

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 96-10986  
Summary Calendar

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HARUN NASSOR TALIB,

Plaintiff-Appellant,

versus

GARY L. JOHNSON, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISION; THE STATE OF TEXAS;  
JANICE WARDER, Judge of the 291st Judicial District,

Defendants-Appellees.

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HARUN NASSOR TALIB,

Petitioner-Appellant,

v.

GARY L. JOHNSON, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISION,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:96-CV-419-T  
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May 20, 1997

Before KING, JOLLY, and DENNIS, Circuit Judges.

PER CURIAM:\*

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\* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Harun Nassor Talib, #689194, appeals from the district court's dismissal of his mixed civil rights/habeas corpus action.

Talib argues that the district court abused its discretion in denying his motion to dismiss from his habeas corpus petition his unexhausted claim of an unconstitutional search and seizure. Talib also argues the merits of his habeas corpus claim that his offense was misclassified as a second degree felony.

We have reviewed the record and the briefs filed by the parties and conclude that the district court abused its discretion in implicitly denying Talib leave to dismiss from his habeas corpus petition his unexhausted claim of an unconstitutional search and seizure. See Hernandez v. Garrison, 916 F.2d 291, 293 (5th Cir. 1990); Rose v. Lundy, 455 U.S. 509, 520 (1982). The portion of the district court's judgment denying Talib's civil rights claims for damages as barred by Heck v. Humphrey, 114 S. Ct. 2364 (1994) is AFFIRMED. The portion of the judgment denying Talib's motion to dismiss from his habeas petition his unexhausted claim is VACATED and the case is REMANDED to the district court for the dismissal of Talib's unexhausted habeas claim and for consideration of any remaining habeas claims.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.