

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN FRANCIS FIERRO, JR.,)
)
 Plaintiff,)
)
 v.) Crim. No. 01-100-SLR
) Civ. No. 04-140-SLR
UNITED STATES OF AMERICA,)
JOSEPH V. SMITH, Warden, USP)
Lewisburg, and HARRY G.)
LAPPIN, Director, Federal)
Bureau of Prisons,)
)
 Defendants.)

Christopher Koyste, Assistant Federal Public Defender,
Wilmington, Delaware. Counsel for Plaintiff.

Colm F. Connolly, United States Attorney and Robert Prettyman,
Assistant United States Attorney, United States Attorney's
Office, Wilmington, Delaware. Counsel for Defendants.

MEMORANDUM OPINION

Dated: June 17, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff John Fierro, Jr. is an inmate at the Federal Prison Camp in Lewisburg, Pennsylvania. Currently before the court is plaintiff's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and § 2241. (D.I. 44) The motion is fully briefed and ripe for review. (D.I. 55, 56, 58) The court has jurisdiction pursuant to 28 U.S.C. § 2255 and § 2241.

II. BACKGROUND

On February 19, 2002, plaintiff pled guilty to one count of giving a false statement during an attempted firearms purchase in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2). (D.I. 11) On June 12, 2002, he was sentenced to three years probation with four months of home confinement. (D.I. 20)

On July 28, 2003, plaintiff appeared before the court to address charges that he failed to comply with terms of his supervised release. The court found plaintiff guilty, based on his admission, that he violated the condition of his probation that required him to participate in a drug treatment program. (D.I. 29) He was sentenced to time served and to one year of supervised release with certain conditions.

On January 28, 2004, a petition was filed containing allegations that plaintiff had violated the terms of his newly imposed conditions of supervised release by lying to his

probation officer, testing positive for marijuana and cocaine use, failing to submit to random urine samples and for failing to attend two sessions of his drug treatment program. (D.I. 33)

At the February 17, 2004 revocation hearing, plaintiff pleaded guilty to violating three conditions of his supervised release. (D.I. 38) The court revoked plaintiff's remaining term of supervised release and ordered him to serve 5 months of imprisonment. The court recommended, to the Bureau of Prisons ("BOP"), that plaintiff be placed at the "Sussex County Work Release Center in Delaware so he may continue to work for [his] employer."¹ (Id.) Plaintiff was released on unsecured bail and ordered to self-report on a date and location to be determined by the BOP.

After learning that the BOP could not consider the court's recommendation for placement at the Sussex County Work Release Center, plaintiff presented an oral motion to amend the court's judgment and commitment order pursuant to Federal Rule of Criminal Procedure 35.² (D.I. 44, Ex. C) Plaintiff sought to change the 5-month term of imprisonment to a continuation of

¹For purposes of this opinion, this center is the equivalent of a Community Correction Center ("CCC").

²The BOP advised the United States Probation Office for the District of Delaware that inmates could no longer be placed at work release centers due to a December 13, 2002 memorandum issued by the United States Department of Justice's Office of Legal Counsel ("OLC"). (D.I. 44 at 3; Ex. D.; see also D.I. 45)

supervised release to be served at the Sussex County Work Release Center. In denying the motion, the court concluded:

Although we all misunderstood that the Sussex Correctional Institution was a bona fide option, because it was only a recommendation, and to tell you the truth the Bureau of Prisons rejects my recommendations 99 percent of the time for their own reasons, I don't consider I made an error of law. I meant to send him to jail for five months and I still intend to do that.

(D.I. 56 at A57)

On March 5, 2004, plaintiff filed the instant habeas petition and sought a stay of the judgment and commitment order to allow him to remain on supervised release pending resolution of the petition. (D.I. 44) The court denied plaintiff's motion to stay, concluding that:

[a]lthough [plaintiff] has presented case law from other districts where courts have deemed the DOJ advisory opinion to be contrary to law, nevertheless, the Third Circuit has opined that "a district court has no power to dictate any place of confinement for the imprisonment portion of the sentence. Rather the power to determine the location of imprisonment rests with the Bureau of Prisons." In addition, the court did not err in sentencing defendant to a term of incarceration, given the record made at the revocation hearing. The fact that the BOP's placement is not to his liking does not rise to the level of a justiciable controversy, let alone a constitutional violation.

(D.I. 45, quoting United States v. Serafini, 233 F.3d 758, 778 n. 23 (3d Cir. 2000)).

Plaintiff commenced serving his sentence on March 8, 2004 at the Federal Prison Camp, Lewisburg, Pennsylvania. His projected release date is August 6, 2004. (D.I. 56, A61-65) Since the

sentencing, plaintiff has written, pro se, letters requesting that the court release him and reevaluate the judgment imposed. (D.I. 50, 51, 60)

On April 26, 2004, the court conducted a telephonic conference with defense counsel, counsel for the Government and two attorneys representing the BOP. (D.I. 53) In response to the court's inquiries, the government and BOP maintained that plaintiff had been properly designated and that any resulting issues could be addressed by the habeas petition. Plaintiff explained that the habeas petition was not requesting the court to order a particular designation as prohibited by the Third Circuit. See Serafini, 233 F.3d at 778. Instead, the petition sought, only, to compel the BOP to redesignate plaintiff without the restrictions dictated by the OLC Memorandum.

III. DISCUSSION

A. Standard of Review: 28 U.S.C. § 2255 and 28 U.S.C. § 2241³

³Section 2255 provides in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence e.

Section 2241 is a broad statute, conferring jurisdiction on district courts to issue writs of habeas corpus in response to petitions filed by a federal or state prisoner who is in custody

After conviction and exhaustion, or waiver, of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. United States v. Frady, 456 U.S. 152 (1982); United States v. Shaid, 937 F.2d 228 (5th Cir. 1991). Prisoners in federal custody may attack the validity of their sentences through 28 U.S.C. § 2255. Section 2255 is a vehicle to cure jurisdictional errors, constitutional violations, proceedings that resulted in a "complete miscarriage of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 784 (1979); see also U.S. v. Addonizio, 442 U.S. 178 (1979); United States v. Essig, 10 F.3d 968 (3rd Cir. 1993).

Conversely, 28 U.S.C. § 2241 is the only statute that confers habeas jurisdiction to examine the petition of a federal prisoner who is challenging the execution of his sentence and not the legality therein. See Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001); accord U.S. v. Addonizio, 442 U.S. at 185-88; U.S. v. Kennedy, 851 F.2d 689, 691 & n.4 (3d Cir. 1988). Because plaintiff has invoked both statutes, only one of which confers jurisdiction over his claims, the court turns to the requirements of 28 U.S.C. § 2241.

Federal prisoners are required to exhaust administrative

in violation of the Constitution or laws or treaties of the United States. See Coady, 251 F.3d at 484.

remedies before filing a habeas corpus petition under 28 U.S.C. § 2241. Upon exhausting remedies pursuant to 28 C.F.R. §§ 542.10-16, the prisoner may seek § 2241 judicial review. See United States v. Wilson, 503 U.S. 329, 335 (1992). Exhaustion of remedies can be excused if pursuit of administrative remedies would be patently futile. See Fuller v. Rich, 11 F.3d 61, 62 (5th Cir. 1994); James v. United States Dept. Of Health and Human Services, 824 F.2d 1132, 1139 (D.C. Cir. 1987); Gutierrez v. United States, No. 03-CV-1232(FB), 2003 WL 21521759 (E.D. N.Y. 2003).

The record is silent on whether plaintiff has exhausted administrative remedies. It is evident, however, that the BOP policy in issue has been and will continue to be implemented regardless of the challenges raised by federal prisoners. Id.; accord Colton v. Ashcroft, 299 F. Supp. 2d 681, 689 (E.D. Ky. 2004). Accordingly, the exhaustion requirement is waived based on futility.

B. The OLC Memorandum

With the passage of the Sentencing Guidelines in 1987, the BOP concluded that CCC's were penal facilities where the imprisonment portion of a sentence could be satisfied. Id. at 683. As a result, the BOP generally obliged judicial recommendations to place prisoners in CCC's for the imprisonment portion of their sentences. United States v. Serpa, 251 F. Supp.

2d 988, 989 (D. Mass. 2003). "These practices were entirely routine, and were all but taken for granted by all participants: the BOP, the Probation Office, the U.S. Attorney's Office, the defense bar, and the judiciary." Id.

This long-standing placement practice changed on December 13, 2002 when the Office of Legal Counsel ("OLC") of the Department of Justice issued a memorandum in response to the BOP's inquiry into whether the BOP has authority to place an offender directly in community confinement upon the recommendation of the sentencing judge. (D.I. 56, A66) The OLC memorandum concluded that "community confinement does not constitute imprisonment for purposes of a sentencing order, and BOP lacks clear general authority to place in community confinement an offender who has been sentenced to a term of imprisonment. BOP's practice is therefore unlawful." (Id.)

The OLC memorandum found that, while 18 U.S.C. § 3621 allows the BOP discretion in determining the place of imprisonment, § 3621(b) does not provide the BOP authority to designate an offender sentenced to a term of imprisonment to community confinement.⁴ In other words, the broad discretion afforded

⁴18 U.S.C. § 3621(b) provides:

The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district which the person

under § 3621(b) does not allow the BOP to “decide whether the offender will be imprisoned.” (Id. at A71) This latter authority rests with the sentencing judge operating within the confines of the Sentencing Guidelines. Therefore, the OLC memorandum found that 18 U.S.C. § 3621(b), relied on for over 15 years as the basis of the BOP’s placement power, did not give the BOP general authority to place an offender in community confinement from the outset of his sentence, when his sentence included a term of incarceration.

On December 20, 2002, the BOP Director advised all federal judges that the BOP was instituting “a significant procedure change regarding inmate designations to Community Correction Centers,” and that the BOP would no longer honor some judicial recommendations to place inmates in CCCs or use CCCs as a substitute for imprisonment. Serpa, 251 F. Supp. 2d at 988.

The issuance of the memorandum changed the way the BOP and district courts had been designating federal offenders. “It is uncontested that the OLC Memo upset a decades-long policy

was convicted, that the Bureau determines to be appropriate and suitable, considering: (1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence: (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or (B) recommending a type of penal or correctional facility as appropriate; and (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

pursuant to which the BOP operated under the assumption that it had discretion to assign federal prisoners to serve all of part of their sentences in places other than prison.” United States v. Arthur, 367 F.3d 119, 120 (2d Cir. 2004). Community confinement recommendations have been made “in thousands of cases by hundreds of judges continuously since at least 1965, and in nearly all instances accepted by the BOP.”⁵ Iacoboni v. U.S., 251 F. Supp. 2d 1015, 1017 (D. Mass. 2003).

C. The Administrative Procedure Act

Plaintiff raises two grounds for relief. (D.I. 44) First, the BOP memorandum adopting the new policy procedure is erroneous and contrary to Congressional intent and statutes. Second, the BOP memorandum violates the Administrative Procedure Act, 5 U.S.C. § 553, because the “notice and comment procedures” were not followed. Defendants argue that the BOP memorandum is lawful and is a correct interpretation of 18 U.S.C. § 3621.⁶ (D.I. 55)

The Administrative Procedure Act (“APA”) provides that an

⁵CCCs are not synonymous with prisons. See United States v. Serafini, 233 F.3d at 777. A CCC is intended to facilitate the transition between prison and the outside world. See Colton, 299 F. Supp. 2d at 683 n.1. “Imprisonment is the condition of being removed from the community and placed in prison, whereas community confinement is the condition of being controlled and restricted within the community.” United States v. Adler, 52 F.3d 20, 21 (2d Cir. 1995).

⁶Defendants also assert that the court lacks jurisdiction to review plaintiff’s 28 U.S.C. § 2255 petition because he challenges the execution instead of the validity of his sentence.

agency may not adopt a new rule without complying with the "notice and comment" procedures identified in the statute. 5 U.S.C. § 553 et seq. Specifically, prior notice and comment through publication in the Federal Register is required. 5 U.S.C. § 553(b), (c). Notice and comment is not required for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." Lincoln v. Vigil, 508 U.S. 182, 196 (1993); 5 U.S.C. § 553(b)(3)(A). "A rule is interpretive if an agency is exercising its rule-making power to clarify an existing statute or regulation, and substantive if the agency is seeking to create new law, right or duties in what amounts to a legislative act." White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993).

Although some courts have concluded that implementation of the OLC memorandum is violative of the APA or is otherwise unlawful, the Third Circuit has remained silent on the issue.⁷ See e.g. United States v. Tkabladze, 2003 WL 22836502 (C.D. Cal.

⁷On May 18, 2004, the Third Circuit held that a criminal sentence served in an alternative housing facility such as a halfway house does qualify as a prior sentence of imprisonment under § 4A1.1 of the United States Sentencing Guidelines for the purpose of calculating an offender's criminal history score. United States v. Schnupp, 368 F.3d 331 (3d Cir. 2004). Plaintiff asserts that the Court's finding that incarceration in a halfway house constitutes imprisonment reflects disagreement with the OLC memorandum. (D.I. 61) Defendants contend that Schnupp is factually distinguishable. The court agrees. Although the Third Circuit thoroughly analyzes the meaning of "imprisonment," there is nothing to suggest that the Third Circuit would conclude the OLC violates the APA or is otherwise invalid.

2003); Iacoboni v. United States, 251 F. Supp. 2d 1015 (D. Mass. 2003); Cato v. Menifee, 2003 WL 22725524 (S.D. N.Y. 2003); Colton v. Ashcroft, 299 F. Supp. 2d at 681; Loeffler v. Menifee, 2004 WL 1252925 (S.D. N.Y. 2004); Cioffoletti v. Federal Bureau of Prisons, 2003 WL 23208216 (E.D. N.Y. 2003). Absent authority from the Third Circuit, the court declines to join those courts that have found such violations and, instead, concludes that the OLC memorandum is interpretive and exempt from the APA requirements.⁸ See Cohn v. Federal Bureau of Prisons, 302 F. Supp. 2d 267 (S.D. N.Y. 2004).

Moreover, when presented with the effects of the OLC memorandum on plaintiff at bar, the court was, and remains, unswayed. On the record created at the revocation hearing, the

⁸Several district courts in the Third Circuit have discussed the OLC memorandum: Scott v. Federal Bureau of Prisons, Civ. Action No. 04-1744(JEI), 2004 WL 1065772 (D.N.J. 2004) (injunctive relief granted to plaintiff-prisoner seeking to compel BOP to release him to a CCC pursuant to BOP policy before issuance of December OLC 2002 memorandum; United States v. Gilbride, No. 3:00CR0320, 2003 WL 297563 (M.D. Pa 2003) (rejected prisoner's claim that imposition of OLC memorandum violates the ex post facto clause and noted: "The BOP misinterpreted their authority to have certain offenders housed in community confinement centers. The Department of Justice, Office of Legal Counsel, pointed out that they were acting improperly, and BOP changed its practice. The change appears to be in accordance with the law of the Third Circuit"); United States v. Harris, No.Crim.A. 02-385, 2004 WL 350171 (E.D. Pa 2004) (recommendation at sentencing was just that and nothing more); United States v. Zgleszewski, No.Crim.02-774, 2004 WL 350187 (E.D. Pa 2004) (validity of OLC not decided because prisoner filed suit under wrong statute; instead habeas petition should have been filed).

court concluded that plaintiff had failed to address his drug addiction and demonstrated disrespect to the guidance and services offered by the Office of Probation. As a result, the court sentenced plaintiff to 5-months imprisonment for his repeated failure to comply with the terms of his supervised release. The recommendation of placement at a CCC was just that - a recommendation. The BOP designation of plaintiff to a federal prison camp, therefore, is not violative of any laws and does not justify relief under 28 U.S.C. § 2241.

IV. CONCLUSION

For the reasons stated, plaintiff's motion to vacate, set aside or correct his sentence and petition for habeas corpus are denied. An appropriate order shall issue.