

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 92-4618  
Conference Calendar

---

JAMES HENRY JOHNSON,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, Director, Texas  
Department of Criminal Justice  
Institutional Division,

Defendant-Appellee.

- - - - -  
Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 9:92-CV-34  
- - - - -  
(January 21, 1993)

Before GARWOOD, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

Prisoners who challenge the constitutionality of their conviction or sentence must first exhaust their state and federal habeas remedies before seeking relief under § 1983. Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112, 1117 (5th Cir. 1987). Accordingly, federal courts should ordinarily decline to address the merits of a potential § 1983 claim that must be exhausted through habeas review. See William v. Dallas County Comm'rs, 689 F.2d 1212, 1214-15 (5th Cir. 1982), cert.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

denied, 461 U.S. 935 (1983). In cases such as this one, however, where the allegations of the complaint involve a challenge to the validity of conviction and the district court ruled that the state court judge and prosecutor enjoyed absolute immunity from monetary damages, "there remains no sound basis to defer decision on the immunity issue." Serio, 821 F.2d at 1115.

Because Johnson's pleadings do not allege facts indicating that the state court judge lacked jurisdiction over the subject matter or acted in a nonjudicial capacity, Johnson's claims concerning the judge are not actionable under § 1983. See Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). The prosecutor is also absolutely immune from suit for money damages since the conduct alleged to have been improper involved an official act performed in an official capacity. See Mills v. Criminal Dist. Court No. 3, 837 F.2d 677, 679 (5th Cir. 1988).

Because Johnson's § 1983 claim against the TDCJ director can be separated from his claims challenging his state conviction, this Court will address it on the merits. Serio, 821 F.2d at 1119. Apparently, Johnson sued the director because of his position of authority at the Ellis II Unit where Johnson is an inmate. As the doctrine of respondeat superior does not apply to § 1983 actions, Williams v. Luna, 909 F.2d 121, 123 (5th Cir. 1990), the district court properly dismissed Johnson's suit against this official as frivolous. See Denton v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992).

Finally, as Johnson's vague allegations of cruelty by the

sheriff of Houston County do not pass the test for a cognizable constitutional claim, the district court properly dismissed without prejudice the complaint against the sheriff for failure to state a claim. See Mills, 837 F.2d at 679.

Because this appeal is not an extraordinary case, Johnson's motion for appointment of counsel is DENIED. See Ulmer v. Chancellor, 691 F.2d 209, 212-13 (5th Cir. 1982).

AFFIRMED.