

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8313
Conference Calendar

THOMAS D. TINER,

Plaintiff-Appellant,

versus

DAVID HOLGUIN, Parole Officer
for the State of Texas, Et Al.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. M-92-CV-53
- - - - -

March 16, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Thomas D. Tiner, a Texas state prisoner currently incarcerated as a result of a revocation of his parole, appeals the dismissal of his civil rights petition for failure to exhaust state and federal habeas remedies. Liberally construed, his petition challenges indirectly the revocation of his parole. On appeal, he alleges that, during his revocation proceedings, he was denied due process of law and adequate representation by counsel. He further alleges that his First Amendment rights were

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

violated because his parole was revoked merely for threatening to commence legal action against David Holguin, his parole officer.

We require a plaintiff such as Tiner, who attempts to challenge indirectly the legality of his confinement pursuant to a parole revocation, to pursue state and federal habeas remedies prior to asserting a § 1983 claim. Jackson v. Torres, 720 F.2d 877, 879 n.5 (5th Cir. 1983); see Serio v. Members of Louisiana State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987).

Because Tiner challenges his confinement, the district court must determine 1) whether he is presently incarcerated, and if so, 2) whether any record evidence establishes that his allegations have previously been presented in either a direct criminal appeal or a state habeas corpus proceeding. Id. Only after exhaustion of both state and federal habeas remedies will Tiner be allowed to proceed as a civil rights petitioner. Id.

Tiner admits that he has filed a state habeas petition in connection with the parole revocation but that no final resolution of that action has occurred. Further, he admits that he has yet to seek federal habeas relief. Therefore, the district court's dismissal of Tiner's § 1983 petition without prejudice was correct and we AFFIRM. We also deem the statute of limitations tolled while Tiner pursues habeas relief. Rodriguez v. Holmes, 963 F.2d 799, 804-05 (5th Cir. 1992).

AFFIRMED.