IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD HENDERSHOT,
JOSEPH JACKSON and
ERIBERTO GALINDO,

ORDER

Petitioners,

04-C-291-C

v.

JOSEPH SCIBANA,
Warden of Oxford Prison Camp,

Respondent.

- -

This petition for a writ of habeas corpus brought under 28 U.S.C. § 2241 arises out of a change in the policy of the Federal Bureau of Prisons regarding the placement of inmates in "community corrections centers," or halfway houses. Before December 2002, the bureau's opinion was that it had discretion to place federal prisoners in halfway houses at any point in their sentence. See Bureau of Prisons Program Statement No. 7310.04, at 4 (Dec. 16, 1998). Petitioners allege that, in practice, the bureau exercised this discretion by transferring federal inmates to halfway houses for the last six months of their sentence, regardless of the length of the inmate's sentence. See also Monahan v. Winn, 276 F. Supp.

2d 196, 199 (D. Mass. 2003) (noting this practice). For authority, the bureau relied on 18 U.S.C. § 3621(b), which states that the bureau may designate a prisoner's "place of imprisonment" as "any available penal or correctional facility." Although the statute does not define the terms "place of imprisonment" or "penal or correctional facility," the bureau interpreted them to encompass halfway houses.

The bureau changed this policy after the Department of Justice issued an opinion in which it concluded that § 3621(b) could not be construed as including halfway houses. The department took the position that placement in halfway houses was controlled by 18 U.S.C. § 3624(c), which states that, before a prisoner is released, the bureau shall place the prisoner under conditions that give him "a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community." Under § 3624(c), the time spent under these conditions is limited to "a reasonable part" of the sentence, "not to exceed six months, of the last 10 per centum of the term." Under the department's opinion, which the bureau now follows, inmates serving sentences of less than five years will have less than six months of their term left to serve at the time they are transferred to a halfway house.

Each of the petitioners in this case is an inmate at the Federal Correctional Institution in Oxford, Wisconsin. Each is serving a sentence of less than 5 years and is scheduled to serve 10% of his sentence at a halfway house. This works out to approximately three months for petitioner Richard Hendershot, two and a half months for petitioner Joseph Jackson and

four months for petitioner Eriberto Galindo.

Petitioners contend that the bureau violated federal law when it concluded that they are not eligible for placement in a halfway house until they reach the last 10% of their term of imprisonment. In support, they advance the following arguments: (1) the bureau has acted contrary to 18 U.S.C. §§ 3621(b) and 3624(c); (2) the bureau did not comply with the requirements of the Administrative Procedure Act before it changed its interpretation of §§ 3621 and 3624; (3) courts that sentenced petitioners may have based their sentences on a belief that petitioners would receive at least six months in community confinement, making the bureau's new interpretation of the statutes a violation of their due process right to be sentenced on the basis of accurate information; (4) the bureau's application of its new interpretation to petitioners violates the ex post facto clause. Petitioners have paid the $5 filing fee.

Jurisdiction to Hear the Case

There are several preliminary issues that I must address before considering the merits of the petition. The first question is whether petitioners' claims may be brought appropriately as a petition for a writ of habeas corpus under § 2241, which permits district courts to grant relief to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." It is clear that petitioners' third argument may be heard only

under 28 U.S.C. § 2255 and only in the courts that sentenced them, because it raises a challenge to their sentences rather than the execution of their sentences. Kramer v. Olson, 347 F.3d 214, 217 (7th Cir. 2003) (§ 2241 is "usually reserved for attacking the execution, not [the] imposition, of a sentence"); Waletzki v. Keohane, 13 F.3d 1079, 1080 (7th Cir. 1994) ("prisoner who challenges his federal conviction or sentence cannot use [§ 2241] at all but instead must proceed under 28 U.S.C. § 2255"). Accordingly, I will dismiss for lack of jurisdiction petitioners' claim that their sentences are invalid because they are based on inaccurate information.

With respect to petitioners' remaining claims, they do not, and could not, argue that they would no longer be "in custody" if they were transferred to a halfway house. It is true that courts have reached different conclusions about the custodial nature of placement in a halfway house, depending on the context. Compare United States v. Corcoran, 876 F.2d 106 (7th Cir. 1989) (unauthorized departure from halfway house is "escape from custody" under 18 U.S.C. § 751(a)), with Ramsey v. Brennan, 878 F.2d 995 (7th Cir. 1989) (inmate not entitled to sentence credit for time spent in halfway house before trial because he was not in "custody" under 18 U.S.C. § 3568). However, "custody" under the habeas corpus statutes extends even to probation and parole. Williams v. Wisconsin, 336 F.3d 576 (7th Cir. 2003). Thus, it is not difficult to conclude that federal prisoners released to a halfway house are still in the custody of the United States. Wottlin v. Fleming, 136 F.3d 1032 (5th

Cir. 1996) (halfway house resident was "in custody" of Bureau of Prisons for purpose of § 2241).

Nevertheless, neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has held that habeas corpus is an improper remedy for one who does not seek complete release from confinement. Rather, in Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991), the court set forth the following standard to determine whether an inmate is challenging his "custody":

> If the prisoner is seeking what can fairly be described as a quantum change in the level of custody—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation—then habeas corpus is his remedy. But if he is seeking a different program or location or environment, then he is challenging the conditions rather than the fact of his confinement and his remedy is under civil rights law, even if, as will usually be the case, the program or location or environment that he is challenging is more restrictive than the alternative that he seeks.

The court has reaffirmed this standard in later cases. E.g., Bunn v. Conley, 309 F.3d 1002, 1007 (7th Cir. 2002); Johnson v. Litscher, 260 F.3d 826, 831 (7th Cir. 2001); Pischke v. Litscher, 178 F.3d 497, 499 (7th Cir. 1999); Falcon v. United States Bureau of Prisons, 52 F.2d 137, 138 (7th Cir. 1995). (In one case, the court suggested that the question whether a prisoner is challenging his "custody" is governed by the same standard as the question whether the inmate has been deprived of his liberty within the meaning of the due process clause. Sylvester v. Hanks, 140 F.3d 713, 714 (7th Cir. 1998). However, in Pischke, 178

F.3d at 499, the court made it clear that these are separate questions.)

The court has not clearly defined what constitutes "a quantum change in the level of custody" and what does not. In Graham, 922 F.2d at 381, the court admitted that the line between a challenge to custody and a challenge to the conditions of confinement "is not a sharp one." The truth of this statement becomes apparent when one examines the cases decided since Graham. One could argue that the cases in which the court has found habeas corpus to be the proper avenue for relief are not readily distinguishable from those cases in which the court has held the opposite. For example, although the court has held that a prison transfer is not a change in custody even when one prison imposed 23-hour-a-day cell confinement and the other one did not, Falcon, 52 F.3d at 139, the court has stated also that "being locked in one's cell 23 hours of the day is qualitatively different from having, as it were, the run of the prison," United States v. Harris, 12 F.3d 735, 736 (7th Cir. 1994).

In Eaton v. United States, 178 F.3d 902, 903 (7th Cir. 1999), the court of appeals hinted at its view of the question in this case when it stated: "Habeas corpus could get him nowhere; while 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, Eaton was transferred to the halfway way house before he filed his motion, which mooted his claim." Thus, Eaton suggests that a non-moot challenge to a decision denying a transfer to a halfway house from a prison would be cognizable under the habeas corpus statutes. Although the suggestion in

Eaton is not binding, I agree that § 2241 would be an appropriate vehicle in such a case.

As suggested by its name, a halfway house is usually intended as a transitional facility for inmates, to ease their way back into the community. United States v. Mallon, 345 F.3d 943, 949 (7th Cir. 2003) ("Halfway houses are, as the name suggests, facilities that hold their charges in custody part of the time (usually nights and weekends) while releasing them during working hours, so they can begin employment and start the transition to a life of freedom.") The court of appeals has described a halfway house as "a twilight zone between prison and freedom," Ramsey, 878 F.2d at 996, strongly suggesting a view that halfway houses and prisons are qualitatively different. Although petitioners are being held in a prison *camp*, in other contexts, the court of appeals has recognized the dissimilarities between even prison camps and halfway houses. United States v. Stalbaum, 63 F.3d 537 (7th Cir. 1995) (prison camp is not "similar facility" to halfway house for purpose of receiving sentence reduction in escape from custody case).

Petitioners face a second hurdle, however. Even if they are correct that the bureau violated federal law when it changed its policy, success on this point would not necessarily guarantee that they would be transferred to a halfway house at any particular time. Under any interpretation, the statute relied on previously by the bureau to place inmates in halfway houses before the last 10% of their sentences would not *require* the bureau to place an inmate in a halfway house at any particular time; at most, it *permits* the bureau to do so, in the

exercise of its discretion. Thus, the question is whether habeas corpus is an appropriate mechanism to seek relief when the relief that petitioners could obtain would not be an order to be transferred to a halfway house but an order directing the bureau to exercise its discretion. In other words, is the *possibility* of release sufficient to proceed under habeas corpus?

In a number of cases, the Supreme Court has answered a related question, that is, whether a prisoner may bring an action under 42 U.S.C. § 1983 when a judgment in his favor would "necessarily" call into question the validity of his confinement. Nelson v. Campbell, No. 03-6821, __ U.S.__, 2004 WL 1144374, *7 (May 24, 2004); Muhammad v. Close, 124 S. Ct. 1303, 1304 (2004); Edwards v. Balisok, 520 U.S. 640, 641, 648 (1997) Heck v. Humphrey, 512 U.S. 477, 487 (1994). In these cases, the Court has stated that an inmate *must* proceed under the habeas corpus statutes. However, the Court has never held that *only* those claims that would necessarily imply the invalidity of a conviction or confinement are cognizable in habeas corpus. Although there appears to be little case law on the issue, on multiple occasions the Supreme Court has considered petitions for writs of habeas corpus even when it was far from certain that success on the merits would entitle the petitioner to immediate release or a shorter term of confinement. E.g., Lopez v. Davis, 531 U.S. 230 (2001) (considering on merits claim brought under § 2241 that federal statutes require bureau to *consider* certain prisoners for early release); California Dept. of Corrections

v. Morales, 514 U.S. 499 (1995) (considering merits of habeas claim that respondents violated ex post facto clause when they relied on new statute to lengthen time between hearings for parole suitability); see also Powell v. Ray, 301 F.3d 1200 (10th Cir. 2002) (considering merits of habeas claim that respondent violated ex post facto clause by retroactively changing eligibility for pre-parole supervised release); Grove v. Federal Bureau of Prisons, 245 F.3d 743 (8th Cir. 2001) (considering merits of habeas claim that bureau acted beyond its authority in refusing to consider petitioner for early release). Thus, so long as the petitioner is attempting to remove a *barrier* to immediate or speedier release, the habeas corpus statutes may be employed.

In this case, petitioners are seeking to restore the bureau's previous policy, which would have made them eligible for release to a halfway house *before* they reached the last 10% of their sentences. This is sufficient to consider petitioners' claim as one seeking speedier release, a conclusion that is consistent with numerous cases in which courts have held that § 2241 is an appropriate vehicle to challenge the bureau's new policy. Grimaldi v. Menifee, No. 04-CIV01340-DABGWG, 2004 WL 912099 (S.D.N.Y. April 29, 2004); Cohn v. Federal Bureau of Prisons, 302 F. Supp. 2d 267, 270 (S.D.N.Y. 2004); Colton v. Ashcroft, 299 F. Supp. 2d 681, 687 (E.D. Ky. 2004); Benton v. Ashcroft, 273 F. Supp. 2d 1139, 1143 (S.D. Cal. 2003); Iacaboni v. United States, 251 F. Supp. 2d 1015, 1017 n.1 (D. Mass. 2003); Ferguson v. Ashcroft,, 248 F. Supp. 2d 547, 557-61 (M.D. La. 2003).

Exhaustion of Administratives Remedies

Generally, a petitioner must exhaust his administrative remedies before a district court may consider a habeas corpus petition, which petitioners concede they have not done. Clemente v. Allen, 120 F.3d 703, 705 (7th Cir. 1997). However, petitioners point out correctly that district courts have discretion to excuse petitioners from using the administrative complaint process in limited circumstances. Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004). For example, exhaustion is not required if it would be futile because the agency has predetermined the issue. Id. (quoting Iddir v. INS, 301 F.3d 492, 498 (7th Cir. 2002).)

I agree with the numerous other district courts that have concluded that there is no point in requiring petitioners to exhaust when the bureau has enacted a new policy in direct response to an opinion issued by the Department of Justice. E.g., Colton, 299 F. Supp. 2d at 690; Iacaboni, 251 F. Supp. 2d at 1017 n.1; Ferguson, 248 F. Supp. 2d at 563; United States v. West, No. Civ. 03-CV-70239-DT, 2003 WL 111990 (E.D. Mich. Feb. 20, 2003). In such a case, there is "no reasonable prospect" that petitioners will obtain relief through the administrative remedy process. Gonzalez, 355 F.3d at 1017. This conclusion is bolstered by the bureau's adherence to its new policy despite the rulings of various district courts invalidating it.

Appointment of Counsel

There is a one final procedural barrier to considering the merits of petitioners' claims. In Lindell v. Litscher, 212 F. Supp. 2d 936 (W.D. Wis. 2002), a civil rights action, I ruled that I would not allow prisoners proceeding pro se to prosecute a group complaint because of the many problems inherent in administering such cases. For example, there is no guarantee that prisoners who bring joint lawsuits will remain in contact with each other for the length of time it takes a lawsuit to reach resolution. Prisoners are subject to administrative and disciplinary transfers from one institution to another and may be moved regularly within an institution from one cell block to another and to administrative and punitive segregation status. They have limited freedom, if any, to meet with co-petitioners to discuss strategy for a combined lawsuit or to draft documents jointly for filing in a case. Also, too often one inmate takes charge of the multi-prisoner lawsuit and obtains the agreement of other inmates to act on their behalf in prosecuting the joint lawsuit although he lacks the legal authority to do so. Thus, there is no way for the court to insure that each co-petitioner would receive the information he would need before agreeing to the strategic decisions being made in the case. Finally, for the pro se litigant who lets another inmate prosecute a joint action on his behalf, there is significant potential for adverse consequences. This is particularly true in petitions for writs of habeas corpus, where a mistake in the prosecution could cost the petitioner an opportunity for release.

Nevertheless, I will make an exception to the policy stated in the Lindell case in this instance, because I have decided to appoint counsel for petitioners. The legal issues raised by petitioners are substantial and meritorious, as demonstrated by the growing number of district court decisions that have invalidated the bureau's new policy on some or all of the grounds asserted by petitioners. Grimaldi, 2004 WL 912099 (new policy violates § 3621(b)); Panchernikov v. Federal Bureau of Prisons, No. 04 Civ. 2531(RMB), 2004 WL 875633 (S.D.N.Y. Apr. 23, 2004) (policy violates ex post facto clause); Crowley v. Federal Bureau of Prisons, __ F. Supp. 2d __, No. 04 Civ.363(AKH), 2004 WL 516210 (S.D.N.Y. March 17, 2004) (policy violates § 3621(b) and ex post facto clause); Colton, 299 F. Supp. 2d 681 (granting preliminary injunction and concluding that petitioner had strong likelihood of success on claim that policy violates Administrative Procedure Act); Monahan, 276 F. Supp. 2d 196 (new policy is contrary to plain language of § 3621(b), was adopted without notice and comment in violation of Administrative Procedure Act and violates ex post fact and due process clauses); Estes v. Federal Bureau of Prisons, 273 F. Supp. 2d 1301 (S.D. Ala. 2003) (policy violates § 3621(b)); Pearson v. United States, 265 F. Supp. 2d 973 (E.D. Wis. 2003) (policy violates due process clause); Tipton v. Federal Bureau of Prisons, 262 F. Supp. 2d 633 (D. Md. 2003) (granting preliminary injunction and concluding that petitioners were likely to succeed on claims that policy violates § 3621(b), ex post facto and due process clauses and fails to follow requirements of APA); Byrd v. Moore, 252 F. Supp. 2d 293

(W.D.N.C. 2003) (granting preliminary injunction against enforcing new policy on petitioners' claims that it violates § 3621(b), is invalid under APA and violates due process and ex post facto clauses); Iacaboni, 251 F. Supp. 2d 1015 (policy contrary to § 3621(b), did not comply with APA and violates ex post facto clause); Ferguson, 248 F. Supp. 2d 547 (granting preliminary injunction and concluding that petitioner had shown likelihood of success on claim that policy violates § 3621(b) and APA).

However, the outcome of this case is not a forgone conclusion. A number of courts have concluded that the bureau's new policy is not contrary to federal law. Cohn, 302 F. Supp. 2d 267 (policy not contrary to § 3621(b), APA or ex post facto clause); Adler v. Menifee, 293 F. Supp. 2d 363 (S.D.N.Y. 2003) (bureau not barred from enforcing policy by estoppel or ex post facto clause; APA did not apply to policy); Benton v. Ashcroft, 273 F. Supp. 2d 1139 (S.D. Cal. 2003) (policy is reasonable interpretation of §§ 3621(b) and 3624(c), is exempt from APA and does not violate ex post facto clause); United States v. Kramer, No. 02 CR 47, 2003 WL 1964489 (N.D. Ill. Apr. 28, 2003) (as applied to petitioner, policy does not violate ex post facto clause). Accordingly, I conclude that appointing counsel will help insure that the issues raised by petitioners are fully and fairly presented to the court. I will stay a decision on the merits of the petition until it has been

fully briefed.

ORDER

IT IS ORDERED that

1. The petition for a writ of habeas corpus under 28 U.S.C. § 2241 filed by petitioners Richard Hendershot, Joseph Jackson and Eriberto Galindo is DISMISSED for lack of jurisdiction with respect to their claim that they were denied their right to be sentenced on the basis of accurate information.

2. A decision whether to issue an order to show cause with respect to petitioners' remaining claims is STAYED pending the appointment of counsel. If I am able to locate counsel willing to represent petitioners, I will set an expedited schedule for petitioners to file an amended petition, for respondent to file a response and for petitioners to file a traverse.

Entered this 10th day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge