

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

Petitioner Robert Zapata is a prisoner at the Federal Correctional Institution in Oxford Wisconsin. In this petition for a writ of habeas corpus brought under 28 U.S.C. § 2241, petitioner contends that the Federal Bureau of Prisons is calculating his good conduct time erroneously. He relies on White v. Scibana, 314 F. Supp. 2d 834 (W.D. Wis. 2004), in which I concluded that 18 U.S.C. § 3624(b) required the bureau to calculate good conduct time on the basis of the inmate's imposed sentence rather than the actual time he had served.

In an order dated June 1, 2004, I waived the requirement for exhausting administrative remedies. Waiving this requirement in a case brought under § 2241 is appropriate when the agency has predetermined the issue. Gonzalez v. O'Connell, 355 F.3d

1010, 1016 (7th Cir. 2004). I directed respondent Joseph Scibana to show cause why the petition should not be granted.

In his response, respondent concedes that the legal issue in this case is controlled by White. Accordingly, I will grant the petition and order respondent to recalculate petitioner's good conduct time on the basis of his sentence. However, I pause briefly to comment on two issues.

First, in his response, respondent cites 42 U.S.C. § 1997e(a) after noting that petitioner "has failed to exhaust his administrative remedies." To the extent that respondent means to argue that § 1997e(a) applies in this case, I disagree. Section 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." A court may not waive the exhaustion requirement for § 1997e(a). Massey v. Wheeler, 221 F.3d 1030 (7th Cir. 2000). There is no futility exception. Perez v. Wisconsin Department of Corrections, 182 F.3d 532 (7th Cir. 1999).

However, neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has held that § 1997e(a) applies to petitions brought under § 2241. Rather, § 1997e(a) applies to actions challenging "prison conditions." Porter v. Nussle, 534 U.S. 516 (2002). Courts are uniform in holding that a habeas corpus action is not an action

challenging prison conditions. Skinner v. Wiley, 355 F.3d 1293 (11th Cir. 2004); Carmona v. United States Bureau of Prisons, 243 F.3d 629 (2d Cir. 2001); McIntosh v. United States Parole Commission, 115 F.3d 809 (10th Cir. 1997); see Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000) (holding that requirements of Prisoner Litigation Reform Act do not apply to habeas corpus petitions). In Gonzales, 355 F.3d at 1016, the court held expressly that exhaustion of administrative remedies in a § 2241 case is not statutorily required.

Second, respondent requests that the court stay this case pending a decision by the Court of Appeals for the Seventh Circuit in White because petitioner's release date is not imminent even under the method for calculating good conduct time employed in White. Rather, only petitioner's eligibility for transfer to a halfway house would be near after a recalculation. In Caldwell v. Scibana, 04-C-342 (W.D. Wis.), I have set a briefing schedule on the issue whether stays are appropriate in cases in which inmates face a potential delay in being transferred to a halfway house. I need not decide that general question in this case, however, because respondent has already expended resources in filing a response. Thus, I do not see sufficient reason in imposing a stay at this point. However, I emphasize that this order is limited to directing respondent to recalculate petitioner's good conduct time in accordance with White. I express no opinion on when, if ever, the Bureau of Prisons should

transfer petitioner to a halfway house after that recalculation has been completed.

ORDER

IT IS ORDERED that petitioner Roberto Zapata's petition for a writ of habeas corpus is GRANTED. Respondent Joseph Scibana is directed to recalculate petitioner's good conduct time on the basis of each year of his *sentence* rather than on time actually served. .

Entered this 9th day of July, 2004.

BY THE COURT:
BARBARA B. CRABB
District Judge