IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANTHONY PERRY, RICHARD HENDERSHOT, JOSEPH JACKSON, MICHAEL RICHMOND and ERIBERTO GALINDO,

Petitioners,

04-C-332-C

v.

JOSEPH SCIBANA, Warden of the Oxford Prison Camp,

Respondent.

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MARTY LEE BELEW,

ORDER

Petitioner,

04-C-314-C

v.

JOSEPH SCIBANA, Warden,

Respondent.

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WILLARD M. RICE,

ORDER

Petitioner,

04-C-317-C

v.

JOSEPH SCIBANA, Warden,

Respondent.

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MICHAEL JAY MOLZEN,

ORDER

Petitioner,

04-C-318-C

v.

JOSEPH SCIBANA, Warden,

Respondent.

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WAYNE INWOOD,

ORDER

Petitioner,

04-C-319-C

v.

JOSEPH SCIBANA, Warden,

Respondent.

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DAVID SPOHR,

ORDER

Petitioner,

04-C-329-C

v.

JOSEPH SCIBANA, Warden,

Respondent.

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JOHN R. CALDWELL,

ORDER

Petitioner,

04-C-342-C

v.

JOSEPH SCIBANA, Warden,

Respondent.

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These are petitions for writs of habeas corpus brought by petitioners confined at the Federal Correctional Institution and Federal Prison Camp in Oxford, Wisconsin. In each petition, the petitioner alleges that he will be forced to serve a longer duration of confinement because the Bureau of Prisons has computed his good time credits in a manner that is contrary to the dictates of 18 U.S.C. § 3624(b).

As a preliminary matter, I note that in case no. 04-C-15-C, there are five separate

petitioners bringing a single petition. In Lindell v. Litscher, 212 F. Supp. 2d 936 (W.D. Wis. 2002), a civil action, I ruled that I would not allow prisoners proceeding pro se to prosecute a group complaint in this court because of the many problems inherent in administering such cases. For example, there is no guarantee that prisoners who bring joint lawsuits will remain in contact with each other for the length of time it takes a lawsuit to reach resolution. Prisoners are subject to administrative and disciplinary transfers from one institution to another and may be moved regularly within an institution from one cell block to another and to administrative and punitive segregation status. They have limited freedom, if any, to meet with co-petitioners to discuss strategy for a combined lawsuit or to draft documents jointly for filing in a case. Also, too often one inmate takes charge of the multi-prisoner lawsuit and obtains the agreement of other inmates to act on their behalf in prosecuting the joint lawsuit although he lacks the legal authority to do so. Thus, there is no way for the court to insure that each co-petitioner would receive the information he would need before agreeing to the strategic decisions being made in the case. Finally, for the pro se litigant who lets another inmate prosecute a joint action on his behalf, there is significant potential for adverse consequences. This is particularly true in petitions for writs of habeas corpus, where a mistake in the prosecution could cost the petitioner an opportunity for release.

Nevertheless, I will make an exception to the policy stated in the Lindell case in this

instance, because I have decided to appoint counsel in the multiparty case for the purpose of determining whether this is a suit appropriate for class certification and, if so, to litigate the matter on behalf of the class. With the appointment of counsel, the concerns militating against multiparty prisoner lawsuits are eliminated.

Moreover, in Bijeol v. Benson, 513 F.2d 965, 968 (7th Cir. 1975), a class habeas corpus action, the Court of Appeals for the Seventh Circuit recognized that a multi-petitioner habeas corpus action could be maintained under certain circumstances. In Bijeol, the factors convincing the court of appeals that a representative habeas corpus action was proper were 1) there could be no genuine issues of fact; 2) there was a single issue of law identical to all prisoners identified in the class; 3) the number of prisoners was too great for joinder to be practical; and 4) the issue had been definitively adjudicated by the court of appeals in a recent decision.

In United States ex rel. Morgan v. Sielaff, 546 F.2d 218 (7th Cir. 1976), another habeas corpus action adjudicated on behalf of a class of petitioners, the respondents argued on appeal that it was improper for the district court to have allowed the multiparty action because the issue raised in the petition had not been definitively adjudicated in the circuit. The court of appeals rejected this argument, noting that the factors described in Bijeol were not intended as a strict formula to be followed mechanically in deciding whether to allow a representative habeas corpus action. Rather, district courts were to look to the provisions

of Fed. R. Civ. P. 23 for guidance in determining the propriety of a habeas corpus class action. Id. at 221. In the view of the court of appeals, when the Bijeol court listed as its forth factor that it had definitely decided the question of law in an earlier case, it was simply confirming the existence of the Rule 23 requirement that a class action case involve a common question of law.

In this action, petitioners seek a ruling that the policy statement governing the manner in which the Bureau of Prisons calculates their good time credits misinterprets the method of calculation required by 18 U.S.C. § 3624(b). They contend that the miscalculation means that each of them will be incarcerated for a longer period than they otherwise would be.

I decided this precise question on its merits in White v. Scibana, ___ F. Supp. 2d ___, No. 03-C-581-C, 2004 WL 877606 (W.D. Wis. Apr. 23, 2004). I concluded that the Bureau of Prisons was acting contrary to 18 U.S.C. 3624(b) by calculating petitioner Yancey White's good conduct time on the basis of the actual time he had served rather than his imposed sentence. I granted White's petition for a writ of habeas corpus under 28 U.S.C. § 2241 and ordered the warden to recalculate White's good conduct time in accordance with § 3624(b).

Although none of the petitioners in these cases has moved for class certification, I conclude from the number of petitions that are being filed by Oxford prison inmates seeking

the relief I granted to White that the number of cases will continue to climb unless the issue is addressed in a class action. Each of the petitioners has advised the court that the Bureau of Prisons has denied them administrative relief despite the White decision. Indeed, I take judicial notice from the attachment to the petition in Zapata v. Scibana, 04-C-306-C, that the warden of the Oxford institution has taken the position that this court's ruling in White applies only to White, and that unless the Court of Appeals for the Seventh Circuit agrees with this court, he will not calculate good time credits in the manner prescribed in White. I note, also, that the government appealed the final decision in White on May 27, 2004, and that it may be months before the court of appeals will reach the merits of that case. Given these circumstances, it is my tentative view that class certification of the question may well be appropriate. Accordingly, I will allow the petitioners in case no. 04-C-332-C to remain parties to a multiparty action on the condition that I am able to locate a lawyer willing to represent petitioners and obtain class certification. Petitioners' counsel will bear the burden of showing that the requirements for class certification of the petitioners in this case are met. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982); Retired Chicago Police Association v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993).

One other matter requires comment. There are presently two other habeas corpus actions proceeding in this court that raise the same claim as was raised in White v. Scibana and these cases: Zapata v. Scibana, 04-C-306-C and Campbell v. Scibana, 04-C-311-C.

Orders to show cause already have been issued in these two cases. The respondent has filed his response in the Campbell case and has moved for a stay of proceeding. I am issuing a separate order in that case today that will terminate the proceedings in this court. With respect to the Zapata case, I do not intend to stay the proceedings at this time. Zapata's release date will be September 1, 2004, if his sentence is recalculated in the manner prescribed in White. Because the suit is already underway, it is probable that he can obtain relief before a class is certified in the Perry case, if it is. However, if his case is not resolved by the time a class is certified, he will become a member of the class and his individual lawsuit will have to be dismissed. This will leave counsel for the class free to seek emergency injunctive relief with respect to him and any others for whom a delay in obtaining a final ruling would result in present illegal confinement.

ORDER

IT IS ORDERED that the decision whether to issue an order to show cause in these actions is STAYED pending the appointment of counsel in case no. 04-C-332-C and a determination whether a class should be certified. If I am able to locate counsel willing to represent petitioners in a class action, and assuming a class is certified, I will dismiss the individual cases and set an expedited schedule in the class suit for respondent to file a

response and petitioners to file a traverse.

Entered this 4th day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge