

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

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No. 92-7632  
Summary Calendar

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ALONZO JACK RODGERS, III,

Plaintiff-appellant,

VERSUS

CHRISTINE HOUSTON, ET AL.,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Southern District of Mississippi

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CA H91 0240 R N

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( June 28, 1993 )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

In 1988, Alonzo Jack Rodgers, III, pleaded guilty and was sentenced by a Mississippi state court to ten years, four years to serve and six years suspended with five years probation. He was placed on probation on October 10, 1988. Probation was subsequently revoked with Rodgers receiving a sentence of five years in April 1990.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Subsequent to his re-incarceration, Rodgers pro se filed a civil rights complaint against several individuals of the Mississippi Department of Corrections and court system. He alleged that he was illegally confined due to his new prison number and to the clerical mistakes stemming from the order of confinement. He also alleged various violations of his rights while incarcerated. The magistrate judge granted Rodgers in forma pauperis status.

The district court, sua sponte, dismissed the complaint without prejudice. It found that Rodgers had been released from incarceration and was living in Illinois, thereby concluding that Rodgers received his requested relief, release from confinement.

The district court noted that there was no indication that his confinement had been calculated incorrectly. As to Rodgers' other claims, the district court concluded that Rodgers failed to allege a deprivation of a constitutional right.

### **OPINION**

Rodgers brings four arguments on appeal, all stemming from the alleged mistake in sentencing from the revocation of his probation. He argues that he was illegally confined, that the five-year sentence legally cannot exceed the original four-year sentence, that the records department should have questioned the correctness of the commitment order, and that the director of records had the duty to question its correctness.

If a § 1983 claim implicates the constitutionality of the plaintiff's sentence, he must exhaust his available habeas remedies before bringing the claim in a civil rights action. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1117 (5th Cir. 1987). Nothing in the record indicates that Rodgers has pursued his state and federal habeas remedies. Although it appears that Rodgers is no longer in prison, the record is unclear whether Rodgers is still "in custody," a requirement for Mississippi state habeas relief and federal habeas relief. MISS. CODE ANN. §§ 99-39-3 & 99-39-5 (Supp. 1992); 28 U.S.C. § 2254(a).

If Rodgers is still "in custody," his § 1983 claim concerning the legality and duration of his sentence may not proceed without the exhaustion of his habeas remedies. Serio, 821 F.2d at 1117; see Jones v. Cunningham, 371 U.S. 236, 242-433, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963) (concluding that parole is sufficient restraint on liberty to fall within the writ's "custody" requirement). Neither the record nor the district court's memorandum order indicates that proper consideration was given to the habeas nature of Rodgers' complaint.

Rodgers, in another appellate case, Rodgers v. Brown, No. 92-7653, filed with this Court a brief with attached exhibits. One of these exhibits appears to be a copy of Rodgers discharge certificate from his five-year sentence, dated July 10, 1992. This alleged document has not been filed by Rodgers in this appeal. It is suggested that the district court inquire into the validity of this document in deciding the "in custody" issue.

Because Rodgers does not challenge the district court's determination as to his other civil rights claims, these issues are deemed abandoned on appeal. Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1539 n.14 (5th Cir. 1984). Rodgers has attached to his appellate brief a form requesting to proceed in forma pauperis (IFP). The district court granted IFP status to Rodgers.

[A] party who has been permitted to proceed in an action in the district court in forma pauperis . . . may proceed on appeal in forma pauperis without further authorization unless . . . the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed . . . .

Fed. R. App. P. 24(a). Because the district court did not decertify Rogers' IFP status, he may proceed IFP on appeal. The motion is denied as unnecessary.

We REVERSE the portion of the district court's judgment relative to the claim of illegal confinement and REMAND such portion of the case to the district court for further consideration consistent with this opinion. Otherwise, we AFFIRM the judgment of the district court.