

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

GENARO VICARIO,

Petitioner,

v.

C. HOLINKA, Warden, et al.,

Respondents.

ORDER

04-C-630-C

Petitioner Genaro Vicario, a prisoner at the Federal Correctional Institution in Waseca, MN, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He requests leave to proceed in forma pauperis and supports his request with an affidavit of indigency.

Ordinarily, this court will not make a determination whether a petitioner is indigent for the purpose of filing a § 2241 petition until he submits a trust fund account statement for the six-month period immediately preceding the filing of his habeas corpus petition. See Longbehn v. U.S., 169 F.3d 1082 (7th Cir. 1999). Petitioner has not submitted the required trust fund account statement. Instead, he avers in his affidavit that he has no taxable income, financial resources or investments. These averments are insufficient to

provide a full and clear picture of petitioner's financial status. Therefore, petitioner will be given until September 28, 2004, in which to submit his trust fund account statement. Once the statement is received, this court will calculate petitioner's average monthly deposits and his average monthly balances for the six-month period mentioned above. If 20% of the greater of these two figures is \$5 or more, he will not be eligible for indigent status and will have to prepay all of the \$5 filing fee. If 20% of the greater of these two figures is less than \$5, he will be required to prepay whatever portion less than \$5 has been calculated.

Now that petitioner is aware of the formula this court uses in determining whether a prisoner is indigent for the purpose of paying a \$5 filing fee, he may be able to figure easily whether he qualifies. If he knows that he will not qualify for indigent status, he may elect to submit a check or money order made payable to the clerk of court in the amount of \$5 in lieu of the six-month statement requested above. In any event, petitioner should act quickly. If, by September 28, 2004, petitioner does not submit either the \$5 payment or a trust fund account statement for the period beginning approximately March 7, 2004 and ending approximately September 7, 2004, his request for leave to proceed in forma pauperis will be denied and this action will be closed.

Also, there are two other problems with petitioner's petition, one of which must be remedied immediately. The problem of greatest import is that the petition contains no factual statements concerning petitioner's commitment or detention and is not verified to

be true under penalty of perjury as 28 U.S.C. § 2242 requires. The full text of petitioner's petition reads as follows:

The above captioned petitioner hereby moves the court for an order directing the Bureau of Prisons, C. Holinka, warden, et al., to correct the good time credits from 47 days per year served to 54 days per year imposed as a sentence. WHEREFORE, the petitioner prays that the court grant the aforestated order as relief.

In White v. Scibana, 314 F. Supp. 2d 834 (W.D. Wis. 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. Although petitioner does not say so expressly, I presume he is attempting to raise the same claim in his petition. However, in the time that has passed since the Yancey White's petition was granted, several other federal prisoners have filed habeas corpus petitions challenging the Bureau of Prisons's method of calculating their good time credits. I have stayed the proceedings in most of these actions pending a decision on the appeal filed in White's case. I have decided to issue orders to show cause only if (1) the petitioner submits a sentence computation from the Bureau of Prisons showing the inmate's term of imprisonment, good conduct time that has been both earned and disallowed, current release date and pre-release preparation date; and (2) I can conclude on the basis of that information that the petitioner would be entitled to imminent release or eligible for an imminent halfway house transfer after his good conduct time is recalculated in accordance

with White. Because petitioner has provided no factual information about his own sentence and commitment, it is impossible to tell whether an order to show cause is warranted because petitioner's release or halfway house eligibility dates are imminent or whether an order to stay the action should be entered pending the appeal in White.

Second, petitioner appears not to be aware that the proper district for a § 2241 habeas corpus petition is the district in which the petitioner is confined at the time he files the petition. Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004). Nevertheless, in Moore v. Olson, 368 F.3d 757 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit held that the location of the district court in which a federal prisoner brings a petition for a writ of habeas corpus is a matter of venue, subject to waiver and forfeiture, rather than a matter of subject matter jurisdiction. (The court pointed out as well that every district court has subject matter jurisdiction over habeas corpus proceedings under 28 U.S.C. § 1331, as any claim under § 2241 entails a federal question and that the sufficiency of service of process on a warden outside a judicial district cannot be attacked because Fed. R. Civ. P. 4(i)(2)(A) creates national service for federal employees sued in their official capacities.) Given that the court of appeals has determined that § 2241 is a special venue provision for habeas corpus petitioners that supersedes 28 U.S.C. § 1391(e) to the extent of any conflict, it may well be that even if petitioner cures the deficiencies in his habeas corpus petition, respondent Holinka will not waive venue in this district and will seek to have the case dismissed or

transferred to the district in which petitioner is confined.

ORDER

IT IS ORDERED that

1. Petitioner may have until September 28, 2004, in which to submit either the \$5 fee for filing his petition or a trust fund account statement for the period beginning approximately March 7, 2004 and ending approximately September 7, 2004. If, by September 28, 2004, petitioner does not submit either the \$5 payment or the required trust fund account statement, his request for leave to proceed in forma pauperis will be denied and this action will be closed.

2. Petitioner may have until September 28, 2004, in which to submit an amended petition for a writ of habeas corpus that is signed and verified in accordance with 28 U.S.C. § 2242 and that includes factual allegations about his commitment, together with documentary evidence to show the date of his commitment, the length of his sentence, the Bureau of Prisons' present calculation of his good time and his current release and pre-release dates. If, by September 28, 2004, petitioner fails to submit a petition that conforms to the form required by § 2242, I will dismiss the petition without prejudice to his filing a new petition at a later date.

3. If, by September 28, 2004, petitioner complies with the directives set out in

numbers 1 and 2, above, I will STAY a decision whether to issue an order to show cause or enter a stay pending the appeal of White to allow respondent to advise the court whether respondent will waive venue or will move to dismiss or transfer the case on the ground that it is improperly venued in this district.

Entered this 7th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge