

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RICHARD HENDERSHOT,

Petitioner,

v.

JOSEPH SCIBANA , Warden of
Oxford Prison Camp,

Respondent.

ORDER

04-C-415-C

In an order entered in this case on June 23, 2004, I imposed a stay of all proceedings pending a decision by the Court of Appeals for the Seventh Circuit in White v. Scibana, No. 04-2410. Now petitioner has filed a motion to lift the stay.

When I imposed the stay in this case, I had not yet ruled in Caldwell v. Scibana, 04-C-342-C (copy attached), that I would not impose a stay in cases raising the claim raised in White v. Scibana, 314 F. Supp. 2d 834 (W.D. Wis. 2004), 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 placement after his good conduct time is recalculated in accordance with White.

Petitioner's motion to lift the stay is supported by documentation showing that on October 10, 2001, he began serving a 48-month sentence. The Bureau of Prisons presently projects petitioner's release date to be April 3, 2005, if he is awarded 188 days of projected and earned good conduct time. The documentation shows also that petitioner is presently projected for release to a halfway house on or around November 28, 2004. If petitioner's good conduct time were to be recalculated in accordance with White, his projected release would be shortened by approximately 28 days, which may render him eligible for pre-release to a half way house before the court of appeals decides White. Therefore, I will lift the stay previously imposed in this case.

Petitioner admits that he has not exhausted his administrative remedies. He argues that exhaustion would be futile because the Bureau of Prisons is bound by its program statements in ruling on administrative appeals and until the legitimacy of the program statement at issue in this case is determined by the Court of Appeals for the Seventh Circuit in White, the Bureau of Prisons must deny all requests for administrative relief challenging the Bureau's method of calculating good conduct time.

The court of appeals has held that district courts may waive the exhaustion requirement in cases brought under § 2241 in limited circumstances. In particular, waiver is appropriate when the agency has predetermined the issue. Gonzalez v. O'Connell, 355

F.3d 1010, 1016 (7th Cir. 2004). In this case, respondent and the bureau have made it clear that they believe that an inmate's good conduct time should be calculated on the basis of the time he has served. Further, respondent has appealed the decision in White and it is his position that White does not have to be applied to inmates not a party to that case. See Zapata v. Scibana, No. 04-C-306-C (W.D. Wis. June 1, 2004). Accordingly, I conclude that it is unnecessary for petitioner to exhaust his administrative remedies because doing so would be futile.

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 with

a copy of this order are three copies of his petition, his motion to lift the stay and this court's orders of June 23 and today. Because the court cannot grant petitioner any relief until his petition is served, he should move quickly to obtain certified mail stickers from the proper prison authorities and mail his petition to the individuals listed above. Pursuant to Fed. R. Civ. P. 4(1), petitioner is requested to submit proof to the court that he served his petition by certified mail. A copy of the postmarked certified mail receipt for each of the individuals to whom the petition was sent will constitute proof of service.

ORDER

IT IS ORDERED that the stay imposed in this case on June 23, 2004, is LIFTED. Respondent Joseph Scibana may have until September 14, 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 3rd day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge