

**UNITED STATES COURT OF APPEALS  
For the Fifth Circuit**

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No. 93-1100  
Summary Calendar

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Kenneth Burke,

Plaintiff-Appellant,

VERSUS

Debra Goodall,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Northern District of Texas

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3-93 CV 0023 X

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( May 19, 1993)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge\*:

Pro se prisoner filed a civil rights action alleging constitutional violations involving ineffective assistance of counsel and denial of his request to change counsel. The district court dismissed the action as frivolous under 28 U.S.C. § 1915(d). For the following reasons we affirm the district court's decision as modified.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

### **Facts and Prior Proceedings**

Kenneth Burke, a prisoner proceeding pro se, filed a 42 U.S.C. § 1983 complaint against the trial counsel who represented him in a criminal prosecution. The basis of the claim was ineffective assistance of counsel and the denial of right to change counsel. The complaint was sent to the magistrate for recommendations. The magistrate recommended dismissing Burke's § 1983 complaint as frivolous under 28 U.S.C. § 1915(d), noting that the claim lacked an arguable basis in law because defense attorneys in criminal prosecutions do not act under color of state law and therefore are not subject to suit under § 1983. The magistrate also noted that Burke's allegations regarding ineffective assistance of counsel called into question the legality of his state criminal conviction and therefore Burke's complaint could be construed as a petition for federal habeas relief. The magistrate stated that it did not appear that Burke's habeas complaint had ever been litigated, so he concluded that Burke had failed to exhaust state remedies and could not presently maintain this action for federal habeas relief. The district court adopted the magistrate's report and recommendation and dismissed the complaint as frivolous pursuant to 28 U.S.C. § 1915(d). Burke timely appeals to this court.

### **Discussion**

This Circuit bars consideration of claims under § 1983 that directly or indirectly challenge the constitutionality of the prisoner's confinement without first exhausting state remedies, such as habeas corpus. **Serio v. Members of Louisiana State Board of Pardons**, 821 F.2d 1112, 1117 (5th Cir. 1987). In the instant case, Burke has alleged constitutional claims that challenge the legality of his confinement.<sup>1</sup> As such, these claims must first be pursued through habeas corpus. **Id.** When a prisoner brings a civil rights action before a habeas petition, the district court should dismiss the civil rights action without prejudice and direct the plaintiff to promptly pursue habeas remedies. **Rodriguez v. Holmes**, 963 F.2d 799, 804-05 (5th Cir. 1992). While the district court properly construed Burke's complaint as a request for habeas corpus relief, the district court should have dismissed the suit without prejudice for failure to exhaust state remedies and should have directed

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<sup>1</sup> Burke alleges ineffective assistance of counsel. He also alleges a constitutional violation occurred when the trial court refused to allow Burke to retain new counsel. These allegations concern the fact or duration of Burke's confinement.

Burke to promptly pursue state remedies.

Finally, for the first time on appeal, Burke alleges a conspiracy between the state and his attorney. An allegation that a private attorney conspired with immune state officials states a claim under § 1983. **Richardson v. Gleaming**, 651 F.2d 366, 371 (5th Cir. 1981). Although Burke presents this issue for the first time on appeal, we note that Burke was never given the opportunity to amend his complaint in the district court or otherwise clarify his case at a **Spears** hearing before the complaint was hastily dismissed. Therefore, our resolution of the case to direct Burke to undertake his state remedies first, gives him the opportunity to bring the allegations of conspiracy properly under § 1983 after exhaustion of his state remedies.

### **Conclusion**

Accordingly, we modify Burke's dismissal to reflect a dismissal without prejudice for failure to exhaust state remedies.<sup>2</sup>

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<sup>2</sup> We do not remand this case to allow the district court to hold the suit in abeyance because the Texas "rule of habeas abstention" forbids the state to consider a habeas motion while a similar motion is "pending" in federal court. **Rodriguez**, 963 F.2d at 804. In addition, we note that the time during which Burke pursues the available state remedies tolls the statute of limitations, thus allowing Burke to return to federal court within the limitations period. **Rodriguez**, 963 F.2d at 804-05.