

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

KENNETH DEAN SMITH©,

Petitioner,

v.

JOSEPH SCIBANA, Warden,

Respondent.

ORDER

04-C-865-C

In White v. Scibana, 314 F. Supp. 2d 834 (W.D. Wis. 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). Respondent has appealed that decision and the Court of Appeals for the Seventh Circuit has granted respondent's motion for expedited treatment of the appeal. Oral argument was heard on September 9, 2004, and a decision may be forthcoming before the end of this year.

Petitioner Kenneth Dean Smith© is an inmate at the Federal Correctional Institution in Oxford, Wisconsin. His petition under § 2241 raises the same issue as that in White: he

alleges that the bureau is calculating his good conduct time on the basis of time served rather than the sentence imposed. In a letter accompanying the petition, petitioner states that his prison account balance amounts to \$1.00, so he had a friend send the court the \$5 filing fee. The fee has been paid.

In the time that has passed since the Yancey White's petition was granted, several other prisoners at the Oxford facility have filed habeas corpus petitions challenging the Bureau of Prisons' method of calculating their good time credits. I have stayed the proceedings in most of these actions pending a decision on the appeal filed in White's case. I have decided to issue orders to show cause 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.

In this case, it appears from the documentation petitioner submitted with his petition that he is serving a sentence of 43 months and is presently scheduled for release on May 1, 2005, assuming he earns all 168 days of good time that the Bureau of Prisons is projecting he will earn. If his good time is recalculated in accordance with White, he will be eligible for release approximately 40 days earlier and his currently projected pre-release date of January 8, 2005, may be adjusted similarly. I conclude that petitioner will be irreparably

harmful 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 completely exhausted his administrative remedies. However, I will waive this requirement because any delay in receiving relief will cause petitioner substantial prejudice and because the Bureau of Prisons 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). 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. 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 particular rule 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 the extra copies of his petition and this court's order. As noted above, petitioner will have to verify his petition before he serves it on the respondents. 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. Petitioner should note that if he does not have the means to pay the postage for certified mail from his prison account, he will have to return the copies of his petition to this court along with a motion for leave to proceed in forma pauperis that is accompanied by a copy of his trust fund account statement for the last six months.

ORDER

IT IS ORDERED that petitioner may have until November 26, 2004, in which to submit proof of service of his petition on the respondent, United States Attorney for the Western District of Wisconsin and Attorney General in Washington, D.C. If petitioner does not have the means to pay the costs of mailing his petition to the respondent, Attorney General and United States Attorney for the Western District of Wisconsin, he may have until November 26, 2004, in which to file a motion for leave to proceed in forma pauperis which is accompanied by a trust fund account statement for the last six months.

Further, IT IS ORDERED that respondent may have until December 1, 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 18th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge