

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-4219  
(Summary Calendar)

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JOE LOUIS BOOKER, JR.,

Plaintiff-Appellant,

versus

JAMES RODGERS, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(3:89-CV-30)

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(January 4, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

Plaintiff-Appellant Joe Louis Booker, Jr., a state prisoner in Texas, filed the instant suit, styled as a civil rights suit but complaining of his conviction and incarceration. He appeals the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

ruling of the district court which, in essence, directed Booker first to exhaust his state and federal habeas corpus claims, and suspended Booker's instant civil rights action for future disposition. For the reasons set forth below, we vacate the order of the district court and remand for disposition in accordance with this opinion.

## I

### FACTS AND PROCEEDINGS

In May 1989, Booker filed suit under 42 U.S.C. § 1983 complaining not of a civil rights violation but of his conviction. According to Booker's complaint, his conviction resulted from entrapment and a conspiracy against him. The district court ruled that Booker's civil rights suit was actually a claim related to the fact or length of his confinement and that such claims had to be pursued first as state and federal habeas claims. The court then "suspended" the action "in order to protect the plaintiff's right to pursue such claim at a later time." Booker responded with two motions to reactivate the cause. Both were denied, and Booker timely appealed.

## II

### ANALYSIS

A § 1983 action is the appropriate remedy for recovering damages for mistreatment or for illegal administrative procedures that violate constitutional rights. See Richardson v. Fleming, 651 F.2d 366, 372 (5th Cir. 1981). The writ of habeas corpus is the appropriate federal remedy for a state prisoner challenging the

fact of confinement. Preiser v. Rodriguez, 411 U.S. 475, 484, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). To determine which remedy a prisoner should pursue, a court must look beyond the relief sought to determine whether the claim, if proved, "would factually undermine or conflict with the validity of the state court conviction which resulted in the prisoner's confinement." Fleming, 651 F.2d at 373. If the basis of the claim goes to the constitutionality of the conviction, "the exclusive remedy is habeas corpus relief with the comity inspired prerequisite of exhaustion of state remedies." Id.

Booker challenges only the fact of his confinement, and, specifically, the court proceedings that led to his confinement, seeking his "freedom" from the conviction. If Booker received an unfair trial, he is incarcerated in violation of his constitutional rights and must pursue state and federal habeas corpus remedies before asserting a § 1983 claim. Serio v. Members of Louisiana State Bd. of Pardons, 821 F.2d 1112, 1118-19 (5th Cir. 1987). There is no indication from the record or from Booker's brief that he has exhausted his state habeas remedies, a prerequisite to federal habeas relief. See 28 U.S.C. § 2254(b).

In this case, the district court "suspended" Booker's suit, that is, held the case in abeyance. "[H]olding in abeyance a federal complaint by a Texas litigant to avoid limitations problems while state remedies are exhausted harbors potential difficulties" because Texas has developed a rule in which a state prisoner requesting a state writ of habeas corpus is precluded from

proceeding in state court if he has a case pending in federal court concerning the same habeas corpus matter or seeking identical relief. Jackson v. Johnson, 950 F.2d 263, 266 (5th Cir. 1992). The appropriate solution is to dismiss the "civil rights/habeas action without prejudice and instruct the litigant to promptly pursue state remedies." Id. As we have indicated, "[t]he time during which the litigant is pursuing the available state remedies would toll the statute of limitations, thus allowing the litigant to return to federal court within the limitations period." Id.

The district court's decision to hold the § 1983 claims in abeyance, rather than dismissing the lawsuit without prejudice, should therefore be corrected. See id. At the same time Booker should be admonished to file promptly any necessary state actions. The ruling of the district court is therefore VACATED, and this case REMANDED for further proceedings consistent herewith.