IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN R. CALDWELL,

Petitioner,

ORDER

04-C-342-C

v.

JOSEPH SCIBANA, Warden,

Respondent.

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This petition for a writ of habeas corpus under 28 U.S.C. § 2241 is currently stayed pending a decision by the Court of Appeals for the Seventh Circuit in White v. Scibana, 04-2410. In White, 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 and ordered the warden to recalculate White's good conduct time in accordance with § 3624(b).

After respondent appealed the decision in White, I stayed most of the actions of other inmates seeking writs on the basis of White. I have made exceptions only in cases in which the inmate could show that his release date would be imminent if his good conduct time

were recalculated in accordance with White. The reason for this exception should be obvious: grave, irreparable harm would be caused to any inmate who was incarcerated beyond his release date. Cf. Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (one factor courts should consider in deciding whether to stay injunction pending appeal is "whether issuance of the stay will substantially injure the other parties interested in the proceeding").

Even under White, petitioner would not be entitled to release until 2005. As a result, I have not lifted the stay in this case. However, petitioner has moved the court to reconsider this decision because after a White recalculation he would be eligible for transfer to a halfway house on August 10, 2004. He argues that the differences between confinement in a halfway house and confinement in prison are substantial enough to merit immediate relief.

I agree with petitioner that stays should be lifted in cases in which a recalculation may allow an inmate to be transferred to a halfway house before the court of appeals can decide White. As I have noted in Hendershot v. Scibana, 04-C-291-C (W.D. Wis. June 10, 2004), there are significant differences between community confinement and confinement in prison, significant enough such that a transfer from one to the other is a change in "custody" for the purpose of the habeas corpus statutes. Thus, by staying petitioner's action, he may be denied the opportunity to be confined under significantly less restrictive conditions. This is sufficient reason to justify a lifting of the stay.

Respondent objects to a lifting of the stay because petitioner has failed to exhaust his

administrative remedies as required by 42 U.S.C. § 1997e(a). This argument has several problems. First, the issue whether petitioner is required to exhaust his administrative remedies is separate from the issue whether the stay should be lifted. Although respondent's brief requests only a denial of petitioner's motion to lift the stay, accepting respondent's argument would require outright dismissal of the action. In any event, as I noted in Zapata v. Scibana, 04-C-306-C (W.D. Wis. July 9, 2004), § 1997e(a) does not apply to habeas corpus actions. Respondent appears to agree with this conclusion as a general matter, but he argues that a transfer to a halfway house is not cognizable under the habeas corpus statutes.

I disagree with respondent's argument that a denial of a transfer to a halfway house may not be challenged under § 2241; as respondent recognizes, I came to the opposite conclusion in Hendershot. Whether my conclusion in Hendershot is correct, however, has no bearing on the question whether the stay should be lifted. The scope of this case is limited to the question whether the Bureau of Prisons is calculating petitioner's good conduct time in accordance with § 3624(b), an issue that respondent agrees is properly considered under § 2241. Petitioner has *not* brought a claim in which he seeks a transfer to a halfway house on a particular date. Petitioner's eligibility for a transfer is relevant in this case only in determining whether the possibility for an earlier transfer on an imminent date is a sufficient ground for lifting the stay. I have concluded that it is.

Respondent argues next that even if § 1997e(a) does not apply, it would be inappropriate to waive the requirement for exhausting administrative remedies because none of the exceptions for waiver identified in Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004), are applicable to this case. I disagree. Gonzalez lists four different exceptions, including futility. Respondent does not deny that the bureau has predetermined its view of the appropriate method for calculating good conduct time. Nevertheless, he argues that it would not be futile for petitioner to seek an administrative remedy because he could receive "some form of relief." However, the only relief identified by respondent is "an explanation," which is no relief at all. Accordingly, I adhere to the conclusion that Caldwell and other inmates bringing petitions in reliance of White are not required to exhaust their administrative remedies.

I emphasize, however, that I cannot order petitioner to be placed in a halfway house on a particular date. Petitioner points out that under 18 U.S.C. § 3624(c), the Bureau of Prisons "shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community." Presumably, petitioner has come up with the August 10 date by subtracting six months from the date that he would be released under White. However, § 3624(c) does not require the

Bureau of Prisons to place inmates in halfway houses for six months; that time period is a ceiling and not a floor. In fact, the statute does not even require the bureau to transfer inmates to halfway houses at all. It says only that inmates should spend a reasonable part of their sentence learning to prepare for release. It appears that the bureau's *practice* is to transfer most inmates to halfway houses for the last six months of their sentence, see Hendershot, at 1, but that does not change the fact that the statute grants the bureau discretion to decide how the inmate is to be prepared for release and how much time the inmate needs to prepare.

Although I cannot order petitioner to be released to a halfway house, I conclude that petitioner should have the opportunity to be considered for such a transfer. The primary reason for the stay is to minimize any unnecessary burden on respondent and the bureau. This administrative consideration must give way to allowing inmates the chance to increase their liberty, even if that chance is not 100%. If petitioner's good conduct time is recalculated in accordance with White, petitioner may well receive a halfway house transfer in August if the bureau is consistent with its general practice. Again, this is sufficient to justify allowing this case to go forward. Therefore, in the existing White-related petitions, I will lift the stay if: (1) the petitioner submits a sentence computation from the Bureau of Prisons showing the inmate's term of imprisonment, good conduct time that has been both earned and disallowed, current release date and pre-release preparation date; and (2) I can

conclude on the basis of that information that the petitioner would be entitled to imminent release or eligible for an imminent halfway house transfer after his good conduct time is recalculated in accordance with White.

Petitioner should note that because he is not proceeding in forma pauperis, it is his obligation to serve the petition on the respondent. Pursuant to Fed. R. Civ. P. 81, the rules governing service of process in civil actions are applicable to this proceeding because no specific rules governing service of process in § 2241 habeas corpus actions exist elsewhere in a statute or in the Rules Governing Section 2254 and 2255 cases. The rule governing service of process in civil actions brought against a federal official in his official capacity is Fed. R. Civ. P. 4(i ). According to this rule, petitioner's petition must be sent with a copy of this court's order by certified mail to: 1) the respondent; 2) the United States Attorney for the Western District of Wisconsin; and 3) the Attorney General in Washington, D.C. The address for the United States Attorney in this district is: The Hon. J.B. Van Hollen, 660 W. Washington Ave., Madison, WI, 53703. The address for the Attorney General in Washington, D.C. is: The Hon. John Ashcroft, United States Attorney General, 950 Pennsylvania Ave., N.W., Rm. 5111, Washington, DC 20530. Enclosed to petitioner's

counsel with a copy of this order are the extra copies of his petition and this court's order.

ORDER

IT IS ORDERED that petitioner John Caldwell's motion to lift the stay imposed in this case is GRANTED and the stay is LIFTED. Respondent Joseph Scibana may have until August 2, 2004, in which to show cause why this petition for a writ of habeas corpus should not be granted on petitioner's claim that the Bureau of Prisons is calculating his good time credits in violation of 18 U.S.C. § 3624(b)(1). There is no need for a traverse.

Entered this 19th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge