

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

JEROME CAMPBELL,

Petitioner,

v.

WARDEN SCIBANA, F.C.I. Oxford,

Respondent.

ORDER

04-C-311-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 Jerome Campbell 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 filed an informal “emergency” administrative remedy with his corrections counselor, who wrote:

The government is currently in the process of reviewing the order issued by Judge Crabb to make a determination concerning appeal. Pursuant to the Federal Rules of Appellate Procedure, the government has 60 days from the date of the order to file a Notice of Appeal. Therefore, your requests for recalculation of your sentence will be given further consideration once a final decision concerning appeal is made.

Petitioner appealed to respondent Scibana, but filed this action when he did not receive a response within 5 days. On May 24, 2004, petitioner filed a motion in this court to supplement the record with respondent’s decision on petitioner’s appeal. Although petitioner did not attach the decision to his motion, he writes that it would provide “further evidence of the futility” of administrative exhaustion. At this stage of the proceedings, I will assume that respondent’s decision was the same as the correction counselor’s, that no action would be taken on petitioner’s complaint until a decision was made regarding the appeal of White.

Petitioner concedes that he has not exhausted all of his administrative remedies; he could still appeal to the regional director and general counsel. See 28 C.F.R. § 542.15. However, 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 timeframe 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 have been April 22, 2004, if the bureau had calculated his good conduct time in accordance with White. Thus, *any* delay will prejudice petitioner because every day that passes is an additional day that he may be being incarcerated illegally. 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 at two levels. Accordingly, respondent will be directed to show cause why this petition should not be granted. Because of the extremely time sensitive nature of the petition, I will require respondent to file his response no later than June 3, 2004.

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.

ORDER

IT IS ORDERED that respondent may have until June 3, 2004, in which to show

cause why this petition should not be granted on petitioner Jerome Campbell's claim that the Bureau of Prisons is calculating his good time credits in violation of 18 U.S.C. § 3624(b)(1). FURTHER, IT IS ORDERED that petitioner's motion for appointment of counsel is DENIED.

Entered this 26th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge