

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

ERIBERTO GALINDO,
Petitioner,

ORDER

04-C-418-C

v.

JOSEPH SCIBANA, Warden of
Oxford Prison Camp,

Respondent.

In an order entered in this case on June 23, 2004, I imposed a stay of all proceedings pending a decision by the Court of Appeals for the Seventh Circuit in White v. Scibana, No. 04-2410. On September 28, 2004, petitioner moved to lift the stay. At that time, petitioner contended that his release date had been set by the Bureau of Prisons for January 14, 2005 and his six-month pre-release date for November 19, 2004. I denied petitioner's motion on September 30, 2004, after finding that the documentation petitioner submitted in support of his petition showed different release and pre-release dates. In particular, I found that the Bureau had computed petitioner's release date to be June 17, 2005 and his projected "sixmonth/10% date" as February 11, 2005. I found also that if petitioner's good conduct time were to be recalculated in accordance with White, his projected release date would be

shortened by approximately 28 days, which might render him eligible for pre-release to a halfway house by mid-January, 2005, by which time I expected the court of appeals would have ruled on the White appeal.

Presently before the court is petitioner's second motion to lift the stay. Petitioner points out that recently, this court lifted the stay in another case, Jackson v. Scibana, where the petitioner showed he might be eligible for pre-release to a halfway house in early January if his good conduct time were to be recalculated in accordance with White. In lifting the stay in that case, I reasoned that although the Court of Appeals for the Seventh Circuit is expected to rule on the White appeal before the end of this year, if the court were to affirm this court's decision, there would be insufficient time to resolve petitioner's petition in petitioner's favor and give respondent an opportunity to adjust petitioner's pre-release date if it wished to do so. Petitioner Eriberto Galindo is in the same position. Therefore, I will lift the stay previously imposed in this case.

As an initial matter, I note that when petitioner signed the petition in this case, he did not verify the petition as 28 U.S.C. § 2242 requires. Instead, petitioner swore to the truthfulness of the factual assertions made in an affidavit attached to the petition. Ordinarily, a petitioner makes factual assertions in the body of his petition. It is the factual assertions that require verification. In this case, petitioner's only factual assertions are made in his "affidavit," which I am accepting as having been incorporated into the petition. Thus,

I consider that petitioner has satisfied the requirements of 28 U.S.C. § 2242.

Petitioner admits that he has not exhausted his administrative remedies. He argues that exhaustion would be futile because the Bureau of Prisons is bound by its program statements in ruling on administrative appeals and until the legitimacy of the program statement at issue in this case is determined by the Court of Appeals for the Seventh Circuit in White, the Bureau of Prisons must deny all requests for administrative relief challenging the Bureau's method of calculating good conduct time.

The court of appeals has held that district courts may waive the exhaustion requirement in cases brought under § 2241 in limited circumstances. In particular, waiver is appropriate when the agency has predetermined the issue. Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004) (court may waive exhaustion requirements for § 2241 to prevent prejudice caused by unreasonable delay or when agency has predetermined issue). 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). Therefore, it is proper to waive the exhaustion requirement because exhaustion would be futile. 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 court's 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 the extra copies of his petition and this court's order. Pursuant to Fed. R. Civ. P. 4(l), petitioner is requested to submit proof to the court that he served his petition by certified mail. A copy of the postmarked certified mail receipt for each of the individuals to whom the petition was sent will constitute proof of service.

ORDER

IT IS ORDERED that the stay imposed in this case on June 23, 2004 is LIFTED.

Further, IT IS ORDERED that no later than November 30, 2004, petitioner is to submit proof of service of his petition upon the respondents.

Finally, IT IS ORDERED that respondent may have until November 30, 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 16th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge