

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 93-5374  
Conference Calendar

---

JAMES HENRY JOHNSON,

Plaintiff-Appellant,

versus

MELVIN D. WHITAKER,

Defendant-Appellee.

- - - - -  
Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 9:93cv108  
- - - - -  
(March 22, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that James Henry Johnson's motion for leave to appeal in forma pauperis (IFP) is DENIED. The appeal lacks arguable merit and is, therefore, frivolous. Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. See 5th Cir. R. 42.2.

Because the district court did not conduct a Spears<sup>1</sup> hearing or afford Johnson any other opportunity to amend his pleadings, the 28 U.S.C. § 1915(d) dismissal is premature if the complaint, viewed in its most favorable light with all its allegations accepted as true, states a colorable claim. Foulds v. Corley, 833 F.2d 52, 53-55 (5th Cir. 1987).

---

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

According to Johnson's complaint, Judge Melvin D. Whitaker, a state court trial judge, improperly denied Johnson his constitutional right to appeal his criminal conviction. Johnson does not allege facts indicating that Judge Whitaker lacked jurisdiction over the subject matter or acted in a nonjudicial capacity. See Stump v. Sparkman, 435 U.S. 349, 359, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (even grave procedural errors do not deprive a judge of all jurisdiction). Thus, his claims concerning the judge are not actionable because the judge is absolutely immune from damages liability. See Malina v. Gonzales, 994 F.2d 1121, 1124-25 (5th Cir. 1993).

Finally, Johnson's "motion for discovery" is DENIED.