UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7730
Summary Calendar

CHRISTOPHER MOORE,

Petitioner-Appellant,

VERSUS

J. STEWART MURPHY, ET AL.,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
(CA-2:92-247-B-O)

(December 1, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Christopher Moore challenges the § 1915(d) dismissal of his *pro se*, *in forma pauperis* habeas petition. We **AFFIRM** in part and **VACATE** and **REMAND** in part.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Pursuant to his conviction for murder, Moore is presently confined for life in the Mississippi State Penitentiary. He alleges that he has met with the Parole Board eight times since he became eligible for parole in 1985. Moore claims that, at the first seven meetings, he received set-offs ranging from one month to one year.[2] On April 28, 1992, he met with the Parole Board an eighth time; after denying Moore parole, the Board gave him a five-year set-off.

After exhausting his state remedies, Moore filed this action (styled a petition for writ of habeas corpus), alleging two grounds for relief. First, he claimed that the Parole Board arbitrarily increased his set-off from no more than one year to five years. Second, he claimed that the promulgation by the Board in 1992 of new "Laws, Policies & Procedures", pursuant to which the Board may provide a set-off of up to five years, is an ex post facto law, and thus unconstitutional. The district court dismissed his petition as frivolous under 28 U.S.C. § 1915(d).

[2] "Set-off" is the period between denial and reconsideration of parole.

II.

Moore asserts that the district court erred in dismissing his claims as frivolous.[3] We review for abuse of discretion. *E.g.*, ***Denton v. Hernandez***, 112 S.Ct. 1728, 1734 (1992). A complaint is deemed "frivolous" for purposes of § 1915(d) if it "lacks an arguable basis either in law or in fact." ***Neitzke v. Williams***, 490 U.S. 319, 325 (1989).

A.

Liberally construed, Moore raises a due process challenge to the Parole Board's deviation from the alleged prior practice of granting set-offs of no more than one year. For the reasons discussed recently in ***Hunter v. Murphy***, No. 92-7747 (5th Cir., March 31, 1993) (per curiam) (unpublished; attached), we must vacate and remand the district court's order dismissing this part of Moore's complaint as frivolous. As in ***Hunter***, we express no opinion as to the underlying merit of Moore's claim; we merely remand for the district court to undertake further, appropriate proceedings in order to determine whether the Parole Board's prior practice created a constitutionally protected liberty interest in annual parole consideration.

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[3] Moore states in his brief that his action is "habeas corpus, and/or § 1983". Given the procedural posture of this case, and the fact that the touchstone of either claim is the violation of a constitutional right, *see* ***Thomas v. Torres***, 717 F.2d 248 (5th Cir. 1983), *cert. denied*, 465 U.S. 1010 (1984), we need not determine the appropriate classification of this claim.

B.

As in ***Hunter***, Moore's ex post facto challenge is without merit. The new procedures that Moore alleges constitute ex post facto laws were not effective until July 1, 1992. Because he complains about the Board's decision of April 28, 1992, those procedures did not govern the Board's decision in his case. Accordingly, that portion of the district court's order dismissing Moore's ex post facto claim as frivolous is affirmed.

III.

For the foregoing reasons, the judgment of the district court is **AFFIRMED** in part and **VACATED** and **REMANDED** in part for further proceedings consistent with this opinion.

AFFIRMED in **PART** and **VACATED** and **REMANDED** in **PART**.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7747

Summary Calendar

ELLIS HUNTER,

Petitioner-Appellant,

VERSUS

J. STEWART MURPHY, ET AL.,

Respondents-Appellees.

Appeal from the United States District Court

for the Northern District of Mississippi

(2:92-CV-147)

(March 31, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[4]

Ellis Hunter appeals the § 1915(d) dismissal of his habeas petition. We **AFFIRM** in part and **VACATE** and **REMAND** in part.

I.

In February 1988, Hunter pleaded guilty to manslaughter and was sentenced to a 20 year term, with four years suspended. Because he had already spent 197 days in jail, his 16 year sentence began to run from August 2, 1987. Pursuant to Miss. Code Ann. § 47-7-3, Hunter was first considered for parole in March 1991, after serving one-fourth of his sentence. Finding that his release at that time would not be "in the best interest of society", the Parole Board agreed to consider him again in one year. In March 1992, the Board again considered Hunter for parole and again determined that his release would not be in society's best interest. The Board agreed to consider him again in 18 months. Hunter then filed a Motion to Show Cause[5] in Sunflower County Circuit Court, alleging that the Parole Board arbitrarily increased his set-off[6] from one year to 18 months, in violation of Miss. Code

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[4] 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.

[5] In his federal habeas petition, Hunter calls this state court pleading a petition for writ of habeas corpus. In his brief, he calls it a motion to show cause. The state court record has not been incorporated in its entirety, so we are unable to confirm how Hunter's state court pleading was styled.

[6] "Set-off" is the period of time between denial of parole and reconsideration.

Ann. § 47-7-17, and that the set-off increase violates the Ex Post Facto Clause. The circuit court denied the motion in July 1992. Both the circuit court and the Mississippi Supreme Court denied Hunter leave to appeal *in forma pauperis*.

Having exhausted his state remedies, Hunter filed a federal habeas petition in October 1992, alleging that the increased set-off violated his due process rights and the Ex Post Facto Clause of the United States Constitution, and seeking a new parole hearing and assurance that any set-off will not exceed one year. Liberally construing Hunter's petition to include an equal protection claim, the district court held that there was no arguable basis in law or fact for violation of the Due Process, Equal Protection, or Ex Post Facto Clauses of the Constitution, and dismissed Hunter's petition as frivolous under 28 U.S.C. § 1915(d). The district court issued a certificate of probable cause and granted Hunter leave to appeal *in forma pauperis*.

II.

Hunter contends that the district court erred in dismissing his due process and ex post facto claims as frivolous.[7] We review for abuse of discretion. ***Denton v. Hernandez***, __ U.S. __, 112 S.Ct. 1728, 1743 (1992).

The federal *in forma pauperis* statute allows *sua sponte*

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[7] In his brief, Hunter alternatively refers to his action as habeas corpus and under 42 U.S.C. § 1983. Given the procedural posture of this case, and the fact that the touchstone of either claim is the violation of a constitutional right, *see* ***Thomas v. Torres***, 717 F.2d 248 (5th Cir. 1983), *cert. denied*, 465 U.S. 1010 (1984), we need not determine the appropriate classification of this claim.

dismissal of a complaint filed thereunder if the district court is "satisfied that the action is frivolous". 28 U.S.C. § 1915(d). However, a complaint is not "frivolous" merely because it fails to state a claim within the meaning of Fed. R. Civ. P. 12(b)(6). Only when it "lacks an arguable basis either in law or in fact", ***Neitzke v. Williams***, 490 U.S. 319, 325 (1989), is it properly dismissed under § 1915(d). We conclude that Hunter's due process claim is not so legally meritless as to warrant such dismissal. His ex post facto claim, however, was properly dismissed.

A.

The district court found that Hunter's due process claim was frivolous, because the Mississippi parole statute grants no constitutionally protected liberty interest in parole. It also noted that the 18 month set-off did not exceed the Parole Board's statutory discretion. We agree that Miss. Code Ann. § 47-7-3 does not create an expectation of parole and thus, does not create a constitutionally protected liberty interest in early release. Both the Mississippi Supreme Court, ***Harden v. State***, 547 So. 2d 1150 (Miss. 1989), and this court, ***Scales v. Mississippi State Parole Bd.***, 831 F.2d 565 (5th Cir. 1987) have recognized that an inmate in a Mississippi prison has no liberty interest in his potential parole release. A complaint asserting such liberty interest as its constitutional basis could fairly be said to "lack[] an arguable basis ... in law".

Hunter, however, does not base his constitutional claim on a right to parole, but on a right to be *considered* for parole. The district court correctly recognized that Miss. Code Ann. § 47-7-17 fixes a time for initial parole eligibility, but then grants the Board authority to reconsider applicants "at such intervals thereafter as it may determine". Certainly, this statute does not give rise to a liberty interest in any particular interval between considerations for parole. On the other hand, we have recognized that liberty interests can also be created by regulation or practice. ***Lewis v. Thigpen***, 767 F.2d 252, 261 (5th Cir. 1985). Hunter contends that until adoption of the Parole Board's "Laws,

Policies and Procedures 1992-1996", its practice was to consider parole applicants each year, never applying a set-off in excess of 12 months. This practice, he says, created a liberty interest by instilling the expectation of annual consideration.

Although Hunter's allegations have not established a protectable liberty interest in annual parole review, we cannot say that they "claim[] ... infringement of a legal interest which clearly does not exist". ***Neitzke***, 490 U.S. at 327. As our court observed:

> Even though statutes and regulations are written, an appellate court would have difficulty reviewing a district court determination of whether a liberty interest was created in the absence of a full factual development concerning the practices of the state for the interaction between written regulations and actual practices often produces results not apparent by a mere examination of the regulations. Moreover, the practices of a state may be determinative, for even if a state by statute or regulation explicitly refuses to grant inmates certain liberty interests, practices of a state may nevertheless give rise to those same liberty interests.

Parker v. Cook, 642 F.2d 865, 876 (5th Cir. Unit B Apr. 1981).

At this stage, the only evidence of Parole Board regulations, policies or practice in the record are the Laws, Policies and Procedures which became effective in July 1992. These policies state that the "set-off length will be one (1) month to five years as determined by the Board". This publication, however, was not in effect at the time of Hunter's March 4, 1992, hearing. Absent further proceedings, as may be appropriate, we are unable to determine whether prior practice had created a constitutionally protected liberty interest in annual parole consideration.

B.

The Ex Post Facto Clause of the United States Constitution "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred". ***Weaver v. Graham***, 450 U.S. 24, 29 (1981). Hunter seems to contend that his 18 month set-off was assigned in accordance with the 1992 Parole Board regulations and, because the regulation allowing set-off between one month and five years did not exist at the time he committed the crime for which he is imprisoned, its application to him violates the Ex Post Facto Clause. We need not reach the merits of this contention, because it is factually incorrect. Those new procedures became effective on July 1, 1992. Hunter's 18-month set-off was imposed on March 4, 1992. The "law" he labels "ex post facto" had not even taken effect. His claim, therefore, "lacks an arguable basis either in law or in fact" and was properly dismissed as frivolous.

III.

Accordingly, the judgment is **AFFIRMED** in part and **VACATED** and **REMANDED** in part for further proceedings consistent with this opinion.

AFFIRMED in PART and VACATED and REMANDED in PART.