

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-2758
Summary Calendar
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JOSE LORENZO SPEARMAN,
a/k/a
Pablo Carlos Ramirez Camara,

Plaintiff-Appellant,

versus

ANN RICHARDS, Governor,
ET AL.,

Defendants-Appellees.

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

(CA H 93 246)

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(January 14, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

Plaintiff-appellant Jose Lorenzo Spearman (Spearman), a Texas prisoner, filed this civil rights complaint under 42 U.S.C. § 1983 against eleven defendants, including the Governor of Texas,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Immigration and Naturalization Service officials, the United States Attorney General, and officials of the Texas Board of Pardons and Paroles. The district court found that "[t]he gravamen of Spearman's claim affects the length of his prison term." Accordingly, the district court dismissed the claim without prejudice for failure to exhaust habeas remedies. Spearman now appeals the dismissal. We affirm.

A civil rights claim under section 1983 that serves as a challenge to the legality of a prisoner's confinement must first be brought as a habeas corpus action. See *Serio v. Members of the Louisiana State Board of Pardons*, 821 F.2d 1112, 1119 (5th Cir. 1987). Such a claim may not be dismissed with prejudice irrespective of merit until the habeas remedies have been exhausted. *Williams v. Dallas County Com'rs*, 689 F.2d 1212, 1215 n.2 (5th Cir. 1982), *cert. denied*, 461 U.S. 935 (1983). A district court may stay the action or dismiss it without prejudice if such a dismissal would not improperly prejudice the claim by action of any applicable statute of limitations. See *Serio*, 821 F.2d at 1119; *Clark v. Williams*, 693 F.2d 381, 382 (5th Cir. 1982).

In Texas, where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right. This Texas tolling rule enables a federal district court to dismiss the "civil/rights habeas actions" without prejudice and to direct the litigant to pursue promptly state remedies. *Jackson v. Johnson*,

950 F.2d 263, 266 (5th Cir. 1992). The time during which the litigant is pursuing the available state remedies would toll the statute of limitations, thus allowing the litigant to return to federal court within the limitations period. *Id.*

In this case, the district court dismissed the claim without prejudice pending exhaustion of habeas remedies. Spearman claimed that he was convicted for a crime he did not commit and had been improperly denied parole. Spearman also asserted that he should be released from jail and allowed to become a naturalized citizen under the amnesty program of the Immigration and Naturalization Service. In addition to \$2,000,000 in damages, Spearman seeks a pardon for his conviction and permanent legal residence status. There is no doubt that Spearman's complaint attacks his confinement. Therefore, his claims must be first brought in a habeas proceeding.¹

On appeal, Spearman has not alleged that he has fully exhausted his state habeas remedies, but simply suggests that he should not be required to do so. In his brief on appeal, Spearman states that he filed two habeas petitions under 28 U.S.C. § 2254. One or both of these may be still pending; and it is not clear what claims are asserted therein.

The district court did not err in dismissing the complaint without prejudice for failure to exhaust. Accordingly, the district court's judgment is

¹ Given the confused nature of Spearman's pleadings, it is not possible to separate his habeas issues from any other issues that he may present. See *Serio*, 821 F.2d at 1119.

AFFIRMED.