IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EDGAR AMIR GRACIANI,

OPINION and ORDER

Petitioner,

11-cv-296-bbc

v.

CAROL HOLINKA,[1]

Respondent.

- -

Pro se petitioner Edar Amir Graciani, a prisoner at the Federal Correctional Institution in Oxford, Wisconsin, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 and has paid the $5 filing fee. Although some of petitioner's allegations are difficult to follow, he seems to be asserting five claims:

> (1) respondent has concluded incorrectly that he is ineligible for a sentence reduction under 18 U.S.C. § 3621(e)(2)(B), which authorizes sentence

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[1] Petitioner's caption in his petition and supporting brief lists "U.S. Bureau of Prisons, et al" as the respondent. I am substituting Carol Holinka as the respondent because she is the warden of the Oxford prison and petitioner's custodian. al- Marri v. Rumsfeld, 360 F .3d 707, 712 (7th Cir.2004) (prisoner's custodian is only proper respondent in habeas petition). See also Eckstein v. Kingston, 460 F.3d 844 (7th Cir. 2006) (correcting caption in habeas case to name warden of prison where petitioner is incarcerated).

reductions of up to one year if a prisoner convicted of a nonviolent offense completes a residential drug abuse treatment program;

(2) respondent is refusing to release him to a halfway house, in retaliation for his complaints about sexual assault occurring at the prison and in violation of 18 U.S.C. § 3624(c);

(3) respondent has placed him in segregation in retaliation for the same complaint;

(4) respondent has "mislabel[ed]" and "slander[ed]" him;

(5) respondent is making threats against him in an attempt to stop him from seeking administrative remedies.

I will allow petitioner to proceed against respondent on his claim that he is entitled to be released to a halfway house, but his remaining claims must be dismissed because they cannot be brought in the context of a habeas petition.

OPINION

A. § 2241 vs. Civil Action

The first question is whether 28 U.S.C. § 2241 is the proper vehicle for petitioner to raise each of his claims. I conclude that the answer is "yes" as to petitioner's claim that he is entitled to be released to a halfway house under 18 U.S.C. § 3624, but "no" as to his remaining claims.

Claims under § 2241 are limited to challenges to a prisoner's "custody." Pischke v.

Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (habeas is proper vehicle for presenting claim "if but only if the prisoner is seeking to 'get out' of custody in a meaningful sense."). Whether petitioner is held in prison or a halfway house, he is likely still in "custody" for the purpose of § 2241. Wottlin v. Fleming, 136 F.3d 1032 (5th Cir. 1996) (halfway house resident was "in custody" of Bureau of Prisons for purpose of § 2241). After all, the Court of Appeals for the Seventh Circuit has held that "custody" under the habeas corpus statutes extends even to probation and parole. Williams v. Wisconsin, 336 F.3d 576 (7th Cir. 2003).

However, that does not end the matter. The court of appeals has held that habeas provides the proper route even in some cases in which a prisoner is not seeking complete freedom. The question is whether the prisoner is seeking "a quantum change in the level of custody." Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991); see also Glaus v. Anderson, 408 F.3d 382, 387-88 (7th Cir. 2005) ("Graham outlines a clear distinction: a petitioner requests either a "quantum change in the level of custody," which must be addressed by habeas corpus, or "a different program or location or environment," which raises a civil rights claim).

In Hendershot v. Scibana, 04-C-291-C, 2004 WL 1354371 (W.D. Wis. June 10, 2004), I concluded that the difference between a prison and a halfway house represents a "quantum change in the level of custody" under Graham because the two forms of custody are qualitatively different. See also Eaton v. United States, 178 F.3d 902, 903 (7th Cir.

1999) ("[A] claim to be entitled to release from a more to a less restrictive form of custody is within the scope of the habeas corpus statute."); Ramsey v. Brennan, 878 F.2d 995 (7th Cir. 1989) (halfway house is "a twilight zone between prison and freedom"). I am unaware of any authority that has undermined the holding in Hendershot. In Richmond v. Scibana, 387 F.3d 602, 605 (7th Cir. 2004), the court noted this question but decided it was unnecessary to resolve it.

However, Richmond is a potential jurisdictional obstacle for another reason: the court stated that "§ 2241 does not furnish the appropriate means to contest the Bureau's understanding of § 3624(c)." Id. at 606. That statement may not apply to this case because the issue in Richmond was different. The prisoner was challenging the bureau's interpretation of a previous version of § 3624(c) under which the bureau concluded that it did not have discretion to transfer prisoners to a halfway house before the last 10% of their sentence. The prisoner's position was that the bureau could *consider* him for transfer to a halfway house sooner. Because success in his case would not guarantee him a transfer, the court concluded that he was not challenging his "custody." Id. at 606. In this case, petitioner's claim is that he is entitled to transfer *now*, suggesting that the rationale of Richmond does not apply.

With respect to his claim regarding a sentence reduction, petitioner alleges that respondent has concluded incorrectly that he is not eligible for the reduction. (He does not

identify their reason in the body of his complaint, but he attaches a document in which an administrator explained that the program he completed did not qualify as a "residential drug abuse treatment program."). Even if I agreed with petitioner that he is *eligible* for the reduction, this would not mean that he is *entitled* to one. Under § 3621(e), a sentence "may be reduced" by the bureau if it determines that a prisoner meets the criteria, which means that it simply allows the bureau to exercise its discretion. The only restriction on the bureau's discretion in the statute is that the bureau may not reduce a sentence by more than 12 months. Id. Thus, if petitioner prevailed on his claim, I would direct the bureau to exercise its discretion in determining an appropriate sentence reduction for petitioner, but I could not order petitioner's release on a particular date. Bush v. Pitzer, 133 F.3d 455, 456 (7th Cir. 1997) ("Section 3621(e)(2)(B) permits but does not compel early release."). See also Bailey v. Holinka, No. 09-cv-360-bbc, 2009 WL 2030371, *2 (W.D. Wis. 2009) (concluding that prisoner could not use § 2241 to bring claim challenging bureau's determination that past crime made prisoner ineligible for sentence reduction under § 3621(e)).

With respect to petitioner's placement in segregation, traditionally, that type of claim is raised in a civil action rather than a petition for a writ of habeas corpus. E.g., Wilkinson v. Austin, 545 U.S. 209 (2005); Sandin v. Conner, 515 U.S. 472 (1995); Marion v. Columbia Correction Institution, 559 F.3d 693 (7th Cir. 2009); Lekas v. Briley, 405 F.3d 602 (7th Cir. 2005); Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997); Whitford v. Boglino,

63 F.3d 527 (7th Cir. 1995). The court of appeals has stated in dicta that "a quantum change in the level of custody" might be demonstrated by a prisoner seeking "the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation." Graham, 922 F.2d at 381. However, in later cases, the court has called that dicta into doubt. For example, in Glaus, 408 F.3d at 387, the court stated:

> [Graham] refers to the possibility of habeas corpus for a change from having the run of the prison to being restricted to solitary confinement. In recent years, however, the Supreme Court has indicated that prisoners do not have a liberty interest for purposes of civil rights actions in anything but the most dramatic differences in levels of confinement. See Sandin v. Conner, 515 U.S. 472 (1995); see also Wilkinson v. Austin, 543 U.S. 1032 (2004) (granting certiorari on the issue of what due process rights a prisoner has prior to placement in super-maximum security facility) (argued March 30, 2005). As we discuss below, although the Supreme Court has never expressly ruled out the use of habeas corpus to address that kind of change, it has never held that habeas corpus is an option for these claims either. In the absence of further guidance, we choose not to take that step here.

See also Bunn v. Conley, 309 F.3d 1002, 1008 (7th Cir. 2002) (in dicta, suggesting that"difference between living in the general population or in disciplinary segregation" not enough to qualify as quantum change in custody); Moran v. Sondalle, 218 F.3d 647, 650-651 (7th Cir. 2000) (habeas petition improper vehicle for challenging constitutionality of "transfer to a new prison, administrative segregation, exclusion from prison programs, or suspension of privileges"). Because the general practice is to raise challenges to placement in segregation in a civil action and neither the Supreme Court nor the court of appeals has

held that such a claim may be brought in a habeas action, I decline to allow petitioner to do so in this case.

Petitioner's remaining two claims are that prison officials are spreading lies about him and making threats against him. Because these claims have nothing to do with his level of custody, they cannot be raised in a petition brought under § 2241.

B. Merits

Under the Second Chance Act of 2007, 18 U.S.C. § 3624(c),

> The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.

The language of the statute makes it clear that prisoners are not guaranteed 12 months at a halfway house. Rather, the bureau is required, when "practicable," to allow a prisoner to spend "a portion" of the last months of his term under conditions that will prepare him for reentry. Sessel v. Outlaw, 2009 WL 1850331, *4 (E.D. Ark. 2009) ("These are matters left to the discretion of the BOP."); Daraio v. Lappin, 2009 WL 303995 (D. Conn. Feb. 9, 2009) (bureau "retains discretion under the Second Chance Act to decide whether and when an inmate should be placed at" halfway house). Neither the amount of time nor the place for

that preparation is spelled out by § 3624(c)(1).

This does not mean that the bureau has absolute authority to deny a prisoner transfer to a halfway house. Under § 3624(c)(6), the bureau must "ensure that placement in a community correctional facility . . . is . . . of sufficient duration to provide the greatest likelihood of successful reintegration into the community." In addition, decisions about placement in a halfway house must be made "on an individual basis" and take into account the factors listed in 18 U.S.C. § 3621(b). 18 U.S.C. § 3624(c)(6)(A)-(B). See also Sessel, 2009 WL 1850331, at *4; Daraio, 2009 WL 303995; 28 C.F.R. § 570.22 ("Inmates will be considered for pre-release community confinement in a manner consistent with 18 U.S.C. section 3621(b), determined on an individual basis, and of sufficient duration to provide the greatest likelihood of successful reintegration into the community, within the time-frames set forth in this part.").

In this case, petitioner alleges that respondent Holinka granted his request for a 12-month placement in a halfway house, but now officials are refusing to transfer him because of a grievance he filed about sexual assaults occurring at the prison. Although officials have told him that they cannot place him in a halfway house sooner because there is not enough bed space, he says this is a pretext because he has received information from others at the halfway house that bed space is available.

These allegations are sufficient to state a claim under two legal theories: (1) the refusal

to transfer petitioner is retaliation for the exercise of his right to complain about prison conditions; and (2) the decision to deny his transfer violates § 3624 because it is not based on the appropriate factors. Accordingly, I will allow petitioner to proceed against respondent Holinka on this claim.

ORDER

IT IS ORDERED that

1. Edgar Amir Graciani's petition for a writ of habeas corpus under 28 U.S.C. § 2241 is DISMISSED WITHOUT PREJUDICE as to the following claims:

(a) respondent has concluded incorrectly that petitioner is ineligible for a sentence reduction under 18 U.S.C. § 3621(e)(2)(B);

(b) respondent has placed him in segregation in retaliation for the same complaint;

(c) respondent has "mislabel[ed]" and "slander[ed]" him;

(d) respondent is making threats against him in an attempt to stop him from seeking administrative remedies.

These claims may not be brought in a petition for a writ of habeas corpus because they are not challenges to petitioner's custody.

2. No later than 20 days from the date of service of the petition, respondent Holinka

is to file a response showing cause, if any, why this writ should not issue with respect to petitioner claim that the bureau is violating his federal rights by refusing to transfer him to a halfway house.

3. Petitioner may have 20 days from the service of the response in which to file a traverse to the allegations of the response submitted by respondent.

4. For the sake of expediency, I will send the petition to the bureau, the local United States attorney and the United States Attorney General via certified mail in accordance with Fed. R. Civ. P. 4(i), along with a copy of this order.

5. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

6. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed

copies of his documents.

Entered this 9th day of May, 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge