

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

KEITH CADE

Petitioner,

ORDER

v.

04-C-360-C

JOSEPH SCIBANA,

Respondent.

Petitioner submitted a pleading in this case that was designated as a proposed civil action for monetary and injunctive relief, brought pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Under the 1996 Prison Litigation Reform Act, the court assessed petitioner Cade an initial partial payment of the \$150 filing fee in the amount of \$14.58, which petitioner paid on June 21, 2004. Subsequently, the court screened petitioner's "complaint." At that time, the court discovered that petitioner was raising a claim that could be considered only in a habeas corpus action: that the Bureau of Prisons was miscalculating his good conduct time, an issue that this court recently decided in White v. Scibana, 314 F. Supp. 2d 834 (W.D. Wis. 2004).

In an order dated July 9, 2004, I advised petitioner that it was not permissible under

the law of the Seventh Circuit to convert his civil action to a habeas corpus action. Nevertheless, I refrained from dismissing the case to allow petitioner to advise the court whether he wished his pleading to be treated as a habeas corpus action. I told petitioner that if he chose to proceed under Bivens, his case would have to be dismissed immediately as legally frivolous. However, if he chose to proceed under the habeas corpus statute, I would direct the clerk of court to refund him the amount over \$5 that he has already paid and I would dismiss his claim for money damages, because such relief is unavailable as habeas corpus relief.

Now petitioner has responded to the July 9 order. He states expressly that he wishes his pleading to be considered a habeas corpus petition. In addition, he has submitted documentation from the Bureau of Prisons revealing the term of his imprisonment, the number of days of good conduct time that the Bureau of Prisons is projecting him to earn and his current release and pre-release preparation dates. From this documentation I conclude that petitioner would be eligible for an imminent halfway house transfer if his good conduct time is recalculated in accordance with White.

In particular, the documentation reveals that petitioner was committed to the custody of the Bureau of Prisons on May 1, 1998, to serve a 97-month sentence. His projected pre-release date under the Bureau of Prisons' method of calculating good conduct time is September 7, 2004. Petitioner has been approved for transfer to a work release center on

September 8, 2004. If petitioner's good time credit is recalculated in accordance with White, he may be eligible for earlier work release. I conclude that petitioner will be irreparably harmed if he is forced to wait until the court of appeals decides White before he can obtain a ruling in his case.

Petitioner does not allege that he has exhausted his administrative remedies. Nevertheless, I will waive this requirement because any delay in receiving relief will cause petitioner substantial prejudice. Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004) (court may waive exhaustion requirements for § 2241 when necessary to prevent prejudice caused by unreasonable delay). Accordingly, respondent will be directed to show cause why this petition should not be granted.

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 this rule, petitioner's petition must be sent with a copy of this order, a copy of the order of July 9, 2004, and petitioner's response to the July 9 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 three copies of his petition and three copies of this order, the July 9 order and his response to it.

ORDER

IT IS ORDERED that

1) this action is to be treated as a habeas corpus action brought pursuant to 28 U.S.C. § 2241;

2) the clerk of court is directed to refund to petitioner \$9.58, which is the amount over the \$5 fee for filing a habeas corpus petition that he paid on June 21, 2004;

3) petitioner's claim for money damages is DISMISSED as inappropriate in a habeas corpus proceeding;

4) respondent may have until July 27, 2004, 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). There

is no need for a traverse.

Entered this 23rd day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge