UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-3875

(Summary Calendar)

WILBERT MATTHEWS,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden, Louisiana State Penitentiary, and ATTORNEY GENERAL STATE OF LOUISIANA,

Respondents-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 91 2433 E)

(December 1, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Wilbert Matthews, an inmate of the Louisiana State Penitentiary, brings this pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 (1988), contending that the parole board violated his due process rights. The district court dismissed the petition with prejudice. Finding no ripe claim for

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

adjudication, we affirm, but modify the dismissal to be without prejudice.

In 1978, Matthews was convicted of second degree murder, pursuant to La. Rev. Stat. Ann. § 14:30.1 (West 1986). At that time, section 14:30.1 provided that "[w]hoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation, or suspension of sentence for a period of forty years."

Also in effect, when Matthews was convicted, was La. Rev. Stat. Ann. § 15.574.4B (West 1992), which provided that "[n]o prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years." Matthews wrote a letter to the parole board concerning his future eligibility for parole, and was informed that he *would not* be considered for parole as long as he was serving a life sentence, pursuant to section 15:574.4. See State of Louisiana's Records, vol. 1, at tab B.

Matthews claims that section 14:30.1 created a legitimate expectation that he would become eligible for parole after serving 40 years of his life sentence. He therefore argues that he has a vested liberty interest in parole eligibility. However, he contends that the parole board, by following the dictates of section 15:574.4, *will not* consider him for parole, even after the passage of 40 years, because his sentence would not have been commuted to a fixed number of years.

Matthews has served only 14 years of his life sentence. He has not been denied parole by the parole board because, even under his own arguments, he is not eligible to apply for parole until after he has served 40 years, or after he has received a commuted sentence from the Governor to a fixed number of years.

Matthews thus fails to present an actual, justiciable case or controversy.[1] *See* U.S. Const. Art. III, § 2, cl. 1. The alleged controversy between the parole board and Matthews "has not ripened into a definite and concrete dispute capable of judicial resolution." *Cross v. Lucius,* 713 F.2d 153, 159 (5th Cir. 1983). We can only speculate whether, when 40 years of his life sentence has passed, Matthews will actually be denied parole. "It does not matter that in the future this litigation may be used as a strategic instrument; there must be an adversarial relationship between the parties as to the question and the judicial process must be capable of adjudicating it." *Matter of Talbott Big Foot, Inc.,* 924 F.2d 85, 87 (5th Cir. 1991).

Therefore, the dismissal of the district court was correct, albeit for different reasons. However, the dismissal should have been without prejudice, to allow Matthews to return to either a federal or state forum when an actual controversy has presented itself for resolution. Accordingly, the judgment of the district

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[1] Although neither party raises this issue, we are required to do so *sua sponte. See United States v. Barrett,* 837 F.2d 1341, 1345 (5th Cir. 1988), *cert. denied,* 492 U.S. 926, 109 S. Ct. 3264, 106 L. Ed. 2d 609 (1989) (Where neither party raises a justiciability issue, "this court is required to do so *sua sponte,* because this issue implicates the article III requirement that there be a live case or controversy.").

court is **MODIFIED** to be without prejudice and, as modified, **AFFIRMED.**