

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60766
Summary Calendar

JUAN MANUEL GONZALEZ,

Plaintiff-Appellant,

versus

JESUS JAIME GARZA, ET AL.,

Defendants-Appellees.

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

(CA-L-93-75)

(June 15, 1995)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

PER CURIAM:*

Juan Manuel Gonzalez, an inmate in the Texas Department of Corrections, appeals the district court's dismissal as frivolous of his civil rights action. Finding no error, we affirm. We also deny Gonzalez's motions for "default" and "default/summary

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

judgment."

Background

In July 1989 Gonzalez was convicted of murder and sentenced to 99 years in prison. In May 1993, proceeding pro se and in forma pauperis, Gonzalez invoked 42 U.S.C. § 1983 and filed suit against prosecutors Jose M. Rubio, Jr. and Armando Trevino, Justice of the Peace Jesus Garza, and law enforcement officers Juan Garza and Antonio Aguilera. Gonzalez contended that his murder conviction resulted from the defendants' conspiracy to falsely imprison him. He based his claim on allegations of false arrest; witness blackmail; the withholding of vital evidence; the offering of perjured testimony; and the use of inflammatory evidence. Gonzalez also claimed that he was denied access to the courts.

The magistrate judge, construing Gonzalez's complaint as a petition for a writ of habeas corpus, recommended dismissal for the failure to exhaust state remedies. Gonzalez countered that he had not filed a habeas corpus petition but, rather, a civil rights complaint under § 1983. He also asserted that he had sought a state writ of habeas corpus which had been denied. Determining that Gonzalez had not presented the same claims to the state court, the magistrate judge reaffirmed the initial recommendation in an addendum to the initial report. Gonzalez again objected, reiterating that the instant suit was brought under § 1983, not 28 U.S.C. § 2254, underscoring that the relief he sought was damages. The magistrate judge, in a second addendum, recommended that the

action be dismissed under the Supreme Court's holding in **Heck v. Humphrey**.¹ Contending, inter alia, that **Heck** did not apply retroactively to his action, Gonzalez again objected. The district court dismissed the complaint with prejudice; Gonzalez timely appealed.

Analysis

We review a district court's § 1915(d) dismissal under the abuse of discretion standard.² Applying the rule of **Heck**, which applies retroactively to the instant action,³ we conclude that Gonzalez's complaint does not state a viable § 1983 claim. Gonzalez has repeatedly declared that the instant suit is a § 1983 action for damages. A judgment in favor of Gonzalez on his claim that the defendants conspired to falsely imprison him would necessarily implicate the validity of his conviction or sentence.⁴ Accordingly, because Gonzalez has failed to prove an essential element, i.e., that his conviction or sentence was reversed on direct appeal, expunged by executive order, declared invalid by an

¹114 S.Ct. 2364 (1994)(holding that a state prisoner's § 1983 claim for damages is not cognizable when the complaint attacks the validity of a conviction or other harm whose unlawfulness would render the conviction invalid, unless the conviction has been invalidated or otherwise set aside).

²**Booker v. Koonce**, 2 F.3d 114 (5th Cir. 1993). § 1915 (d) directs the dismissal as frivolous of an in forma pauperis complaint which lacks an arguable basis in law. **Id.**

³**Boyd v. Biggers**, 31 F.3d 279 (5th Cir. 1994).

⁴Indeed, Gonzalez argues in his pleadings that he "seeks relief for constitutional violations that was [sic] in direct cause of the conviction."

authorized state tribunal, or called into question by a federal writ of habeas corpus, as required by **Heck**, the complaint properly was dismissed with prejudice.⁵

Neither Gonzalez's allegations that evidence was manipulated or withheld to corroborate perjured testimony, nor anything else in the record raises a viable claim that Gonzales was denied access to the courts.⁶ The right of access protects one's physical access to the courts.⁷ Further, even if Gonzalez had stated a claim in this regard, our consideration would be foreclosed by **Heck**. Dismissal of this claim was proper.

We also deny Gonzalez's Motion for Default, and his Motion for Default/Summary Judgment. There is no authority under federal rules or precedents for entry of such an order at the appellate level.

The judgment of the district court is AFFIRMED.

⁵**Heck; Boyd; Stephenson v. Reno**, 28 F.3d 26 (5th Cir. 1994).

⁶Although in his brief Gonzalez alleges that this right was denied by "manipulation" of the evidence, in the pleadings he provides a variety of other allegations to support this claim. These include assertions that he was denied a request for a birth certificate of a state's witness; that the defendants failed to respond to discovery; and that the defendants conspired to prevent him from obtaining the transcripts of his state habeas proceeding.

⁷**Foster v. City of Lake Jackson**, 28 F.3d 425 (5th Cir. 1994)(citing **Crowder v. Sinyard**, 884 F.2d 804 (5th Cir. 1989), cert. denied, 496 U.S. 924 (1990)).