

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

ROBERTO S. ZAPATA, #07788-073,

Petitioner,

v.

JOSEPH SCIBANA, Warden, F.C.I. Oxford,

Respondent.

ORDER

04-C-306-C

In White v. Scibana, ___ F. Supp. 2d ___, No. 03-C-581-C, 2004 WL 877606 (W.D. Wis. Apr. 23, 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).

Like White, petitioner Roberto S. Zapata 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. Petitioner has paid the \$5 filing fee.

Generally, a petitioner must allege that he exhausted his administrative remedies

before a district court may consider a habeas corpus petition. Clemente v. Allen, 120 F.3d 703, 705 (7th Cir. 1997). In this case, petitioner alleges that he was sentenced in December 1996 to 120 months in prison. He states that on May 5, 2004, he filed a request for an administrative remedy (BP-8), arguing that he should receive 54 days of good conduct time for every year of his ten-year sentence. On May 10, 2004, he received a response advising him that the Bureau of Prisons was considering whether to file an appeal in the White v. Scibana case and that petitioner's sentence would not be recomputed at the present time. On May 21, 2004, petitioner received a response to his request from respondent Scibana, advising petitioner:

* * *

Recently the Bureau was ordered by the United States District Court, Western District of Wisconsin, to recalculate the GCT for a particular inmate; however, the court did not invalidate Bureau policy, and the policy remains in effect. Your sentence will not be recomputed at this time. Your request for administrative relief is denied.

In the event you are not satisfied with this response and wish to appeal, you may do so within 20 calendar days of this response by submitting a BP-230(13) to the Regional Director, Federal Bureau of Prisons, North Central Regional Office, Gateway Complex, Tower II, 8th Floor, 400 State Avenue, Kansas City, Kansas 66201-2492.

Assuming petitioner were to appeal respondent's response, the Regional Office has 30 days to respond to his BP-230(13) and the Central Office has another 40 days to respond to petitioner's BP-11. Moreover, at each stage of the appeal process, the Bureau of Prisons may obtain extensions of up to 30 additional calendar days to respond. In other words, it is

certain that by the time petitioner exhausts his administrative remedies, it will be the eve of the date he is to be released to a half-way house if his good time credits are computed in the manner ordered in White.

As the Court of Appeals for the Seventh Circuit has reaffirmed recently, exhaustion of administrative remedies is not a prerequisite to every case brought under § 2241. Because exhaustion in a § 2241 case is not required by statute, 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 cause the petitioner “prejudice . . . due to an unreasonable delay or an indefinite time frame for administrative action.” Id. (quoting Iddir v. INS, 301 F.3d 492, 498 (7th Cir. 2002).)

In this case, petitioner alleges that his correct release date would be September 1, 2004, if the bureau had calculated his good conduct time in accordance with White. Further, I take judicial notice that the government has appealed this court’s decision in White. Therefore, petitioner will be prejudiced by having to delay filing his petition in this court until he has hurdled the remaining administrative procedural obstacles in his path. Under these circumstances, I conclude that petitioner’s interest in seeking immediate relief in federal court outweighs any institutional interest in requiring complete exhaustion, particularly when petitioner has already been denied relief. Accordingly, respondent will be directed to show cause why this petition should not be granted.

Petitioner has filed a motion for appointment of counsel with his petition, stating that he is untrained in the law and cannot afford to hire a lawyer. However, lack of legal training will not prejudice petitioner in this case because the legal issue was decided by this court in White. Accordingly, petitioner's motion for appointment of counsel will be denied.

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 rule governing service of process in civil actions brought against a federal official in his official capacity is Fed. R. Civ. P. 4(i). According to the 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, the brief he filed with the court, and copies of his declaration in support of the petition and supplemental filing dated May 24, 2004, setting out his recent attempt at exhausting his administrative remedies. I have

construed all of these documents together as petitioner's petition for a writ of habeas corpus.

ORDER

IT IS ORDERED that respondent may have 20 days from the date of service of petitioner's petition upon him 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). Petitioner may have 20 days from the date of service of the response in which to serve and file a traverse. Service of the traverse is to be made by mailing a copy to counsel for the respondent, whose name will be known to petitioner at the time respondent files a response.

Entered this 1st day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge