

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT BARDLE : CIVIL ACTION
 :
 v. :
 :
 UNITED STATES OF AMERICA : NO. 05-cv-05279-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

April 20, 2006

The issue in this habeas corpus case is whether the United States Parole Commission, after revoking special parole, can lawfully impose a further period of special parole, to follow the re-commitment to imprisonment. In essence, the question is whether a violator must be accorded credit for "street time."

Magistrate Judge Charles B. Smith, to whom this case was referred for Report and Recommendation has filed a thorough and comprehensive Report, recommending that this court conclude that the Parole Commission has improperly denied petitioner credit for street time. The government filed objections to the Report, and I heard oral argument on this date. Both sides agree that, if this court follows Third Circuit precedent, Fowler v. United States Parole Comm'n, 94 F.3d 835 (3d Cir. 1996), petitioner's position is correct. The respondent argues, however, that the Fowler decision has been overruled, by implication, in Johnson v. United States, 529 U.S. 694 (2000).

For the reasons set forth in Judge Smith's Report, and as discussed by my colleague Honorable Clifford Scott Green in Marker v. Riley, 2004 WL846699 (E.D. Pa.), the Fowler decision is not squarely overruled by Johnson, there is a substantial question as to whether it can be regarded as having been overruled by implication, and, in any event, this court is obliged to follow the Fowler decision until such time as it is overruled by the Third Circuit, or undoubtedly overruled by the Supreme Court of the United States. I therefore approve and adopt the Magistrate Judge's Report.

Since it is quite probable that petitioner has already served his original sentence plus sentences for parole violations if properly calculated, I conclude that this court's order granting the Writ of Habeas Corpus should provide that petitioner is to be released within 10 days of this date, unless, within that time period, respondent can demonstrate that, if calculated in conformity with the views set forth in this opinion and in the Report of Judge Smith, a further period of custody may lawfully be required.

An Order to that effect follows.

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ORDER

AND NOW, this 20th day of April 2006, upon consideration of the Report and Recommendation of Magistrate Judge Charles B. Smith and the objections thereto, and after oral argument, IT IS ORDERED:

1. The Report and Recommendation are APPROVED and ADOPTED.
2. The Petition of Robert Bardle for a Writ of Habeas Corpus is conditionally GRANTED.
3. Petitioner shall be released from custody not later than 10 days after the date of this Order, unless within that period respondent can demonstrate that a properly calculated sentence (in conformity with the views expressed in the Magistrate's Report and in the accompanying opinion) warrant further confinement beyond that date.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.