

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	No. 3:00cr0320
	:	
v.	:	(Judge Munley)
	:	
SUSAN GILBRIDE,	:	
Defendant	:	

.....

MEMORANDUM

_____ Before the court for disposition is the defendant’s “Motion To Stay and/or Overturn Bureau of Prisons Re-Designation Decision as Being Violative of the Ex Post Facto Clause of the United States Constitution.” Briefs have been filed, and an argument on the motion has been held. The matter is thus ripe for disposition.

Background

Defendant Susan Gilbride pled guilty on December 14, 2000, to charges of Credit Card Fraud. On April 25, 2001, this court sentenced her to twelve (12) months of imprisonment, the sentence to run consecutively to a state court sentence. The court recommended that the Federal Bureau of Prisons (hereinafter “BOP”) allow the defendant to serve her federal sentence at Catholic Social Services Community Contract Facility (hereinafter “CSCC”). In addition, the court imposed a three (3) year term of supervised release with special conditions requiring the payment of partial restitution of \$3,471.50 and participation in counseling.

The state paroled the defendant on July 14, 2002, and she began to serve the sentence imposed by this court. As recommended, BOP designated CSCC as the place for service of defendant's sentence. She is scheduled to be released on July 13, 2003.

On December 20, 2002, BOP effected a policy change based upon an opinion issued by the United States Department of Justice, Office of Legal Counsel. The opinion states that "imprisonment" is not synonymous with "community confinement," and therefore, BOP has no discretion to allow an inmate sentenced to imprisonment to serve the sentence in a community confinement center. BOP then re-designated defendants who were: 1) housed in a community correction center based upon a sentencing court's recommendation and 2) had more than 150 days left to serve on their prison sentence as of December 16, 2002. BOP found that Defendant Susan Gilbride falls into that category, and re-designated her to Federal Correctional Institution, Danbury, Connecticut.¹ On December 23, 2002, the BOP informed the plaintiff that she would be transferred to a prison institution.²

Defendant now moves the court to stay and/or overturn the BOP's re-designation decision as being a violation of the Ex Post Facto Clause of the United States Constitution. She claims that the retroactive application of the reinterpretation of the law violates the Ex

¹As of January 31, 2003, the defendant has 163 days remaining on her sentence.

²The Bureau of Prisons also notified the defendant that she could challenge the transfer if she was dissatisfied with it through the BOP's administrative remedy program. The record does not indicate whether the defendant proceeded through the administrative remedy program.

Post Facto Clause of the United States Constitution.³

Discussion

Article One of the United States Constitution prohibits “ex post facto” laws. U.S. CONST. art. I, § 10. “To fall within the ex post facto prohibition, a law must be retrospective - - that is, it must apply to events occurring before its enactment - - and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime.” Lynce v. Mathis, 519 U.S. 433, 441 (1997) (citations and internal quotations omitted).

In the instant case, the government asserts that the decision of the Department of Justice, Office of Legal Counsel does not represent the enactment of any new or different law- - it merely reflects the law as it was at the time of the defendant’s sentencing and acknowledges the controlling precedent that defendants such as Gilbride are not entitled to community confinement.

At the time of the defendant’s sentencing, the BOP’s policy was to place offenders in a community corrections center, halfway house or other form of “community confinement” rather than a prison where the offender was deemed to be low-risk and nonviolent and received a short sentence. The December 13, 2002, memorandum from the U.S. Department of Justice, Office of Legal Counsel indicated that the BOP’s policy was not authorized under

³Originally, the defendant also argued that she did not fall within the policy because she had fewer than 150 days left on her sentence when the new policy was implemented. At oral argument, defense counsel conceded that she in fact had more than 150 days left on her sentence when the policy was implemented.

the law. BOP thus changed its policy. According to the government, the BOP did not change a regulation or law, it merely changed an existing mis-interpretation of the law. We must decide whether a change in interpretation of the BOP's authority that was implemented to correct an earlier and allegedly erroneous statutory interpretation violates the Ex Post Facto Clause.

Although, the Third Circuit has not addressed this issue, it appears that the overwhelming authority of the other circuit courts of appeal holds that a change in a regulation that is merely a correction of a misapplied existing law is not a violation of the Ex Post Facto Clause. In Glenn v. Johnson, the Fourth Circuit Court of Appeals addressed this issue. 761 F.2d 192, 194-95 (4th Cir. 1985). In Glenn, the North Carolina Parole Commission changed a regulation regarding parole in conformance with an opinion of the state's attorney general. The change did not violate the Ex Post Facto Clause because it merely corrected an erroneous interpretation of the law, and the change was foreseeable and inescapable. Id. at 194-95. The Second Circuit Court of Appeals addressed a similar situation in Caballery v. United States Parole Comm'n, 673 F.2d 43 (2d Cir.) cert. denied 457 U.S. 1136 (1982). In Caballery, the United States Parole Commission had changed a practice that was based upon a misinterpretation of a statute. The court found no ex post facto violation because the Ex Post Facto Clause does not give one a vested right in an erroneous statutory interpretation. Id. at 46-47.

The Fifth Circuit found it was not a violation of the Ex Post Facto Clause for a federal

parole regulation to be revised after the defendant's conviction where the regulation corrected a previously erroneous practice which had been contrary to an existing statute. Cortinas v. United States Parole Comm'n, 938 F.2d 43, 45-46 (5th Cir. 1991). See also, Mileham v. Simmons, 588 F.2d 1279, 1280 (9th Cir. 1979) (holding that the Ex Post Facto Clause does not provide one with a vested right in an erroneous interpretation); Stephens v. Thomas, 19 F.3d 498, 500 (10th Cir. 1994) cert. denied 513 U.S. 1002 (1994) (holding that the Ex Post Facto Clause does not prohibit the correction of a misapplied existing law which disadvantages one in reliance on its continued misapplication); and Metheny v. Hammonds, 216 F.3d 1307, 1311 (11th Cir. 2000) cert. denied 531 U.S. 1196 (2001) (holding same).

The defendant cites no authority to the contrary, and our research has uncovered none. This case falls directly into the line of cases cited above. 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. See United States v. Serafini, 233 F.3d 758, 778 (3d Cir. 2000) (stating that "community confinement" does not constitute "imprisonment"). Moreover, the defendant does not challenge the validity of the new policy, rather, she challenges its retroactive application. This change, however, was foreseeable as the previous practice was improper under Third Circuit law. Accordingly, we find that the Ex Post Facto Clause has not been violated in the instant case.

Conclusion

For the reasons set forth above, we find that the Ex Post Facto Clause has not been violated and that the defendant's motion should be denied. An appropriate order follows.

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ORDER

_____ **AND NOW**, to wit, this 31st day of January 2003, the Defendant's Motion To Stay and/or Overtum Bureau of Prisons Re-Designation Decision as Being Violative of the Ex Post Facto Clause of the United States Constitution (Doc. 24) is hereby **DENIED**.

BY THE COURT:

JUDGE JAMES M. MUNLEY
United States District Court

Filed: January 31, 2003