

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

RUSSELL ANDERSON,

Petitioner,

v.

WARDEN SCIBANA, F.C.I. Oxford,

Respondent.

ORDER

04-C-421-C

In an order entered in this case on July 1, 2004, I stayed all proceedings pending a decision by the Court of Appeals for the Seventh Circuit in White v. Scibana, No. 04-2410. On October 25, 2004, petitioner moved to lift the stay and provided Bureau of Prisons documentation showing the current computation of his good conduct time and his projected release and pre-release dates. On July 20, 2004, I denied petitioner's motion to lift the stay, finding that petitioner would already be released to a halfway house by the time he would receive this court's order.

Presently before the court is petitioner's second motion to lift the stay. In this motion, petitioner points out that his release date is imminent. From the documentation petitioner submitted in support of his petition, it appears that petitioner was sentenced on

November 24, 1997 to a 121-month term of imprisonment. Under the Bureau of Prisons' current computation of petitioner's good time credits at 474 days, his projected release date is January 25, 2005. If petitioner's good conduct time were to be recalculated in accordance with White v. Scibana, 314 F. Supp.2d 834 (W.D. Wis. 2004), his release date would be shortened by approximately 70 days, making him immediately eligible for release. I conclude that petitioner will be irreparably harmed if he is forced to wait until the court of appeals decides White before he can obtain a ruling in his case.

Petitioner does not allege that he exhausted his administrative remedies. Nevertheless, 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) (court may waive exhaustion requirements for § 2241 to prevent prejudice caused by unreasonable delay or when agency has predetermined issue). 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). Therefore, it is proper to waive the exhaustion requirement because exhaustion would be futile. Accordingly, respondent will be directed to show cause

why this petition should not be granted.

Petitioner should note that because he is not proceeding in forma pauperis, it is his obligation to serve the petition on the respondent. 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.

Fed. R. Civ. P. 4(i) governs service of process in civil actions brought against a federal official in his official capacity. 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 extra copies of his petition, as well as copies of the Bureau of Prisons documentation that was attached to his July 8, 2004 submission, which I am considering as an addendum to the petition. Pursuant to Fed. R. Civ. P. 4(l), petitioner is to submit proof to the court that he served his petition and the addendum 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. No final order will be issued in this case until proof of service has been filed.

ORDER

IT IS ORDERED that the stay imposed in this case on July 1, 2004 is LIFTED.

Further, IT IS ORDERED that no later than December 2, 2004, petitioner is to submit proof of service of his petition upon the respondents.

Finally, IT IS ORDERED that respondent may have until December 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 24th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge