

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-30288
Summary Calendar

RAYMOND ROCHON,

Plaintiff-Appellant
Cross-Appellee,

versus

FRANK BLACKBURN, Warden, Louisiana,
State Penitentiary, ET AL.,

Defendants-Appellees,

LARRY SMITH, ET AL.,

Defendants-Appellees

Cross-Appellants.

Appeals from the United States District Court
for the Middle District of Louisiana

(CA-93-206-B-M2)

March 16, 1995

Before THORNBERRY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:*

Facts and Prior Proceedings

Raymond Rochon, a prisoner in the Louisiana State Penitentiary at Angola, Louisiana, filed a civil rights complaint pursuant to 42

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S.C. § 1983 against various state officials alleging that he is required to perform hard labor at the Angola prison even though he was sentenced to life imprisonment without any mention of hard labor. He contends that this requirement is tantamount to involuntary servitude.

The magistrate judge concluded that Rochon's complaint sought to have his sentence vacated and therefore constituted a "mixed" petition containing both state habeas corpus claims and civil rights claims. The magistrate judge recommended that the habeas claims be dismissed without prejudice for failure to exhaust state remedies and that the section 1983 claims be stayed pending final judgment on the habeas claims. The district court adopted the report and recommendation of the magistrate judge. Rochon filed a timely notice of appeal.

Discussion

Rochon filed this action under 42 U.S.C. § 1983. Rochon's complaint, however, essentially alleges that he is not serving his prison sentence subject to the same terms and conditions under which he was sentenced by the state trial court. Specifically, Rochon asserts that he is being required to serve his prison time at hard labor, although he was not sentenced to hard labor by the trial court. Although Rochon is not attacking his conviction, he is attacking his sentence at hard labor. As such, his complaint must be construed as a writ of habeas corpus, not a civil rights complaint. **Richardson v. Fleming**, 651 F.2d 366, 372 (5th Cir. 1981). Simply put, if the basis of a section 1983 claim would

factually undermine or conflict with the state court conviction or sentence, habeas corpus is the exclusive remedy. **Id.** Viewed from any perspective, Rochon's claim serves as a challenge to the legality of his confinement, therefore he must first present his claim through a habeas corpus action, which will require exhaustion of state remedies. **Id.**

The district court dismissed the habeas claim for failure to exhaust state remedies but stayed the section 1983 claims pending final judgment on the habeas claims. At the time the district court made this decision, the court did not have benefit of a recent Supreme Court opinion. In **Heck v. Humphrey**, ___ U.S. ___, 114 S.Ct. 2364, 2372, 129 L.Ed. 2d 383 (1994), the Supreme Court held that if a section 1983 plaintiff attempts to recover damages for an allegedly unconstitutional conviction or imprisonment, the plaintiff must first prove that the particular conviction or sentence has been reversed or otherwise made invalid. **Id.** If the conviction or sentence has not been invalidated, the claims related to the conviction or sentence are not cognizable under section 1983 and must be dismissed. **Id.** In the case before us, the Louisiana Supreme Court has affirmed Rochon's conviction and sentence of life imprisonment at hard labor and has rejected his contention that he is serving a harsher sentence than the one imposed at trial. **See State v. Rochon**, 393 So. 2d 1224, 1225 (La. 1981). Thus, under

Heck, Rochon's claim is not cognizable under section 1983 at this time and must be dismissed.¹ **Heck**, 114 S.Ct. at 2372.

Finally, Rochon has filed two motions in this appeal. The first requests that the defendant's cross-appeal be dismissed because the State did not object to the magistrate judge's report and recommendation. A failure to object does not bar an appeal; it only precludes a challenge to the factual findings made by the magistrate, therefore this motion is denied. **See Nettles v. Wainright**, 677 F.2d 404, 410 (5th Cir. 1982)(en banc). The second motion requests that Rochon be appointed counsel. This motion is denied because there are no exceptional circumstances requiring appointment of counsel at this time, nor do the interests of justice require such. **See Richardson v. Henry**, 902 F.2d 414, 417 (5th Cir. 1990), **cert. denied**, 498 U.S. 1069 (1991).

Conclusion

Based on the foregoing, we affirm the dismissal of all of Rochon's claims.

AFFIRMED.

MOTION OF APPELLANT TO DISMISS APPELLEES' CROSS APPEAL IS DENIED.

MOTION OF APPELLANT FOR APPOINTMENT OF COUNSEL IS DENIED.

¹ We make clear that we are in no way expressing an opinion concerning the merits of Rochon's claim. We are simply pointing out that the procedural vehicle that he has chosen to pursue his claim is inappropriate at this time.