

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 12th day of April, two thousand and six.

PRESENT:

JOSÉ A. CABRANES
SONIA SOTOMAYOR
REENA RAGGI

Circuit Judges

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WAMEL ISLAM ALLAH

Plaintiff-Appellant,

v.

No. 04-6713-pr

SERGEANT VINCENT JUCHENWIOZ, CIVILIAN GISELLE WILSER,
CORRECTIONAL OFFICER DAVID TORTORELLO,

Defendants-Appellees.

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REPRESENTING APPELLANT: Wamel I. Allah, Auburn, NY, *pro se*

REPRESENTING APPELLEES: Patrick J. Walsh, Assistant Solicitor General (Eliot Spitzer, Attorney General of the State of New York; Robert H. Easton, Deputy Solicitor General, *on the brief*), Office of the Attorney General of the State of New York, New York, NY

Appeal from a judgment of the United States District Court for the Southern District of

New
York (Lawrence M. McKenna, *District Judge*).

**UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED,
ADJUDGED, AND DECREED** that the judgment of the District Court is **AFFIRMED**.

Pro se plaintiff-appellant Wamel I. Allah appeals from a September 6, 2005 Memorandum and Order of the District Court denying his motion to reconsider an earlier ruling of the District Court which dismissed his § 1983 his suit on the ground that defendants—who are employees of the Department of Correctional Services—were entitled to qualified immunity.

We assume the parties' familiarity with the procedural background and facts of this case. Plaintiff alleges that in September 1993, while he was incarcerated at Green Haven Correctional Facility, defendants filed a false inmate misconduct report against him in retaliation for his refusal to be recruited as an informant against fellow inmates. In a July 30, 1999 Memorandum and Order, the District Court dismissed on summary judgment plaintiff's Eighth and Fourteenth Amendment claims, as well as his claims under 42 U.S.C. §§ 1985 and 1986. *Allah v. Juchenwioz*, No. 93 Civ. 8813 (LMM), 1999 WL 562100 (S.D.N.Y. July 30, 1999). The District Court did not dismiss plaintiff's § 1983 retaliation claim, however, holding that an inmate has a constitutional right not to snitch, *id.* at *3-*4, and concluding that plaintiff had presented triable issues of fact under this cause of action.

On February 11, 2004, defendants moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that they were entitled to qualified immunity because at the time the incident allegedly occurred, it was not clearly established that plaintiff's refusal to become an informant was constitutionally protected conduct. In an October 26, 2004 Memorandum and Order, the District Court granted defendants' motion and dismissed the complaint after determining that "defendants are entitled to qualified immunity because the right not to snitch which the Court found to exist in its 1999 decision was not clearly established at the relevant time." *Allah v. Juchenwioz*, No. 93 Civ. 8813 (LMM), 2004 WL 2389823, at *4 (S.D.N.Y. Oct. 26, 2004).

"When, as here, the district court resolves a qualified immunity issue on a motion to dismiss, we review the Court's determination *de novo*, accept as true all material allegations of the complaint, and draw all reasonable inferences in the plaintiff's favor." *Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003).

Because we agree with the District Court's conclusion that defendants were shielded from suit by the doctrine of qualified immunity, we hold that the District Court properly dismissed plaintiff's suit. "In general, public officials are entitled to qualified immunity if (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." *Holcomb v. Lykens*, 337 F.3d 217, 220 (2d Cir. 2003) (internal quotation marks and citation omitted). At the outset, we "address the

threshold question of whether the . . . complaint alleges the deprivation of an actual constitutional right. If it does, we then decide whether the right was clearly established *at the time of the officers' alleged misdeeds.*" *Id.* (internal quotation marks and citation omitted) (emphasis added). For a constitutional right to be "clearly established," the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

For the purposes of this appeal, we need not and do not address whether the District Court was correct in its previous assessment that an inmate has a constitutional right not to become an informant. Even assuming *arguendo* that such a right existed, it was not "clearly established" at the time when the challenged conduct occurred in 1993. Neither the Supreme Court nor this Court has ever held that a prisoner enjoys a constitutional right not to become an informant. Moreover, neither of the two cases that the District Court cited for this proposition in its 1999 Order—*Jackson v. Johnson*, 15 F. Supp. 2d 341 (S.D.N.Y. 1998) and *Watson v. McGinnis*, 964 F. Supp. 127 (S.D.N.Y. 1997)—had been decided by September 1993.¹ Because defendants' conduct did not violate any clearly established constitutional rights, we hold that the District Court did not err in dismissing plaintiff's retaliation claim.

* * * *

We have considered all of plaintiff's arguments and found each of them to be without merit. Accordingly, the October 26, 2004 and September 6, 2005 judgments of the District Court are **AFFIRMED**.

FOR THE COURT,
Roseann B. MacKechnie, Clerk of Court

By: _____

¹ We further note that the District Court in *Jackson* merely "assume[d] without deciding" the issue of whether plaintiff had a "constitutional right[] not to snitch." *Jackson*, 15 F. Supp. 2d at 364. *Cf. David v. Hill*, 401 F. Supp. 2d 749, 757 (S.D. Tex. 2005) (assuming without deciding that prisoner had a constitutional right not to participate in a prison investigation).