

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60658
Summary Calendar

WILLIE JAMES STEWART,

Plaintiff-Appellant,

VERSUS

J. STEWART MURPHY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
(4:93-CV-121-B-0)

(November 30, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Willie James Stewart appeals from the district court's dismissal, pursuant to 28 U.S.C. § 1915(d), of his civil rights complaint. We **AFFIRM**.

I.

On April 14, 1993, Stewart, a state prisoner proceeding *pro se* and *in forma pauperis*, filed a "Complaint Concerning Conditions of Confinement" pursuant to 42 U.S.C. § 1983. He claimed that members of the Mississippi Parole Board violated his due process rights and

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 Pursuant to that rule, the court has determined that this opinion should not be published.

the *ex post facto* clause by changing his "set-off" (the period between parole denial and reconsideration) from one year to five years. Stewart requested that his set-off be returned to the original, one-year schedule, and that he be awarded \$225,000 in compensatory and punitive damages.²

The district court dismissed, without prejudice, Stewart's complaint as duplicative of a 28 U.S.C. § 2254 complaint in which Stewart also challenged the Parole Board's decision to change the set-off period. The court noted that Stewart's § 2254 action was held in abeyance pending a decision on class certification of the set-off issue, **Hunter v. Murphy**, (N.D. Miss. No. 2:92CV147-S-O),³ and that Stewart's § 2254 claim had been "brought under" the pending class claim.

II.

A district court may dismiss *sua sponte* a pauper's complaint as frivolous when the complaint lacks an arguable basis in either law or fact, 28 U.S.C. § 1915(d); and we review such a dismissal for abuse of discretion. **Denton v. Hernandez**, 112 S. Ct. 1728, 1734 (1992).

Pursuant to § 1915(d), a civil rights action may be dismissed as duplicative. **Pittman v. Moore**, 980 F.2d 994, 994-95 (5th Cir. 1993). Stewart concedes that the instant action is based upon the

² Stewart filed an amended complaint, requesting a jury trial and alleging that he suffered mental pain and anguish as a result of the intentional wrongdoing of the defendants.

³ The set-off issue is on remand from **Hunter v. Murphy**, No. 92-7747 (5th Cir. March 31, 1993) (unpublished).

same due process issues raised in his § 2254 proceeding, but contends that the dismissal of this civil rights action deprives him of his right to monetary damages. The district court has not determined, however, whether to classify the pending class action on the set-off issue as a habeas or a § 1983 matter. Thus, Stewart should be provided the opportunity to amend his pending § 2254 action to include his claim for money damages.⁴ The dismissal was proper.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

⁴ Likewise, the *ex post factor* issue can be considered in the pending action.