IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Twanda Marshinda Brown, et al., etc.,	)	Civil Action No.
	)	
Plaintiffs,	)	3:17-1426-MBS
	)	
v.	)	**OBJECTIONS**
	)	**OF DEFENDANT**
Lexington County, South Carolina, et al.,	)	**LEXINGTON COUNTY**
	)	**TO REPORT AND RECOMMENDATION**
Defendants.	)	
_____	)	

Defendant Lexington County hereby files objections to that portion of the Report and Recommendation "R & R"), filed in this case on February 5, 2018, which recommends that "Defendants' motion for summary judgment on [Plaintiffs'] damages claim against Lexington County for failure to afford assistance of counsel be denied without prejudice." ECF No. 74 at 21. The specific grounds for these objections are set forth below.

ARGUMENT

Claim Five of the Second Amended Complaint seeks damages from Lexington County and others. The claim against Lexington County is that "Lexington County directly and proximately caused the violation of the right of Plaintiffs . . . . to counsel by developing and maintaining a policy, practice, and custom of grossly underfunding public defense. . . ." ECF No. 48 at 110, ¶ 499.

The R&R recommended the dismissal of this claim against all Defendants except Lexington County. With regard to the damage claims against Lexington County, the R & R addressed only one of the several grounds asserted by the County in its Motion for Summary

Judgment on Damage Claims, ECF No. 50, and that one only very briefly. The County respectfully submits that the R & R was in error, particularly in that it did not address or consider most of the grounds argued by Lexington County, including the County's citation of *Reed v. Town of Lexington*, 902 F.2d 1566 (4th Cir. 1990)(unpublished), in which the Fourth Circuit rejected a damage claim against the County that was virtually identical to the one raised by Plaintiffs in the present case. Each ground raised by Defendants' summary judgment motion as a reason for dismissing the damage claims against Lexington County is discussed separately below.

1. Lexington County's alleged failures to provide appointed counsel for indigent persons do not give rise to a cause of action for damages against the County.

a. Any alleged underfunding of a public defender system does not, as a matter of law, show proximate cause of any alleged injury.

Plaintiffs have alleged that they have a claim against Lexington County for damages based on alleged underfunding by the county of the public defender system. However, this claim lacks merit for the simple reason that even if public defender systems did not exist, a magistrate would still be able to appoint counsel for indigent persons from members of the bar. *See, e.g.,* S.C. Code Ann. § 17-3-10, which provides that "Any person entitled to counsel under the Constitution of the United States shall be so advised and if it is determined that the person is financially unable to retain counsel then counsel shall be provided upon order of the appropriate judge unless such person voluntarily and intelligently waives his right thereto." In other words, even if the public defender were to be found to be underfunded, Plaintiffs cannot show that that underfunding was a proximate cause of their convictions.

The R & R discussed this contention by Lexington only briefly and incompletely. In its entirety, the R & R's conclusion on this point is as follows:

> Defendants argue that Plaintiffs' damages claims against Lexington County based on underfunding of the public defender system are barred for lack of causation because a judge could appoint a member of the bar to represent an indigent person if the public defender system did not exist. [ECF No. 50-1]. In support, Defendants cite to S.C. Code Ann. § 17-3-10, which provides in relevant part: "Any person entitled to counsel under the Constitution of the United States shall be so advised and if it is determined that the person is financially unable to retain counsel then counsel shall be provided upon order of the appropriate judge unless such person voluntarily and intelligently waives his right thereto."
>
> The undersigned finds that the statute does not address whether the court may appoint a member of the bar for indigent defendants and therefore is not relevant to causation. The undersigned recommends that Defendants' motion for summary judgment on their damages claim against Lexington County for failure to afford assistance of counsel be denied without prejudice.

R & R, ECF No. 74 at 20-21. This conclusion in the R & R is, with all respect, puzzling. The statute clearly provides that if a person is unable to retain counsel, "then counsel shall be provided upon order of the appropriate judge. . . ." In light of this clear language, it is difficult to see how the R & R could hold that "the statute does not address whether the court may appoint a member of the bar for indigent defendants. . . .," when in fact the statute does just that. It cannot seriously be argued that in referring to the appointment of "counsel," the statute was referring to anything other than "a member of the bar." In this context, the term "counsel" cannot mean anything other than a member of the bar. Otherwise, the statute would be imposing the illegal

requirement that a court appoint someone other than an attorney to represent a criminal defendant, and such a contention is unsustainable.[1]

Accordingly, even if the public defender system were to be found to be underfunded, other counsel could have been appointed by the magistrates, and Plaintiffs cannot show that such underfunding of one source of appointed counsel was a proximate cause of their convictions.

Under general tort law principles, "'[p]roximate cause requires proof of causation in fact and legal cause. Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's [actions]" (citation omitted))." *Sartin v. McNair Law Firm PA*, 756 F.3d 259, 264 (4th Cir. 2014), quoting *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389, 393 (S.C.Ct.App.2008). As applied to the present case, Plaintiffs must therefore first show that they most probably would have been successful in avoiding criminal liability, or at least jail time, in the underlying criminal cases if representation by a public defender had been made available to them. *See id.* (in legal malpractice case, plaintiff must show that he most probably have been successful but for the alleged malpractice). Plaintiffs have not attempted to make such a showing, and could not possibly succeed even if they had tried. Again, they must show that the absence of one particular type of appointed counsel, a public defender, was the proximate cause of their convictions and subsequent enforcement thereof, and this they cannot do.

In opposing summary judgment on this point, Plaintiffs cited several cases as general authority for the unremarkable proposition that proximate cause is not necessarily decided prior

[1] The County's contention on this point is not rebutted by any absence of funding for such appointed counsel, even assuming such funding is indeed absent, because attorneys have a duty to represent indigent criminal defendants regardless of whether compensation is available. *See, e.g., Ex parte Dibble*, 279 S.C. 592, 594, 310 S.E.2d 440, 441 (Ct. App. 1983)("It has been traditionally held that a lawyer, by accepting a license to practice law, becomes an officer of the court and assumes the obligation of representing, without pay, indigent defendants in criminal cases. *Powell v. State of Alabama*, 287 U.S. 45 (1932); *United States v. Dillon*, 346 F.2d 633 (9th Cir.1965)")(emphasis added).

to trial. ECF No. 50 at 42-43. However, there are many situations in which it is held that the absence or presence of proximate causation is indeed determined as a matter of law. *See. e.g., Charleston Area Med. Ctr., Inc. v. Blue Cross & Blue Shield Mut. of Ohio, Inc.,* 6 F.3d 243 (4th Cir. 1993)(no proximate cause as a matter of law); *Childress v. City of Richmond, Va.,* 134 F.3d 1205, 1207 (4th Cir. 1998)(affirming district court's conclusion that as a matter of law the officers' filing of charges was not the proximate cause of the allegedly retaliatory actions by the City); *Jordan v. Allstate Ins. Co.*, No. 4:14-CV-03007-RBH, 2016 WL 4367080, at *9 (D.S.C. Aug. 16, 2016), aff'd, 678 F. App'x 171 (4th Cir. 2017)("[P]roximate cause for Plaintiff's alleged damages is lacking as a matter of law"). *Talkington v. Atria Reclamelucifers Fabrieken BV*, 152 F.3d 254, 264 (4th Cir. 1998); *Estate of Knight ex rel. Knight v. Hoggard*, 182 F.3d 908 (4th Cir. 1999)(unpublished)("[b]ecause the evidence was simply insufficient to establish proximate cause, we conclude that the district court should have awarded judgment as a matter of law"); *Bias v. IPC Int'l Corp*., 107 F.3d 865 (4th Cir. 1997)(unpublished)(presented with undisputed testimony, court concluded as a matter of law that certain events were insufficiently foreseeable ascribe proximate causation to a defendant).

Given that a court can find that proximate causation is absent as a matter of law, this is a case in which such a rule would apply. Plaintiffs need to show that but for the alleged underfunding of public defenders' offices, their cases would have turned out differently. This is not possible, both because there were other avenues available for the appointment of counsel and because they cannot show that the outcome of their cases would most probably have been different.

b. No authority supports Plaintiffs' claims for damages against a local governing body for alleged failure to fund a public defender system.

Plaintiffs have not cited a single case in which a local governing body has been held liable for damages when it was claimed that there had been a violation of the Sixth Amendment right to counsel. Instead, Plaintiffs assert only that "[a] local government's inadequate funding and provision of indigent defense is a cognizable Sixth Amendment injury." ECF No. 66 at 43. The primary authority cited for that point is *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, 2011 WL 13101827, at *1 (W.D. Wash. Oct. 17, 2011), but in that case the court noted in an earlier opinion that the "complaint seeks only declaratory and injunctive relief").[2] Plaintiffs cite four other cases in two footnotes, ECF No. 43, nn. 56, 57, but none of those four involved damage claims either. *Tucker v. State*, 162 Idaho 11, 394 P.3d 54, 59 (2017)("various forms of equitable relief"); *Church v. Missouri*, No. 17-CV-04057-NKL, 2017 WL 3383301, at *11 (W.D. Mo. July 24, 2017)("Plaintiffs seek prospective relief on behalf of themselves and [others]"); *Kuren v. Luzerne Cty.*, 146 A.3d 715, 718 (Pa. 2016)(issue was "whether a cause of action exists entitling a class of indigent criminal defendants to allege prospective, systemic violations of the right to counsel"); *Hurrell-Harring v. State*, 15 N.Y.3d 8, 930 N.E.2d 217 (2010)(declaratory and injunctive relief).

To the contrary, and quite coincidentally, the Fourth Circuit has held that the Town and County of Lexington cannot be held liable in damages for any denial of counsel. *Reed v. Town of Lexington*, 902 F.2d 1566 (4th Cir. 1990)(unpublished). The plaintiffs in that case argued that the Town or County of Lexington had a duty to provide counsel upon request. They also contended that the town and county acted negligently in failing to provide a system for appointment of

[2] Plaintiffs have cited a later order in the *Wilbur* case, but the order cited above describes the relief sought by the plaintiffs in that case.

counsel in Municipal or Magistrate's Court and in denying the public defender's office authority to represent indigents in Municipal and Magistrate's Court. The Fourth Circuit affirmed the dismissal of the case, holding that "None of the alleged wrongdoers, including the Lexington County magistrates, the Lexington Municipal Judge and the Lexington County Public Defender Corporation, are subject to the control of the Town or County of Lexington." *Id.* at *2. Continuing, the Court held as follows:

> Article V of the South Carolina Constitution creates a unified court system which operates under the jurisdiction of the Supreme Court of South Carolina. As the district judge correctly stated, the Lexington County magistrates are appointed by the Governor and are a part of the state's unified judicial system. S.C. Const. art. V, § 26; *State ex rel Mcleod v. Crowe*, 272 S.C. 41, 249 S.E.2d 772 (1978). Furthermore, magistrates have been declared judicial officers of the state and not the municipality or county. *State v. Cumbee*, 276 S.C. 207, 277 S.E.2d 146 (1981). Thus, as reasoned by the district judge, the magistrates are not subject to the control of the Town or County of Lexington, thereby precluding either of these municipal defendants from providing the relief requested.

Id. It appears that the Court's rationale was that the magistrates were the actors who failed to provide appointed counsel, although if an action for damages had been brought against the magsistrates, it undoubtedly would have been dismissed based on judicial immunity.

To the same effect is a relatively recent South Carolina federal case:

> Moreover, . . . the Lexington City Council cannot be held responsible for actions taken by the . . . the Magistrate's Court for Lexington County . . . . It can be judicially noticed that, in South Carolina, a county's authority over courts within its boundaries was abolished when Article V of the Constitution of the State of South Carolina was ratified in 1973. See Act No. 58, 1973 S.C. Acts 161; Article V, Section 1 of the Constitution of the State of South Carolina; and *State ex rel. McLeod v. Civil and Criminal Court of Horry County*, 265 S.C. 114, 217 S.E.2d 23, 24 (1975). Under the current version of Article V, Section 1, the Supreme Court of South Carolina, not . . . Lexington County, retains the sole authority to supervise magistrates' courts in Lexington County . . . . *See Spartanburg County Dept. of Social Services v. Padgett*, 296 S.C. 79, 370 S.E.2d 872, 875–876 & n. 1 (1988). By virtue of

> Article V, . . . the County of Lexington [does not] exercise administrative or supervisory authority over municipal courts, magistrates' courts, or courts of the State of South Carolina located within the geographical boundaries of Lexington County. Article V, § 1 of the South Carolina Constitution mandates a unified judicial system. Section 4 of the Judicial Article designates the Chief Justice of this Court as the administrative head of the unified judicial system and directs that this Court make rules governing the administration of all courts in this state. Further, this section provides that this Court shall promulgate rules governing practice and procedure in all courts subject to the statutory law.

Dunbar v. Metts, 2011 WL 1480279, at *5 (D.S.C. 2011), report and recommendation adopted, 2011 WL 1480096 (D.S.C., 2011)(emphasis added)(footnotes omitted). As a result, there is no legal support for any claim that Lexington County had authority to make and implement policies as to how specific cases would be handled in magistrates' courts.

Similarly to the Fourth Circuit's holding in *Reed, supra,* the Fifth Circuit has also held that a county official was not liable in damages for failing to provide legal services to him. *Hamill v. Wright*, 870 F.2d 1032 (5th Cir. 1989)(Director of the Domestic Relations Office[ ] had no legal duty to ensure that Hamill was provided with counsel[;] . . . That obligation [to appoint counsel] was upon the state district court judge"); 870 F.2d at 1037; the same case also held that the county itself was not liable for failure to provide appointed counsel, because "Texas law [like South Carolina law] makes only state court judges responsible for appointing attorneys for indigent criminal defendants. A county can exercise no authority over state court judges, as the latter are not county officials." *Id.* These cases provide additional support for the County's contention that it cannot be held liable for any alleged failure to provide an adequate public defender system, because power to appoint counsel lies with the magistrates. Finally, several cases have reached the obvious conclusion that that judicial immunity protects a state judge from damage claims based on alleged deprivations of the right to counsel. *Martin v. Aubuchon*, 623 F.2d 1282, 1285 (8th Cir. 1980); *Banks v. Geary Cty. Dist. Court*, 645 F. App'x 713, 717 (10th

Cir. 2016)(state judge "was clearly entitled to absolute immunity from suit" " in case seeking damages from denial of appointment of counsel).

2. The damage claims against Lexington County are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

All Defendants contended that the damage claims against them are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). ECF No. 50-1 at 4-7, ECF No. 70 at 15-17. The R & R recommended the dismissal of the damage claims against all Defendants except Lexington County based on immunities, or in the case of Defendant Madsen, on the basis that the claims against him were duplicative of those against the County itself. ECF No. 74 at 14-19, 20. In so holding, the R & R did not consider, or even mention, the contention that *Heck v. Humphrey* bars the damage claims against Lexington County, which were not subject to dismissal for the other reasons stated in the R & R.

Plaintiffs' damage claims against Lexington County present issues that could have been raised in the criminal proceedings and which if successful, could have had led to the invalidations of their convictions or sentences, including their imprisonment on bench warrants. Those issues were not raised during any point in their criminal cases, and Plaintiffs' convictions and sentences have never been overturned.[3] As a result, and as will be shown in more detail below, their damage claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) as well as by the *Rooker-Feldman* doctrine.[4]

Plaintiffs' only damage claim against Lexington County is set forth in Claim 5, which raises Sixth Amendment claims based on alleged failure to afford counsel. Such claims can lead

[3] Plaintiff Goodwin, whose criminal case is still active and will remain active until his sentence is completed, could raise those grounds in that proceeding, including the possibility of raising them in advance of the issuance of the issuance of a bench warrant.

[4] *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

to invalidation of a conviction. *See, e.g., Custis v. United States*, 511 U.S. 485, 494 (1994)(failure to appoint counsel for an indigent defendant was subject to collateral attack in habeas corpus).

Heck v. Humphrey, 512 U.S. 477 (1994) holds that a Section 1983 plaintiff cannot bring a damage suit under that statute where a judgment in favor of the plaintiff "would necessarily imply the invalidity of his conviction or sentence." *Id.* at 486. As summarized by the Court,

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

512 U.S. at 486–87 [footnote omitted]. Plaintiffs have not proven, and cannot prove, that their criminal cases had any of the kinds of favorable terminations listed by the Court.

Heck has been applied to claims similar or identical to the damage claims asserted by the Plaintiffs in the present case against Lexington County. It should be noted that the rule in *Heck* applies not only to the original conviction, but also to challenges that would render imprisonment or sentences invalid. *Id.* As a result of the fact that a Sixth Amendment violation will invalidate a conviction, courts have applied *Heck* to bar damage claims based on alleged Sixth Amendment violations. *See, e.g., Carver v. Cty.*, No. CV 1:16-2528-TMC, 2016 WL 4771287, at *2 (D.S.C. Sept. 14, 2016)(claim that amounted to denial of counsel, if found to have merit, would call into question the validity of his conviction, and was barred by *Heck*); .*Kilbane v. Huron Cty. Comm'rs*, No. 3:10 CV 2751, 2011 WL 1666928, at *2 (N.D. Ohio May 3, 2011)("Plaintiff's

assertion he was denied counsel raises a claim which, if found to have merit, would call into question the validity of his conviction").[5]

3. Plaintiffs' damage claims are also barred by the *Rooker-Feldman* doctrine.

In addition to being barred by *Heck v. Humphrey*, Plaintiffs' damage claims are also barred by the *Rooker-Feldman* doctrine, as all Defendants asserted in support of their summary judgment motion. ECF No. 50-1 at 8-9, ECF No. 70 at 17-18. The R & R did not mention or discuss this ground for dismissal of the damage claims against Lexington County. As summarized by the Fourth Circuit, that doctrine applies when "the loser in state court files suit in federal district court seeking redress for an injury allegedly caused by the state court's decision itself. *Davani v. Virginia Dep't of Transp.*, 434 F.3d 712, 713 (4th Cir. 2006). The *Rooker–Feldman* doctrine "divests the district court of jurisdiction where entertaining the federal claim should be the equivalent of an appellate review of [the state court] order." *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192, 202 (4th Cir. 1997). *Heck* precludes damage claims where a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or

[5] Defendants' counsel are aware that the Fourth Circuit has limited *Heck* in some situations. *Wilson v. Johnson*, 535 F.3d 262 (4th Cir.2008). However, this Court, in a decision affirmed by the Fourth Circuit, has held that *Heck* continues to apply where, as here, "the facts directly invoke the Supreme Court's concerns about the ability of criminal defendants to collaterally attack their convictions through a civil suit." *Groves v. City of Darlington, S.C.*, 2011 WL 825757, at *3 (D.S.C. 2011), aff'd, 457 F. App'x 230 (4th Cir. 2011), cert. denied, 567 U.S. 917 (2012). Similarly, in *Addison v. S.C. Dep't of Corr.*, 2011 WL 5877017, at *3 (D.S.C. 2011), report and recommendation adopted, 2011 WL 5876915 (D.S.C. 2011), it was held that "Since Plaintiff acknowledges that he is disputing the Judgment and Commitment Order from the Court of General Sessions, the decision of the United States Court of Appeals for the Fourth Circuit in *Wilson v. Johnson*, 535 F.3d 262 (4th Cir.2008), is not applicable because Plaintiff's incarceration is not the result of an erroneous calculation of a sentence by a state corrections department." It should be noted that in opposing Defendants' motion for summary judgment on the basis of *Heck*, Plaintiffs did not cite a single case in which anything other than parole, probation or other similar independent actions not related to the original sentence was involved. In other words, they have cited no case such as these, where the courts were simply carrying out the original alternative sentence of incarceration.

sentence and the *Rooker-Feldman* doctrine serves a similar function, precluding claims that effectively require a federal court to review and reverse a state court judgment. As a result, both doctrines have been applied in cases such as this to preclude damage claims by convicted persons.

The nature of Plaintiffs' damage claims as amounting effectively to challenges to their convictions and sentences has been discussed at length above. Under such circumstances, it has been held that *Rooker-Feldman* applies independently of the principles of *Heck v. Humphrey*. For instance, in *Jones v. Cumberland Cty. Municipality*, 2015 WL 3440254, at *5 (E.D.N.C. 2015), report and recommendation adopted, 2015 WL 3440258 (E.D.N.C. 2015), the court reached the following conclusions:

> The injuries plaintiff alleges in this case result from alleged improprieties in the state court criminal proceedings, namely, imposition of an excessive fine and term of imprisonment. Matters relating to these state criminal proceedings are not appropriately brought before this court because a determination of plaintiff's claims in his favor would necessarily require this court to find that the state court proceedings produced an improper result and possibly as well that they were prosecuted in an improper matter. The *Rooker–Feldman* doctrine prohibits this court from making such a determination. Plaintiff, of course, retained access to the state courts for pursuit of such claims. The claims should accordingly be dismissed.

Accord, e.g., Shahid v. Borough of Eddystone, 2012 WL 1858954, at *9 (E.D. Pa. 2012), aff'd, 503 F. App'x 184 (3d Cir. 2012), cert. denied, 134 S.Ct. 92 (2013)(federal court may not consider a claim that would require either determining that the state court judgment was erroneously entered or reversing it). Accordingly, Plaintiffs' damage claims against Lexington County should be dismissed under the *Rooker-Feldman* doctrine for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, Defendant Lexington County respectfully requests that the Court decline to adopt that portion of the Report and Recommendation that declined to dismiss the damage claims against Lexington County, and instead issue an Order dismissing those claims.

Respectfully submitted,

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