UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2569
Summary Calendar

LAZARO MENDIVAS GONZALES,

Plaintiff-Appellant,

VERSUS

JAMES ANDREW COLLINS, Director Texas Dept. of Criminal Justice, Institutional Division, and SELDEN HALE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 92 1701)

January 6, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[1]

Gonzales appeals the dismissal of his § l983 action as frivolous under 28 U.S.C. § 1915(d). We vacate the dismissal and remand.

I.

Texas prisoner Lazaro Gonzales filed this civil rights complaint against James Collins, Director of the Texas Department

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of Criminal Justice (TDCJ), and Seldon Hale, Chairman of the Texas Board of Pardons and Parole (the Board). Gonzales alleged that the defendants had deprived him of due process and had subjected him to cruel and unusual punishment because of their refusal to consider his eligibility for mandatory supervised release. He sought monetary damages and declaratory and injunctive relief.

Gonzales alleged that he had received a five-year prison sentence after he pleaded guilty to a third-degree felony on August 13, 1988. On May 18, 1992, he was informed that he was not eligible for mandatory supervised early release due to the nature of his offense. Gonzales contended that under Texas law he is eligible for mandatory supervision and that parole officials have wrongly refused to consider him for possible early release. The district court dismissed the action as frivolous under 28 U.S.C. § 1915(d). This appeal followed.

II.

Gonzales' claim is based on § 8(c) of the Texas parole statute. In pertinent part, § 8(c) provides that "a prisoner who is not on parole shall be released to mandatory supervision" when his accrued good-conduct time plus calendar time served equal the maximum term to which he was sentenced. **See** Tex. Code Crim. Proc. Ann. art. 42.18 § 8(c) (West Supp. 1992). A prisoner is not eligible for release to mandatory supervision, however, if he has been convicted of certain first-degree or capital felonies or if his judgment of conviction contains an affirmative finding rendering him ineligible for early release. **Id**.

Gonzales argues that he has a liberty interest in mandatory supervision under § 8(c) because he was convicted of a third-degree, rather than a first-degree, felony. Relying on **Creel v. Keene**, 928 F.2d 707, 712 (5th Cir.), **cert. denied**, 111 S.Ct. 2809 (1991), the district court reasoned that Gonzales did not have a constitutionally protected liberty interest in parole. The district court's reliance on **Creel** is misplaced. In **Creel**, this Court interpreted § 8(a) of the Texas parole statute and found that no liberty interest existed under the relevant version of that section because the Texas Legislature had amended the section to replace the phrase "shall release" with the phrase "may release." **See Creel**, 928 F.2d at 712. Section 8(a) of the parole statute governs parole rather than release to mandatory supervision. Unlike § 8(a), § 8(c) arguably creates a liberty interest in early release because of its use of the mandatory "shall." Therefore, the suit should not have been dismissed as frivolous on the basis that there is no liberty interest created by the Texas Parole Statute.

The case must be remanded for additional fact-finding. The record is devoid of any information from which it can be determined whether § 8(c) is applicable to Gonzales. It is entirely possible that Gonzales has been denied release to mandatory supervision because the trial court entered an affirmative finding which makes him ineligible for release under § 8(c). On remand, the district court may determine that the suit is frivolous because § 8(c) does not apply to Gonzales due to the circumstances of his conviction.

If § 8(c) is applicable to Gonzales, the issue before the district will be whether the language of the statute creates a constitutionally protected liberty interest in early release. **See Story v. Collins**, 920 F.2d 1247, 1251-52 (5th Cir. 1991).

Although this suit is styled as a civil rights action, if the district court determines that § 8(c) applies to Gonzales, the resolution of the factual and legal issues involved in his claim may determine whether he is entitled to immediate or early release. Such a claim must first be pursued through habeas corpus. **Serio v. Members of La. State Bd. of Pardons**, 821 F.2d 1112, 1119 (5th Cir. 1987). Nevertheless, dismissal of the suit pending Gonzales' exhaustion of state remedies would not necessarily be appropriate. In this situation, the suit should be dismissed insofar as it states a habeas claim. But the district court should stay Gonzales' § 1983 claim if its dismissal (either with or without prejudice) would cause this claim to become time barred. **See Serio**, 821 F.2d at 1119.

VACATED and REMANDED.