of this allegedly incorrect processing under the 1985 conviction instead of the 1991 conviction, Hatcher claimed that the TDCJ-ID had denied him eligibility for parole.[3] He filed this suit in the United States District Court for the Eastern District of Texas, contending that the incorrect processing and the TDCJ-ID officials' failure to correct their mistake denied him due process under both the Federal and Texas Constitutions. Six months later, Hatcher filed another application in the Tarrant County court for a writ of habeas corpus.

A United States magistrate judge held that Hatcher's § 1983 lawsuit properly sounded in habeas corpus and dismissed it without prejudice as frivolous and premature. Several months after the dismissal, the Tarrant County court granted Hatcher's habeas petition. Hatcher now appeals.

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[2] The record does not reflect the disposition of the habeas corpus action.

[3] TDCJ-ID records indicate that with his good-time credits, Hatcher should have been eligible for parole on January 2, 1994. Without his good-time credits, Hatcher will not qualify for parole until August 3, 1996.

II

If a district court determines that an *in forma pauperis* complaint is frivolous, it may dismiss the action. 28 U.S.C. § 1915(d); *accord Mackey v. Dickson*, 47 F.3d 744, 745 (5th Cir. 1995). An action is frivolous when it "lacks an arguable basis either in law or fact." *Neitzke v. Williams*, 490 U.S. 319, 323-25, 109 S. Ct. 1827, 1831-32, 104 L. Ed. 2d 338 (1989); *accord Mackey*, 47 F.3d at 745; *Booker v. Koonce*, 2 F.3d 114, 115-16 (5th Cir. 1993). We review a § 1915(d) dismissal for abuse of discretion. *Denton v. Hernandez*, 504 U.S. 25, ___, 112 S. Ct. 1728, 1734, 118 L. Ed. 2d 340 (1992); *Mackey*, 47 F.3d at 745.

Under *Heck v. Humphrey*, ___ U.S. ___, 114 S. Ct. 2364, 129 L. Ed. 2d. 383 (1994), "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 2372; *see also Mackey*, 47 F.3d at 746 ("If success for the plaintiff in his section 1983 suit would challenge the constitutionality of his conviction and the plaintiff cannot show that the conviction has been reversed, expunged, invalidated, or called into question by the issuance of a habeas writ, the district court may properly dismiss the section 1983 claim under section 1915(d)."). "Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or

sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *Heck*, ___ U.S. at ___, 114 S. Ct. at 2373.

A judgment in favor of Hatcher on his § 1983 claim would necessarily imply the invalidity of the TDCJ-ID's processing of his conviction, its subsequent denial of his good-time credits, and its determination of his parole eligibility date. *See Jackson v. Vannoy*, 49 F.3d 175, 177 (5th Cir. 1995) (holding that an inmate could not make a § 1983 challenge to an arrest that led to the revocation of his parole because to do so would necessarily imply the invalidity of the revocation of parole), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. May 15, 1995) (No. 94-9704).[4] Because such a finding challenges the duration of Hatcher's confinement, it falls squarely under *Heck*, and thereby requires a demonstration that Hatcher has obtained restoration of his good-time credits and correction of his parole eligibility date through a writ of habeas corpus. *See McGrew v. Texas Bd. of Pardons & Paroles*, 47 F.3d 158, 161 (5th Cir. 1995) ("Because an action attacking the validity of parole proceedings calls into question the fact and duration of confinement, it must satisfy the *Heck*

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[4] *See also Serio v. Member of La. State Bd. of Pardons*, 821 F.2d. 1112, 1117 (5th Cir. 1987) (holding that "a prisoner challenging a `single allegedly defective hearing' affecting the date of his parole eligibility or release must first pursue his claim through habeas corpus regardless of the nature of the relief that he requests." (citing *Alexander v. Ware*, 714 F.2d 416, 419 (5th Cir. 1983)). Although Hatcher alleges a continuing violation of due process, his claim is analogous to the challenge against a "single allegedly defective hearing" contemplated in *Serio* because it does not challenge a broad-based policy of the TDCJ-ID, but only an error in his particular case. *See Serio*, 821 F.2d at 1118 (discussing the distinction between broad-based class action challenges to general rules and procedures and narrow attacks on the procedure followed in a single hearing).

element."). Accordingly, the district court properly held that Hatcher could not request relief under § 1983 because he had not yet successfully pursued his claim through habeas corpus.

In his appellant's amended brief, Hatcher appended a copy of the Tarrant County Court's order granting him habeas relief *after* the district court's dismissal, and he claimed that the order was "very sufficient to the instant cause of action." We construe this as a contention that Hatcher has obtained habeas corpus relief as required by *Heck*,[5] but he did not present this claim to the district court. Therefore, we do not consider this claim for the first time on appeal unless Hatcher has shown that a manifest injustice will otherwise result. *See United States v. Madkins*, 14 F.3d 277, 279 (5th Cir. 1994) (refusing to review issue not presented first to district court); *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (declining to review issues raised for the first time on appeal unless issues involved purely legal questions or would result in manifest injustice if not reviewed). Because the district court dismissed Hatcher's claim without prejudice, he may refile and pursue his civil rights action in light of the habeas relief. Accordingly, we do not consider Hatcher's new claim on appeal.

III

For the foregoing reasons, we AFFIRM the judgment of the

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[5] We construe *pro se* pleadings liberally. *See Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d. 652 (1972) (holding a *pro se* complaint, "however inartfully pleaded," to "less stringent standards than formal pleadings drafted by lawyers").

district court.