

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

WADE WHEAT,

Petitioner,

v.

JOSEPH SCIBANA, Warden,

Respondent.

ORDER

04-C-413-C

Petitioner Wade Wheat 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 August 11, 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. See 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 February 2005; he is eligible for transfer to a halfway house on October 12, 2004. Respondent admits that, under White, petitioner would be entitled to an additional 64 days of good conduct time, which would make petitioner eligible for halfway house transfer now. Accordingly, I will grant the petition and

order respondent to recalculate petitioner's good conduct time on the basis of his sentence.

I emphasize, however, that I cannot order respondent to place petitioner in a halfway house on a particular date. Under 18 U.S.C. § 3624(c), the Bureau of Prisons is required, when it is "practicable," to allow inmates to spend a "reasonable part" of their sentence learning to prepare for release. However, the statute grants the bureau discretion to decide how the inmate is to be prepared for release and how much time the inmate needs to prepare. Although it appears that the bureau's practice is to transfer most inmates to halfway houses for the last six months of their sentence, Monahan v. Winn, 276 F. Supp. 2d 196, 199 (D. Mass. 2003), this practice is not required by statute. Therefore, I express no opinion on the question whether or when petitioner should be transferred to a halfway house.

ORDER

IT IS ORDERED that petitioner Wade Wheat'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 18th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge