

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 an order dated December 1, 2004, I granted petitioner Kenneth Dean Smith©'s petition for a writ of habeas corpus brought under 28 U.S.C. § 2241 and directed the Federal Bureau of Prisons to recalculate his good conduct time in accordance with White v. Scibana, 314 F. Supp. 2d 834 (W.D. Wis. 2004). Judgment was entered on December 3, 2004. Presently before the court is respondent's timely filed motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59.

Respondent's motion will be granted, because the legal decision I relied upon in ruling in petitioner's favor in this case has been reversed by the Court of Appeals for the Seventh Circuit. See White v. Scibana, 390 F.3d 997 (7th Cir. 2004) (Bureau of Prisons' interpretation of statutes governing calculation of good-time credit entitled to deference), reh'g en banc denied Feb. 9, 2005. The mandate is expected to issue within 7 calendar days

of the date petitioner's petition for rehearing was denied, although an order staying issuance of the mandate for 90 days may be granted if petitioner shows good cause for a stay pending a challenge to the decision of the court of appeals in the United States Supreme Court. Fed. R. App. P. 41(b) and (d)(2). However, even if the Supreme Court were to grant petitioner's petition for a writ of certiorari and take the issue under consideration, petitioner cannot benefit from the Court's favorable ruling on the merits of the case, if one were to be made, because the issue will be moot as to him on May 1, 2005. This is the date petitioner Smith© is projected for release under the Bureau's method for calculating his good time.

Because the court of appeals has overturned the White decision, and that decision presently governs the issue raised in petitioner Smith©'s case, I must vacate the judgment entered on December 3, 2004 and dismiss petitioner's petition for his failure to show that he is in custody in violation of the Constitution or laws of the United States.

ORDER

IT IS ORDERED that respondent's motion pursuant to Fed. R. Civ. P. 59 to alter or amend the judgment entered on December 3, 2004 is GRANTED. The judgment is VACATED and this petition for a writ of habeas corpus is DISMISSED for petitioner's

failure to show that he is in custody in violation of the Constitution or laws of the United States.

Entered this 14th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge