

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7218
Summary Calendar

HOSEY B. JOHNSON,

Plaintiff-Appellant,

VERSUS

GULFPORT POLICE DEPARTMENT,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(92-CV-356)

June 7, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Hosey B. Johnson, an inmate at the Southern Mississippi Correctional Institute, appeals, *pro se*, the district court's *sua sponte* involuntary dismissal without prejudice, pursuant to Fed. R. Civ. P. 41(b), of his 42 U.S.C. § 1983 action against the Gulfport Police Department for expungement from his criminal record of a robbery charge for which he was not convicted.

The district court held that the Department was not an entity subject to suit under § 1983. Johnson contends that he intended to

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

file an "official capacity" suit within the meaning of **Kentucky v. Graham**, 473 U.S. 159 (1985), and named the Department as the defendant only because he did not know which individual within the Department was responsible for the charge remaining on his record. Additionally, he contends that he should have been given an opportunity to amend his complaint to name the proper party.

"A *pro se* plaintiff ... should be accorded leniency and should be permitted to amend his pleadings [to name the proper party] when it is clear from his complaint that there is a potential ground for relief." **Gallegos v. La. Code of Crim. Procedures Art. 658**, 858 F.2d 1091, 1092 (5th Cir. 1988). And, although it is most questionable whether Johnson's claim lies under § 1983, at least one court has held that § 1983 could be an appropriate vehicle for seeking expungement of criminal records. See **Wilson v. Webster**, 467 F.2d 1282, 1283-84 (9th Cir. 1972). Furthermore, the Department may be the proper party to sue; at least one court has held that suits seeking expungement should be brought against the local law enforcement authorities responsible for the arrest, even where, as here, only the F.B.I. has retained any record of the incident. See **Menard v. Saxbe**, 498 F.2d 1017, 1024-25 (D.C. Cir. 1974); see also **Crow v. Kelley**, 512 F.2d 752, 755 (8th Cir. 1975) (state or local authorities with jurisdiction over arrests and convictions should have initial opportunity to pass on the validity and accuracy of records forwarded to F.B.I.).

Accordingly, we vacate the dismissal and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.