

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

ANTHONY PERRY,
Petitioner,

ORDER
04-C-332-C

v.

JOSEPH SCIBANA, Warden of the
Oxford Prison Camp,

Respondent.

Petitioner Anthony Perry 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. He alleges that, under White, he is entitled to additional days of good conduct time.

I have lifted a stay I imposed earlier because petitioner may be eligible for immediate transfer to a halfway house if his good conduct time is recalculated in accordance with

White. In an order dated July 28, 2004, I directed respondent Joseph Scibana to show cause why the petition should not be granted.

Although petitioner has not exhausted his administrative remedies, the Court of Appeals for the Seventh Circuit has held that district courts may waive the exhaustion requirement in cases brought under § 2241 in limited circumstances. For example, waiver is appropriate when the agency has predetermined the issue. Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004). In this case, respondent and the bureau have made it clear that they believe that an inmate's good conduct time should be calculated on the basis of the time he has served. Further, respondent has appealed the decision in White and it is his position that White does not have to be applied to inmates not a party to that case. Zapata v. Scibana, No. 04-C-306-C (W.D. Wis. June 1, 2004). Accordingly, I conclude that it is unnecessary for petitioner to exhaust his administrative remedies because doing so would be futile.

In his response, respondent concedes that the legal issue in this case is controlled by White. Petitioner's current projected release date is May 2005. Respondent admits that, under White, petitioner would be entitled to an additional 63 days of good conduct time. However, respondent notes that petitioner is already being considered for transfer to a halfway house. Aff. of Quinn Banyai, ¶¶3-4. Although the need for immediate relief may have passed, because respondent has already spent resources in responding to the petition,

I do not see sufficient reason in reimposing a stay. Accordingly, I will grant the petition and order respondent to recalculate petitioner's good conduct time on the basis of his sentence.

ORDER

IT IS ORDERED that petitioner Anthony Perry'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 5th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge