IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PATRICK M. CURRY,

ORDER

Petitioner,

11-cv-386-bbc

v.

CAROL HOLINKA,

Respondent.

- -

Petitioner Patrick Curry has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. He has paid the $5 filing fee. He contends that the Bureau of Prisons has violated his rights by failing to place him in a halfway house for the full 12 months authorized by the Second Chance Act of 2007, enacted as 18 U.S.C. § 3624(c). Petitioner does not say in his petition when he believes he is entitled to a transfer, but documents attached to his complaint show that his projected release date is July 10, 2012 and that he has been approved for a transfer to a halfway house six months earlier on January 12, 2012. Dkt. #1-3, at 4. Thus, if petitioner is correct that he is entitled to 12 months in a halfway house, this would mean that he is entitled to a transfer in a few days.

An initial question is whether petitioner may bring this case under § 2241, which is limited to challenges to a prisoner's "custody." Whether petitioner is held in prison or a

halfway house, he is likely still in "custody" for the purpose of § 2241. Wottlin v. Fleming, 136 F.3d 1032 (5th Cir.1996) (halfway house resident was "in custody" of Bureau of Prisons for purpose of § 2241). After all, the Court of Appeals for the Seventh Circuit has held that "custody" under the habeas corpus statutes extends even to probation and parole. Williams v. Wisconsin, 336 F.3d 576 (7th Cir. 2003).

However, that does not end the matter. The court of appeals has held that habeas provides the proper route even in some cases in which a prisoner is not seeking complete freedom. The question is whether the prisoner is seeking "a quantum change in the level of custody." Graham v. Broglin, 922 F.2d 379, 381 (7th Cir.1991); see also Glaus v. Anderson, 408 F.3d 382, 387-88 (7th Cir. 2005) ("Graham outlines a clear distinction: a petitioner requests either a "quantum change in the level of custody," which must be addressed by habeas corpus, or "a different program or location or environment," which raises a civil rights claim).

In Hendershot v. Scibana, 04-C-291-C, 2004 WL 1354371 (W.D. Wis. June 10, 2004), I concluded that the difference between a prison and a halfway house represents a "quantum change in the level of custody" under Graham because the two forms of custody are qualitatively different. See also Eaton v. United States, 178 F.3d 902, 903 (7th Cir.1999) ("[A] claim to be entitled to release from a more to a less restrictive form of custody is within the scope of the habeas corpus statute."); Ramsey v. Brennan, 878 F.2d 995 (7th Cir.1989) (halfway house is "a twilight zone between prison and freedom"). I am

unaware of any authority that has undermined the holding in Hendershot. In Richmond v. Scibana, 387 F.3d 602, 605 (7th Cir. 2004), the court noted this question but decided it was unnecessary to resolve it.

However, Richmond is a potential jurisdictional obstacle for another reason: the court stated that "§ 2241 does not furnish the appropriate means to contest the Bureau's understanding of § 3624(c)." Id. at 606. That statement may not apply to this case because the issue in Richmond was different. The prisoner was challenging the bureau's interpretation of a previous version of § 3624(c) under which the bureau concluded that it did not have discretion to transfer prisoners to a halfway house before the last 10% of their sentence. The prisoner's position was that the bureau could *consider* him for transfer to a halfway house sooner. Because success in his case would not guarantee him a transfer, the court concluded that he was not challenging his "custody." Id. at 606. In this case, plaintiff's claim is that he is entitled to transfer *now*, suggesting that the rationale of Richmond does not apply.

With respect to the merits of petitioner's claim, he relies on the Second Chance Act, 18 U.S.C. § 3624(c)(1), which provides:

> The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.

The language of the statute makes it clear that prisoners are not guaranteed 12 months at a halfway house. Rather, the bureau is required, when "practicable," to allow a prisoner to spend "a portion" of the last months of his term under conditions that will prepare him for reentry. Sessel v. Outlaw, 2009 WL 1850331, *4 (E.D. Ark. 2009) ("These are matters left to the discretion of the BOP."); Daraio v. Lappin, 2009 WL 303995 (D. Conn. Feb. 9, 2009) (bureau "retains discretion under the Second Chance Act to decide whether and when an inmate should be placed at" halfway house). Neither the amount of time nor the place for that preparation is spelled out by § 3624(c)(1).

This does not mean that the bureau has absolute authority to deny a prisoner transfer to a halfway house. Under § 3624(c)(6), the bureau must "ensure that placement in a community correctional facility . . . is . . . of sufficient duration to provide the greatest likelihood of successful reintegration into the community." In addition, decisions about placement in a halfway house must be made "on an individual basis" and take into account the factors listed in 18 U.S.C. § 3621(b). 18 U.S.C. § 3624(c)(6)(A)-(B). See also Sessel, 2009 WL 1850331, at *4; Daraio, 2009 WL 303995; 28 C.F.R. § 570.22 ("Inmates will be considered for pre-release community confinement in a manner consistent with 18 U.S.C. section 3621(b), determined on an individual basis, and of sufficient duration to provide the greatest likelihood of successful reintegration into the community, within the time-frames set forth in this part.").

At this stage of the proceedings, it is impossible to determine whether the bureau

applied these criteria in good faith when denying petitioner's request for placement in a halfway house. Accordingly, I will direct respondent Holinka to show cause why the petition should not be granted.

ORDER

IT IS ORDERED that

1. No later than 20 days from the date of service of the petition, respondent Holinka is to file a response showing cause, if any, why this writ should not issue with respect to petitioner Patrick Curry's claim that the bureau is violating his federal rights by refusing to transfer him to a halfway house until the last six months of his sentence.

2. Petitioner may have 20 days from the service of the response in which to file a traverse to the allegations of the response submitted by respondent.

3. For the sake of expediency, I will send the petition to the bureau, the local United States attorney and the United States Attorney General via certified mail in accordance with

Fed. R. Civ. P. 4(i), along with a copy of this order.

Entered this 7th day of July, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge