UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8490
Summary Calendar

GEORGE EARL JONES and DAVID NA'IM,

Plaintiffs-Appellants,

and

BENITO LOPEZ,

Movant-Appellant,

versus

DAN MORALES, Attorney General,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A-93-CA-80-JN)

(May 13, 1994)

Before POLITZ, Chief Judge, GARWOOD and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:[*]

George Jones and David Na'im appeal the dismissal for failure to state a claim of their *pro se* 42 U.S.C. § 1983 challenge to the Texas parole eligibility law. Benito Lopez appeals the denial of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

his motions for permissive intervention and *in forma pauperis* status. We affirm.

Background

Jones, Na'im, and Lopez are prisoners of the Texas Department of Criminal Justice, each convicted before 1987 of an aggravated offense under Texas law. Effective September 1, 1987, the Texas legislature amended its parole eligibility law, making inmates convicted of aggravated offenses eligible for release after serving the lesser of one-fourth of the sentence imposed, or 15 calendar years ("one-fourth law").[1] The prior version of the statute required inmates convicted of aggravated crimes to serve the lesser of one-third of the sentence imposed, or 20 calendar years ("one-third law").[2] In 1991 Texas Attorney General Dan Morales issued an opinion stating that the one-fourth rule would not be given retrospective effect. This left Texas prisoners like Jones, Na'im, and Lopez under the previous eligibility rule.

Jones and Na'im sought declaratory and injunctive relief against the Attorney General, alleging equal protection and separation of powers violations. The Attorney General moved to dismiss for, *inter alia*, failure to state a claim, contending that Jones and Na'im had neither asserted discriminatory intent nor claimed that the statute as applied was without rational relationship to legitimate governmental interests. The magistrate

[1]Tex. Code Crim. Proc. Ann. art. 42.18, § 8(b) (West 1991).

[2]Tex. Code Crim. Proc. Ann. art. 42.12, § 15(b) (West 1979).

judge to whom the matter was referred recommended granting the motion. Lopez sought permissive intervention under Fed.R.Civ.P. 24(b), also submitting supplemental pleadings alleging that the legislature intended the one-fourth law to operate retroactively. After considering objections, the district court adopted the magistrate judge's recommendation to dismiss the Jones and Na'im actions and it denied Lopez's motion to intervene. Lopez sought and was denied leave to appeal *in forma pauperis*. Jones, Na'im, and Lopez timely appealed.

Analysis

The appellants claim the district court erred by dismissing their actions without addressing their separation of powers challenge. They maintain that the Texas legislature encroached upon executive authority in passing the one-fourth law. They misperceive the law. There is no federal constitutional or statutory requirement that state governments adhere to the separation of powers ideal.[3] This claim, therefore, is not cognizable under section 1983.

The appellants also present an equal protection claim, asserting differential treatment based on the date of their convictions. The district court correctly found that Jones and Na'im had neither alleged purposeful discrimination[4] nor claimed

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[3] See, e.g., **Whalen v. United States**, 445 U.S. 684, 689 n.4 ("[T]he doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States.").

[4] **Muhammad v. Lynaugh**, 966 F.2d 901 (5th Cir. 1992).

that prospective application of the one-fourth law bore no rational relationship to legitimate government interests.[5] Even if they had, we have upheld the purely prospective application of the one-fourth statute against an identical equal protection challenge.[6] Additionally, appellants' legislative intent argument first appeared in Lopez's pleadings and, given the denial of his motion to intervene, was not addressed by the district court. That issue is not before us.[7]

In the alternative, the appellants challenge the district court's decision to dismiss their claim with prejudice. They were accorded ample opportunity to revise their pleadings. Dismissal with prejudice was appropriate.[8]

The appellants finally contend that the district court erred in denying Lopez permissive intervention. Rule 24(b) interventions are wholly committed to the trial court's discretion.[9] The instant record involves no circumstances extraordinary enough to mandate reversal. They also challenge the denial of the request of Lopez for *in forma pauperis* status on appeal. To avoid denial of pauper

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[5]**United States v. Galloway**, 951 F.2d 64 (5th Cir. 1992).

[6]**Ruiz v. Morales**, No. 93-4405, slip op. (5th Cir. Nov. 3, 1993) (unpublished). See also **Thompson v. Missouri Board of Parole**, 929 F.2d 396 (8th Cir. 1991) (upholding conditional release law against equal protection challenge, noting a rational basis for making a change in eligibility prospective only).

[7]We note in passing that the Attorney General's interpretation has been adopted by the Texas courts. **Ex Parte Choice**, 828 S.W.2d 5 (Tex.Crim.App. 1992) (*en banc*).

[8]**Jacquez v. Procunier**, 801 F.2d 789 (5th Cir. 1986).

[9]**Bush v. Viterna**, 740 F.2d 350 (5th Cir. 1984).

status, an applicant must present a non-frivolous issue.[10] We conclude that the arguments advanced by appellants have no arguable basis in law.

The district court is AFFIRMED in all respects.

[10]**Carson v. Polley**, 689 F.2d 562 (5th Cir. 1982).