UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3668
Summary Calendar

DANNY M. MATHERLY,

Plaintiff-Appellant,

versus

STATE OF LOUISIANA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
CA 92 cv 1635 D

(August 11, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant, Danny Matherly (Matherly), appeals the dismissal of his section 1983 action against the State of Louisiana with prejudice and the staying of his section 1983 action against the Clerk of Court for Louisiana's 34th Judicial District Court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(the Clerk of Court). The district court also dismissed his habeas corpus claims without prejudice. We affirm.

Facts and Proceedings Below

Matherly is presently incarcerated in Louisiana's Dixon Correctional Institute as a result of his guilty plea to a charge of attempted second degree murder and the resulting twenty year sentence imposed on October 2, 1990.[1]

Matherly then filed a suit for post-conviction relief in Louisiana's 34th Judicial District Court (the trial court). As part of that proceeding, on June 19, 1991, Matherly filed a discovery motion asking that the trial court order the District Attorney of St. Bernard Parish (District Attorney) to produce documents pertaining to his original trial. On June 24, 1991, the trial court granted plaintiff's motion and ordered the District Attorney to produce all of the requested documents except one medical report.

The District Attorney did not comply with the court's order so Matherly filed a "writ of mandamus ordering the Clerk of Court to comply with the Court's order." On July 29, 1991, in response to this motion, the trial court issued an order requiring the District Attorney to "show cause on September 9th, 1991, why the requested documents . . . should not be provided."

Matherly then filed a motion asking the trial court to allow him to be present at the September 9, 1991, hearing.[2] The trial

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[1] It is unclear from the record whether Matherly directly appealed the judgment resulting from his guilty plea.

[2] This motion is formally called a motion for writ of habeas

court denied the motion, but agreed to postpone the hearing on the Rule to Show Cause until after Matherly appealed the denial of his motion to appear at the hearing.

Matherly appealed the denial of his motion to appear to the Louisiana Fourth Circuit Court of Appeal by filing an application for supervisory writs. The Fourth Circuit denied the writ, thereby affirming the trial court's denial of Matherly's motion to appear. In its denial of writs, the Fourth Circuit stated in what may be dicta: "The relator's motion requesting certain documents fails to state a particularized need for those documents. . . . In any event, the trial court need not have ordered a show cause hearing in the first place, but having done so, defendant's physical presence is superfluous to the court's proceedings." Matherly appealed this ruling to the Louisiana Supreme Court, which denied his writ application without opinion.

Then Matherly filed the instant action under 42 U.S.C. § 1983 (1988). In his complaint, he requested that the United States District Court order the Clerk of Court to produce the record of his criminal proceedings and that the trial court be ordered to fire his counsel of record. The State of Louisiana and the Clerk of Court were the only parties named as a defendants in Matherly's complaint.[3] Matherly did not raise his right to be present at the Rule to Show Cause hearing as an issue in this section 1983 action.

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corpus ad testificandum.

[3] Matherly's appellate brief states that this action includes a more direct claim against the District Attorney. However, the District Attorney was not named in his complaint nor joined in the action below. Therefore, he is not a party to this suit.

The matter was referred to a magistrate judge who recommended dismissal of the section 1983 action against the State of Louisiana on Eleventh Amendment immunity grounds with prejudice and staying of the section 1983 action against the Clerk of Court pending exhaustion of state court remedies. The magistrate judge also dismissed Matherly's habeas corpus claim without prejudice for failure to exhaust, but it is unclear from his opinion to which claim he was referring.[4] The district court adopted the magistrate judge's report and recommendation and issued a judgment dismissing the section 1983 action against the State of Louisiana on Eleventh Amendment immunity grounds with prejudice, staying the section 1983 action against the Clerk of Court pending exhaustion of state court remedies, and dismissing without prejudice the habeas corpus claim for failure to exhaust. Matherly appeals.

Discussion

We will discuss each of Matherly's claims in turn. First, the district court properly stayed Matherly's claim against the Clerk of Court pending exhaustion of his state court remedies. Where a state prisoner's section 1983 action "would, if proved, undermine the validity of his conviction, then the petitioner should present his claims as a petition for writ of habeas corpus, and must exhaust state habeas remedies before bringing his § 1983 claims

[4] Matherly filed objections to the magistrate judge's report alleging new claims directly attacking the validity of his plea, but the ultimate relief sought at the end of these objections was the furnishing of the documents sought in his complaint. We construe these objections as being reasons why the district court should order the document production and not as raising new claims for the court to consider.

into federal court." *Mills v. Criminal Dist. Court No. 3*, 837 F.2d 677, 680 (5th Cir. 1988).[5] This rule is designed to prevent prisoners from using section 1983 to collaterally attack their convictions without exhaustion of state remedies. *Scruggs v. Moellering*, 870 F.2d 376, 378 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 371 (1989). Since a claim for documents from state court conviction proceedings so they can be used to collaterally attack a conviction could undermine the validity of the conviction under attack, state court habeas remedies must be exhausted before the claims can be brought into federal court. *Id.* (claim for trial court transcripts ancillary to collateral attack cannot be brought until state remedies exhausted). *See Lumbert*, 735 F.2d at 241-42 (claim for damages only from denial of transcript proper under section 1983, but Illinois rule on availability of transcripts for

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[5] Where a prisoner's complaint directly attacks the constitutionality of his incarnation, federal habeas relief is the exclusive remedy and section 1983 relief is not available. *Preiser v. Rodriguez*, 93 S.Ct. 1827, 1841 (1973); *Williams v. Dallas County Comr's*, 689 F.2d 1212, 1214 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 2102 (1983). However, where a prisoner's complaint indirectly attacks the constitutionality of his incarceration, section 1983 relief is available for any constitutional violations. *Serio v. Members of La. State Bd. of Pardons*, 821 F.2d 1112, 1119 (5th Cir. 1987); *Sheppard v. State of Louisiana Board of Parole*, 873 F.2d 761, 762 (5th Cir. 1989) (habeas claims dismissed without prejudice and section 1983 claims remanded for abatement or dismissal without prejudice). Matherly's claim is a section 1983 claim because it does not directly attack the validity of his conviction or the duration of his incarceration, but seeks relief from those who are interfering with his right to do so. Matherly's action only seeks documents relating to the conviction and the dismissal of his counsel, but not his release from prison. *See Lumbert v. Finley*, 735 F.2d 239, 241-42 (7th Cir. 1984) (claim for transcript proper under section 1983, not federal habeas statute). Had the action sought a setting aside of the conviction or sentence for ineffective assistance of counsel, only federal habeas relief would be available.

indigent not unconstitutional).[6]

While Matherly has exhausted his state court remedies on his claim that he has a right to be present at the Rule to Show Cause hearing, he has not exhausted his state court remedies on his claim that he has a right to the documents themselves. As far as we know, the trial court has not held a hearing on the Rule to Show Cause yet, nor has it held the District Attorney in contempt for noncompliance with its order to produce the documents, nor has either party appealed this ruling on the merits to the Louisiana Fourth Circuit or the Louisiana Supreme Court. The district court did not err in staying its disposition of this claim pending Matherly's exhaustion of state court remedies. *Serio*, 821 F.2d at 1119-1120 (when prisoner needs to exhaust state remedies before pursuing relief in a section 1983 action, the district court has the discretion to dismiss the action without prejudice or to stay the action pending exhaustion; the latter method may be preferred to avoid statute of limitations problems).

Second, the district court properly dismissed Matherly's claims against the State of Louisiana with prejudice on immunity grounds. The State of Louisiana is absolutely immune from liability for injunctive relief in section 1983 actions under the Eleventh Amendment. *Will v. Michigan Dept. of State Police*, 109

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[6] The district court's judgment did not also mention that federal habeas remedies may also have to be exhausted before issues affecting the validity of a conviction can be litigated in a federal court section 1983 action. But this omission is not prejudicial to Matherly, nor is it complained of by him; as Matherly is the only party who has appealed, we have no occasion to revise the judgment in respect to the exhaustion of federal habeas remedies.

S.Ct. 2304 (1989) (state cannot be sued under section 1983 because state is not a "person" under the act); *Hans v. Louisiana*, 10 S.Ct. 504 (1890) (state immune from suit in federal court). Even though Matherly has not exhausted his state remedies against the State of Louisiana, dismissal with prejudice is proper since Matherly can allege no facts to avoid the State's defense of absolute immunity. *Mills*, 837 F.2d at 679; *Serio*, 821 F.2d 1114.

Third, the district court did not reversibly err in dismissing Matherly's habeas claims without prejudice. As we recognized in footnote five of this opinion, Matherly has not raised any habeas claims in this action. Since no habeas claims were raised, there was no need for the district court's judgment to dismiss the habeas claims. The judgment need not be reformed, however, because the dismissal was without prejudice for failure to exhaust, as habeas dismissals should be when state remedies have not been exhausted, and therefore has no restrictive effect on Matherly's ability to bring future federal habeas claims.

Conclusion

Since Matherly failed to exhaust state remedies in his claim against the Clerk of Court and since the State of Louisiana is immune from suit, the district court did not err in staying the claim against the Clerk of Court and dismissing the claim against the State of Louisiana with prejudice. Accordingly, the judgment appealed from is

AFFIRMED.