UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8467
Summary Calendar

RICKY L. LONG,

Plaintiff-Appellant,

VERSUS

JAMES A. LYNAUGH, Executive Director,
Texas Department of Criminal Justice
Institutional and Pardons and Paroles Divisions,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(A-91-CV-319)

(February 2, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Ricky L. Long, *pro se*, appeals the dismissal without prejudice of his § 1983 action. We **AFFIRM**.

I.

Long has been incarcerated in a Texas prison since his 1988 conviction. Approximately two months after commencement of his

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 Pursuant to that rule, the court has determined that this opinion should not be published.

sentence, Long was notified that the Board of Pardons and Paroles (now Pardons and Paroles Division)[2] had determined it would be "inappropriate" to set a tentative month for his parole due to the length of his sentence and the time before he would become eligible for parole. In 1990, Long petitioned the Pardons and Paroles Division to establish a tentative date for his release. The Division responded that Texas law required Long to serve at least 15 years and his case was "on the docket for May, 2003". In 1991, Long again petitioned the Division, requesting establishment of a tentative month for parole and a proposed program of measurable institutional progress, and threatening to file suit if these requests were not met. The record does not include a response from the TDCJ. Long filed this civil rights action pursuant to 42 U.S.C. § 1983 against the director of the Division (Lynaugh) in April 1991. Lynaugh moved to dismiss; and the district court granted the dismissal without prejudice, adopting the report and recommendation of the magistrate judge.[3]

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[2] The Board of Pardons and Paroles became the Pardons and Paroles Division of the Texas Department of Criminal Justice (TDCJ) on January 1, 1990. *See* Tex. Code Crim. Proc. Ann. art. 42.13, Historical and Statutory Notes (West Supp. 1991).

[3] The district court granted Long additional time to file objections to the report and recommendation, but adopted that report and entered judgment before Long's additional time had passed. Long does mention this in his notice of appeal, and although he does not assert it as error, we construe his *pro se* brief liberally. Despite the district court's premature entry of judgment, we find no reversible error. The report and recommendation addressed only legal issues which have been addressed, in turn, by the district court and this court.

II.

On appeal, Long raises the issues asserted in his complaint: refusal to establish a tentative parole month and program of progress violates his due process and equal protection rights; the Division's consideration of "protest letters" is also violative of equal protection and due process; and the 1989 amendments to Article 42.18 of the Texas Code of Criminal Procedure are being applied to him in violation of the Ex Post Facto Clause of the United States Constitution.

A.

1.

The Equal Protection Clause "invalidates classifications enacted with the intent to disadvantage a particular group, or which operate to deprive a class of people of their fundamental rights". ***Hatten v. Rains***, 854 F.2d 687, 690 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). The extent to which a particular class is "suspect" governs the level of scrutiny applied to such classifications. We need not even approach that analysis, however, because Long has not asserted a classification at all. He does not contend that the Texas parole law operates to the peculiar disadvantage of any class to which he belongs.

2.

Long also contends that he has a due process right to a tentative parole date and program of progress. We disagree. The Supreme Court has held that when a state holds out the possibility of parole, it provides "no more that a mere hope that the benefit

will be obtained ... a hope which is not protected by due process". ***Greenholtz v. Inmates of Nebraska Penal and Correctional Complex***, 442 U.S. 1, 11 (1979). Likewise, the Texas statute's procedure for establishing a tentative parole month and program of progress creates nothing more than a mere "hope". The statute explicitly states that "[t]he board is not required to establish a tentative parole month and program of progress if the board determines that to do so would be inappropriate in the prisoner's case and indicate[s] that determination in the prisoner's file". Tex. Code Crim. Proc. Ann. art. 42.18 sec. 8(e) (West 1988).[4] The vesting of such extensive discretion in the parole board precludes the creation of the liberty interest claimed by Long.

B.

Long also contends that the Division's consideration of letters or statements protesting his release unconstitutionally cause imposition of a greater punishment. The district court found that this issue is currently under consideration by the same court in a class action suit, ***Johnson v. Keene***, Cause No. A-85-CA-94. Long does not challenge that finding. He may urge his claim in that proceeding, but allowing him to pursue it individually "would interfere with the orderly administration of the class action and

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[4] This text includes the 1987 amendments and is the version in effect at the time that Long was incarcerated. Long contends that, in refusing to set his tentative release date, the board acted instead upon authority of the 1989 version in violation of the Ex Post Facto Clause of the United States Constitution. However, this provision has not been changed since 1987 except to reflect the board's new title as the Pardons and Paroles Division of the TDCJ.

risk inconsistent adjudications". ***Gillespie v. Crawford***, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc). Long's claim, therefore, was properly dismissed (without prejudice).

III.

Accordingly, the judgment is

AFFIRMED.