

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

ROBERTO S. ZAPATA,

Petitioner,

v.

JOSEPH SCIBANA, Warden,
Federal Correctional Institution, Oxford, WI,

Respondent.

ORDER

04-C-306-C

Petitioner, a prisoner at the Federal Correctional Institution in Oxford, Wisconsin, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He requests leave to proceed in forma pauperis. Although petitioner has supported his request with an affidavit of indigency, I cannot determine whether petitioner is indigent for the purpose of filing a § 2241 petition until he submits a trust fund account statement for the six-month period immediately preceding the filing of his habeas corpus petition. See Longbehn v. U.S., 169 F.3d 1082 (7th Cir. 1999).

Once petitioner submits his trust fund account statement, this court will calculate petitioner's average monthly deposits and his average monthly balances for the six-month

period mentioned above. If 20% of the greater of these two figures is \$5 or more, he will not be eligible for indigent status and will have to prepay all of the \$5 filing fee. If 20% of the greater of these two figures is less than \$5, he will be required to prepay whatever portion less than \$5 has been calculated.

Now that petitioner is aware of the formula this court uses in determining whether a prisoner is indigent for the purpose of paying a \$5 filing fee, he may be able to figure easily whether he qualifies. If he knows that he will not qualify for indigent status, he may elect to submit a check or money order made payable to the clerk of court in the amount of \$5 in lieu of the six-month statement requested above. In any event, petitioner should act quickly. If, by June 10, 2004, petitioner does not submit either the \$5 payment or a trust fund account statement for the period beginning approximately January 10, 2004 and ending approximately June 10, 2004, his request for leave to proceed in forma pauperis will be denied and this action will be closed.

Also, petitioner should be aware that although exhaustion of administrative remedies is not a jurisdictional prerequisite in § 2241 habeas corpus proceedings, federal prisoners are ordinarily required to exhaust administrative remedies before petitioning for a writ of habeas corpus. Sanchez v. Miller, 792 F.2d 694, 697 (7th Cir. 1986). In Sanchez, the court of appeals held that

The exhaustion rule . . . is based on the need to allow agencies to develop the

facts, to apply the law in which they are peculiarly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions. It also avoids duplicative proceedings, and often the agency's ultimate decisions will obviate the need for judicial intervention. We also observe that circumvention of the administrative process diminishes the effectiveness of the agency by encouraging prisoners to ignore its procedures. (Citations omitted.)

Id. at 698-699. If the prisoner fails to exhaust and the administrative process becomes unavailable, his habeas claim is barred unless he can demonstrate cause and prejudice. Id.

It appears from petitioner's allegations that he has not exhausted his administrative remedies. Indeed, he contends that exhaustion will be futile, but he does not explain why he believes that is so. His underlying claim appears to be similar to the claim raised in White v. Scibana, 03-C-581-C, slip op. Apr. 23, 2004 (W.D. Wis.), in which this court held that the Bureau of Prisons was calculating good time credits contrary to 18 U.S.C. § 3624. Perhaps petitioner believes that he should be excused from exhausting his administrative remedies because the Bureau of Prisons has predetermined the issue. However, in light of this court's decision in White, it is entirely possible that on administrative review the Bureau of Prisons would recalculate petitioner's good time credits and obviate the need for federal court intervention.

Because exhaustion of administrative remedies in § 2241 cases may be waived, I will not dismiss this action at the outset for petitioner's failure to exhaust. However, if petitioner proceeds with this action by paying the \$5 filing fee or submitting a trust fund account

statement that shows he qualifies for indigent status, he should proceed in the knowledge that this action may be subject to prompt dismissal for his failure to exhaust his administrative remedies.

ORDER

IT IS ORDERED that petitioner may have until June 10, 2004, in which to submit either the \$5 payment or a trust fund account statement for the period beginning approximately January 10, 2004 and ending approximately June 10, 2004. If, by June 10, 2004, petitioner fails to respond to this order, his request for leave to proceed in forma pauperis will be denied without prejudice and this action will be closed.

Entered this 20th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge