UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EMIL FAGIOLO,	:	CIVIL ACTION NO. 3:04-CV-0148
	:	
Petitioner,	:	(JUDGE CONABOY)
	:	
v.	:	
	:	
WARDEN SMITH,	:	
	:	
Respondent.	:	

MEMORANDUM AND ORDER

Petitioner filed this habeas corpus petition pro se on January 21, 2004, pursuant to 28 U.S.C. § 2241. Petitioner seeks "Immediate Half-way House designation and Home Detention at his ten (10%) percent date." (Doc. 1 at 1.)

Background

The following facts are not disputed. On July 19, 2002, Petitioner was sentenced in the United States District Court for the District of Maryland under Zone D of the United States Sentencing Guidelines. He is currently confined at the Federal Prison Camp in Lewisburg, Pennsylvania. Factoring good time credits, Petitioner is scheduled for release on September 22, 2004. Ten percent of his term will be remaining as of July 6, 2004. Petitioner has been approved for Community Confinement Center ("CCC") placement beginning on July 6, 2004. He has secured a place of residence and employment upon his release.

Discussion

Petitioner seeks to have the Court order his transfer to a CCC on March 22, 2004, arguing that he is entitled to CCC placement as of this date because this is when he has six months left to serve. (Doc. 1, Doc. 7.) He disputes the Federal Bureau of Prisons' ("BOP") current policy of limiting CCC placement to the last 10% of a prisoner's sentence (not to exceed six months), citing 18 U.S.C. § 3624(c) and BOP Policy Statement 7310.04 in support. (Id.)

Respondent contends that Petitioner's action should be dismissed for failure to exhaust administrative remedies. (Doc. 6 at 6-9.) Addressing the merits of Petitioner's claim, Respondent argues that the BOP's current policy of limiting CCC placement to the last 10% of a prisoner's term, not to exceed six months, is consistent with the Department of Justice's ("DOJ") interpretation of 18 U.S.C. § 3624(c). (Id. at 9-14.)

Based on Respondent's exhaustion argument, we must first decide if the case is properly before the Court.

A. EXHAUSTION OF ADMINISTRATIVE REMEDIES

We concur with Chief Judge Thomas I. Vanaskie's determination that "the prudential exhaustion of administrative remedies requirement should be waived as an exercise in futility." Serafini v. Dodrill, No. 3:CV-04-311, at 7 (M.D. Pa. Feb. 11, 2004)(interim Order)(citing Zucker v. Menifee, No. 03-CIV-10077, 2004 WL 102779, at *4 (S.D.N.Y. Jan. 21, 2004); Colton v. Ashcroft, No. Civ. A. 03-

554, 2004 WL 86430, at *8 (E.D. Ky. Jan. 15, 2004); Monahan v. Winn, 276 F. Supp. 2d 196, 205 (D. Mass. 2003); Iacaboni v. United States, 251 F. Supp. 2d 1015, 1017 n.1 (D. Mass 2003)). Addressing issues either identical or similar to those presented here, these courts have concluded that exhaustion would be futile because the BOP has adopted a clear and inflexible policy regarding its interpretation of 18 U.S.C. § 3624(c). See, e.g., Monahan, 276 F. Supp. 2d at 205. Because we agree with this reasoning, Petitioner's action is properly before this Court and we will address the merits of his petition.

B. MERITS OF PETITIONER'S ACTION

Petitioner's requested relief requires us to determine both the period of time for which the BOP may consider placing a prisoner in a CCC and whether such placement is an entitlement or discretionary. The issues presented involve the interpretation of the BOP's authority under 18 U.S.C. § 3624(c) and 18 U.S.C. § 3621, and whether the BOP's authority was in any way diminished by the Office of Legal Counsel's ("OLC") December 13, 2002, Memorandum Opinion to the United States Deputy Attorney General.

These issues have been widely and amply written on by a variety of courts around the nation, including the Middle District of Pennsylvania. See Serafini v. Dodrill, No. 3:CV-04-311 (M.D. Pa. Feb. 23, 2004); Gambino v. Gerlinski, 96 F. Supp. 2d 456 (M.D.

Pa. 2000).[1] Here we are not going to write at great length because we concur with the analyses and conclusions in Serafini and Gambino and, given Petitioner's March 22, 2004, six-month date, there is an exigency to this matter.

1. BOP's CCC Placement Policy

18 U.S.C. § 3624(c) and 18 U.S.C. § 3621(b) are the statutory provisions involved in the determination of the correctness of the BOP's current policy of limiting placement in a CCC to the last 10% of a prisoner's sentence, not to exceed six months.

Section 3624(c) provides in pertinent part:

> The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement.

18 U.S.C. § 3624(c).

Section 3621(b) addresses a convicted person's place of imprisonment and includes a general grant of authority allowing the BOP to designate the place of imprisonment:

> The Bureau of Prisons shall designate the place of a 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 . . . that the Bureau determines

[1] We attach the Serafini Memorandum and Order and the Gambino Order.

to be appropriate and suitable, considering [five enumerated considerations].

18 U.S.C. § 3621(b).

The OLC's December 13, 2002, Memorandum Opinion to the United States Deputy Attorney General opined that 18 U.S.C. § 3621 does "not give the BOP the general authority to place the offender in community confinement from the outset of his sentence or to transfer him from prison to community confinement at any time BOP chooses during the course of his sentence." (Doc. 7, Ex. C at 8.) In a footnote in the opinion, the OLC also advised that the "[t]he authority conferred under section 3624(c) to transfer a prisoner to a non-prison site is clearly limited to a period 'not to exceed six months, of the last ten per centum of the time to be served,' . . . and we see no basis for disregarding this time limitation." (Id. at 7 n.6.) The BOP subsequently announced a procedure change limiting pre-release CCC transfers governed by 18 U.S.C. § 3624(c): where previously the BOP followed a practice of placing prisoners in CCCs for the last six months of their sentences, regardless of the length of their sentences, it would now limit pre-release CCC designation to the last 10% of an inmate's prison term, not to exceed six months.[2] (Doc. 6 at 3-5.)

[2] Petitioner cites BOP Program Statement 7310.04 as support for his position that he should be transferred to a CCC on his six-month date, March 22, 2004. (Doc. 1 at 3-4.) Entitled "Community Corrections Center (CCC) Utilization and Transfer Procedures," the program statement instructs that "the Bureau is not restricted by § 3624(c) in designating a CCC for more that the 'last ten per centum

On the issue of the correctness of the BOP's current policy, we have reviewed the relevant case law and adopt the reasoning and conclusion of Chief Judge Vanaskie as set forth in Serafini and the cases upon which he relies. Serafini, No. 3:CV-04-311, at 7-9 (M.D. Pa. Feb. 23, 2004).

> Having examined the case law on both sides of this issue, I am persuaded by the rationale expressed by those courts that have invalidated the position currently being taken by the BOP, particularly the reasons expressed in Zucker, 2004 WL 102779, at *7-10, Cotton, 2004 WL 86430, at *9-10, Cato, 2003 WL 22725524, at *4-6, and Monahan, 276 F. Supp. 2d at 205-22. If a CCC placement counts against a prison term, and the authority to designate a suitable "correctional facility" includes a CCC, as has been recognized for years, then the BOP necessarily has the authority to designate a CCC for more than the last 10% of an inmate's prison term. Decisions dealing with CCC placement in a split sentence context, in which the law directs that some part of the sentence be "imprisonment," are not applicable to the situation presented here. That case law implies an intent on the part of Congress to preclude CCC placement in split sentences. But there is nothing in the statutory scheme that supports an inference that Congress did not intend to authorize CCC placement in other contexts or for more that 10% of a prison term. Had Congress intended otherwise, it would not have delegated to the BOP the authority to place an inmate in any appropriate corrections facility.

Serafini, No. 3:CV-04-311, at 8-9 (M.D. Pa. Feb. 23, 2004).

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of the term,' or more than six months, if appropriate." BOP Program Statement 7310.04 at 4 (issued December 16, 1998)(available at www.bop.gov). The statement's "CCC and Referral Guidelines" section sets out factors to be considered and provides in the first guideline that "[a]n inmate may be referred up to 180 days." Id. at 7-8.

Respondent maintains that Program Statement 7310.04 is inapplicable because it was promulgated prior to the OLC's December 2002 Memorandum. (Doc. 6 at 14.)

Having adopted this reasoning, it follows that the BOP's former practice of placing prisoners in CCCs for the last six months of their sentences, regardless of the length of their sentences, remains valid. Thus, Petitioner is entitled to consideration for CCC placement as of March 22, 2004.

2. Petitioner's Entitlement to CCC Placement and/or Home Confinement

Although the BOP has the authority to place a prisoner in a CCC for more than the final 10% of his sentence, it does not necessarily follow that a prisoner is entitled to such placement. We agree with those cases in the Middle District that have held that a prisoner is not entitled to placement in a CCC or home confinement pursuant to 18 U.S.C. § 3624(c). Serafini, No. 3:CV-04-311, at 3 (M.D. Pa. Feb. 23, 2004); Gambino v. Gerlenski, 96 F. Supp. 2d 456, 459-60 (M.D. Pa. 2000), aff'd, 216 F.3d 1075 (3d Cir. 2000)(unpublished table opinion).

On this issue, we adopt the reasoning set forth in Gambino, including the following summary:

> In Prows v. Federal Bureau of Prisons, 981 F.2d 466 (10th Cir. 1992), cert. denied, 510 U.S. 830, 114 S.Ct. 98, 126 L.Ed.2d 65 (1993), the Court of Appeals for the Tenth Circuit reasoned and concluded that
>
> > [w]hile there is mandatory (albeit qualified) language employed in the statute, it relates only to the general direction to facilitate the prisoner's post-release adjustment through establishment of some unspecified pre-release conditions. Nothing in § 3624(c) indicates any intention to encroach upon the Bureau's authority to decide where the prisoner may be confined during the pre-

release period.

Id. at 469 (citing United States v. Laughlin, 933 F.2d 786, 789 (9th Cir. 1991)). Each district court which has addressed the issue has reached the same conclusion. Lizarraga-Lopez v. U.S., 89 F. Supp. 2d 1166 (S.D. Cal. 2000)(holding that no relief is available pursuant to § 2255 based on alleged violation of § 3624(c) because it does not guarantee placement into community confinement for any federal prisoner and noting that Bureau of Prisons has been granted vast discretion to determine appropriate conditions under which prisoner shall serve his or her sentence); U.S. v. Morales-Morales, 985 F. Supp. 229, 231 (D. Puerto Rico 1997)(§ 3624(c) does not confer upon prisoners the right to seek a particular form or place of pre-release custody); U.S. v. Mizerka, 1992 WL 176162 (D. Or. July 16, 1992)(no habeas corpus relief based on an alleged violation of § 3624(c) because that section does not require the Bureau of Prisons to provide for confinement in a community corrections center prior to the end of the term of imprisonment); Flisk v. U.S. Bureau of Prisons, 1992 WL 80523 (N.D. Ill. April 10, 1992)(no relief available pursuant to § 2255 based on alleged violation of § 3624(c) because that section is not mandatory); Lyle v. Sivley, 805 F. Supp. 755 (D. Ariz. 1992)(habeas corpus relief denied because, inter alia, § 3624(c) does not create a protected liberty interest).

Gambino, 96 F. Supp. 2d at 459.

Because 18 U.S.C. § 3624(c) does not mandate placement in a CCC or home confinement, but rather expresses non-binding guidelines, Petitioner is not entitled to CCC placement or home confinement.

Conclusion

Based on the foregoing, Petitioner is not entitled to CCC placement or home confinement for any set period of time. However, he is entitled to have the BOP consider transferring him to a CCC

under the policy in place prior to the policy change stemming from the December 13, 2002, OLC Memorandum. An appropriate Order follows.

RICHARD P. CONABOY
United States District Judge

DATED: March 12, 2004

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EMIL FAGIOLO,	:CIVIL ACTION NO. 3:04-CV-0148
	:
Petitioner,	:(JUDGE CONABOY)
	:
v.	:
	:
WARDEN SMITH,	:
	:
Respondent.	:

ORDER

AND NOW, this 12th day of March 2003 for the reasons set forth in the accompanying Memorandum, it is hereby ordered that:

1. The Petition for Writ of Habeas Corpus, (Doc. 1), is **GRANTED in PART and DENIED in part;**
2. The Petition is **GRANTED** insofar as Petitioner is to be considered for release to a community confinement center as of March 22, 2004;
3. The Petition is **DENIED** in that Petitioner is not entitled to Court-ordered transfer to a community confinement center or to placement in such a center for any set period of time;
4. Within fifteen (15) days from the date of this Order, Respondent shall, in good faith, consider Petitioner for community corrections center placement in accordance with the factors taken into account by the Federal Bureau of Prisons prior to December 2002;
5. No later than April 2, 2004, Respondent shall file with this Court a written report setting forth the results of its

consideration of placement of Petitioner in a community corrections center for the remaining balance of his prison term.

6. The Clerk of Court is directed to close this case.

RICHARD P. CONABOY
United States District Judge

FILED
SCRANTON

MAR 12 2004

MARY E. D'ANDREA, CLERK
Per _____
DEPUTY CLERK

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

MICHAEL L. SERAFINI,	:	
	:	
Petitioner	:	
	:	
vs.	:	**CIVIL ACTION NO. 3:CV-04-311**
	:	**(CHIEF JUDGE VANASKIE)**
D. SCOTT DODRILL, in his	:	
Official Capacity as	:	
Warden of USP Lewisburg,	:	
	:	
Respondent	:	

MEMORANDUM

This habeas corpus proceeding under 28 U.S.C. § 2241 began on January 5, 2004, when pro se petitioner Michael L. Serafini filed in his underlying criminal cases a document entitled, "PETITION FOR HOME DETENTION AND IMMEDIATE HALF-WAY HOUSE PURSUANT TO 18 U.S.C. § 3624(c)." In this petition, Mr. Serafini essentially claimed that he was entitled to a transfer by the Federal Bureau of Prisons ("BOP") to a community corrections center ("CCC"), or half-way house, when there were six (6) months remaining on his prison term, and that he will be entitled to placement in home detention for the final ten percent of his prison term.

The undisputed facts pertinent to this claim are as follows:

- On June 6, 2002, Mr. Serafini was sentenced by this Court to a prison term of 27 months.

- On July 8, 2002, Mr. Serafini surrendered for commencement of service of his sentence.
- With credit for good conduct time, Mr. Serafini's projected release date is June 21, 2004.
- The BOP has assigned Mr. Serafini a "Prerelease Preparation Date," also known as the "Six-Month/10% Date," of April 12, 2004.
- Mr. Serafini has been approved for community corrections center placement at the Catholic Social Services facility in Scranton, Pennsylvania on April 14, 2004.
- The BOP did not consider Mr. Serafini eligible for placement in a CCC before he reached the 90% point of his effective prison term.

Because Mr. Serafini had less than six (6) months remaining on his prison term when he filed his petition, the Government was directed to respond to it on an abbreviated basis. The Government's response, filed on January 22, 2004, challenged the justiciability of the pro se petition and also asserted that the BOP decision to defer Mr. Serafini's transfer to a CCC until the 90 percent point of his sentence was an appropriate exercise of discretion to which this Court must defer.

On February 2, 2004, Mr. Serafini filed a reply to the Government's response, making clear that the basis of his claim was that the BOP had explicitly declined to exercise discretion to make a CCC placement for more than the last 10% of his prison term. He claimed that the BOP had the authority to place him in a CCC for the last six months of his term of incarceration.

The Government does not dispute the fact that it is now BOP policy that inmates with

relatively short prison terms are eligible for placement in a CCC only for the last 10% of their prison term, but not to exceed six months. The BOP policy is predicated upon a Department of Justice determination that a CCC placement prior to the 90 percent point of the prison term is beyond the authority of the BOP. In his reply submission, Mr. Serafini made clear for the first time that he was contesting the validity of the BOP policy determination that it lacked discretion to place him in a CCC for more than the remaining 10% of his prison term.

In an Order dated February 11, 2004, the Clerk of Court was directed to treat this matter as a habeas corpus proceeding under 28 U.S.C. § 2241, and the Government's challenges to the justiciability of the issue presented by Mr. Serafini were rejected.[1] As to the merits, the February 11th Order held that Mr. Serafini had no entitlement to CCC placement or home detention at any point of time during his prison sentence, citing Gambino v. Gerlinski, 96 F. Supp. 2d 456, 459-60 (M.D. Pa. 2000), aff'd, 216 F.3d 1075 (3d Cir. 2000) (unpublished table opinion). The February 11th Order also noted, however, that the dispositive question here is not whether Serafini has an entitlement to CCC placement, but whether the BOP is precluded from even considering a transfer of Mr. Serafini to a CCC for more than the final ten percent of his prison sentence. Although noting that a number of courts have presented cogent reasons why the BOP retains such discretionary authority, the February 11th Order concluded that, in light of

[1]The February 11th Order directed that the filing fee be paid within seven (7) days. Mr. Serafini complied with this directive by remitting payment on February 17, 2004.

the vagueness of the initial submission made by Mr. Serafini, the Government should be accorded an opportunity to address the merits of the dispositive question presented here. Because of the exigency of the matter, with Mr. Serafini having only about four months remaining on his prison term, the Government was required to file its response on an accelerated basis.

The Government commendably filed a timely response on February 18, 2004. In its response, the Government argues that the BOP lacks the discretion to place an inmate in a CCC for more than the lesser of six months or the remaining ten percent of the inmate's prison term. In making this argument, the Government urges that this Court follow the lead of several other District Courts that have sustained the BOP position, citing Cohn v. Federal Bureau of Prisons, No. 04 CIV 0192, 2004 WL 240570 (S.D.N.Y. Feb. 10, 2004), Adler v. Menifee, 293 F. Supp. 2d 363 (S.D.N.Y. 2003), United States v. Mikutowicz, No. Crim. A. 01-10321, 2003 WL 21857885 (D. Mass. Aug. 6, 2003), and Kennedy v. Winn, No. 03-CV-10568, 2003 U.S. Dist. LEXIS 24177 (D. Mass. July 9, 2003).

As acknowledged by the Government, and as set forth in this Court's February 11th Order, there exist a number of District Court decisions that have reached a contrary conclusion. See, e.g., Zucker v. Menifee, No. 03-CV-10077, 2004 WL 102779 (S.D.N.Y. Jan. 21, 2004); Colton v. Ashcroft, No. Civ. A. 03-554, 2004 WL 86430 (E.D. Ky. Jan. 15, 2004); Cato v. Menifee, No. 03-CV-5795, 2003 WL 22725524 (S.D.N.Y. Nov. 20, 2003); Monahan v. Winn,

276 F.Supp. 2d 196, 203 (D. Mass. 2003); Cioffoletti v. Federal Bureau of Prisons, No. 03-CV-3220, 2003 U.S. Dist. Lexis 21853 (E.D.N.Y. Nov. 6, 2003). These cases have held that the BOP has the authority to decide whether an inmate should be placed in a CCC for the last six months of the sentence, even if that period exceeds the last 10% of the sentence.

The font of statutory authority for placement of an inmate in a CCC near the end of the sentence is 18 U.S.C. § 3624(c), which, in pertinent part, provides:

> The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten percent of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement.

Although this section does not state that a CCC affords conditions that will provide a "prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community," id., the BOP recognizes that a CCC is an appropriate option under § 3624(c). It also had taken the position that it had the discretionary authority to transfer an inmate to a CCC for up to as much as the final six months of the sentence, even if the six month period exceeded the remaining ten percent of the sentence. See Monahan v. Winn, 276 F. Supp. 2d at 211 n.11. This position was memorialized in BOP Program Statement 7310.04, which stated that the BOP "is not restricted by § 3624(c) in designating a CCC for an inmate and may place an inmate in a CCC for more than the last 10 per centum of the term . . . ." (Emphasis added.)

This position was apparently based upon the BOP's interpretation of 18 U.S.C. § 3621, which delegates to the BOP the authority to designate any "available penal or correctional facility" that it determines to be appropriate and suitable as a place of imprisonment. Because a community confinement center is unquestionably a "correctional facility," see Iacoboni v. United States, 251 F.Supp. 2d 1015, 1024-26 (D. Mass. 2003), the BOP viewed its authority to designate a defendant's place of imprisonment as including a CCC. Thus, the BOP had concluded that it could transfer an inmate to a CCC for the final six months of that defendant's imprisonment, even where the six month period exceeded the last ten percent of the prison term. Indeed, the BOP routinely did so. See Cioffoletti, 2003 U.S. Dist. Lexis 21853, at *1-2 ("long observed" practice "of allowing eligible inmates to serve up to the last six months of their sentence in a community correction center regardless of the term of that sentence. . . .").

As related in the February 11th Order, the BOP abandoned this interpretation of its authority in the wake of a Memorandum Opinion issued by the Department of Justice Office of Legal Counsel ("OLC") to the United States Deputy Attorney General on December 13, 2002. The December 13, 2002 Memorandum Opinion, referred to herein as the "OLC Opinion," interpreted 18 U.S.C. § 3621(b) as precluding designation of a CCC as the place of imprisonment "at any time BOP chooses during the course of [the] sentence." (OLC Opinion at 8.) Although the OLC Opinion acknowledged that the BOP could transfer an inmate to a CCC under the authority of 18 U.S.C. § 3624(c), it could do so only for the last ten percent of the

term to be served, but not to exceed six months.

Courts that have sustained the BOP adoption of the OLC Opinion have generally focused on the language of 18 U.S.C. § 3624(c), which does indeed suggest that a prisoner be placed "under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community," only for the last ten percent of the term, and not to exceed, in any event, six months. See, e.g., Cohn, 2004 WL 240570, at *4. As to the interplay between § 3624(c) and § 3621(b), the courts affirming the BOP position have generally relied upon case law holding that a CCC is not a place of imprisonment for purposes of Section 5C1.1 of the United States Sentencing Guidelines. Id. at *5. In other words, the courts sustaining the BOP position generally take the position that a CCC cannot be a place of imprisonment under § 3621(b).

The courts finding the BOP position untenable have generally relied upon the fact that a CCC is undoubtedly a "penal or correctional facility" to which the BOP may transfer an inmate under the authority of 18 U.S.C. § 3621(b). See, e.g., Cato, 2003 WL 22725524, at *4; Monahan, 276 F. Supp. 2d at 206. This conclusion is supported by the fact that time spent in a CCC under a criminal judgment is credited against a prison sentence. See Reno v. Koray, 515 U.S. 50, 62-63 (1995). As to the cases holding that a CCC is not a place of imprisonment under § 5C1.1 of the United States Sentencing Guidelines, the courts have reasoned that the Guideline provisions particular to the type of "split sentences" authorized for offenders within

Zones C or D of the Guidelines do not undermine the general grant of authority to the BOP to designate a CCC as a place for imprisonment. E.g., Zucker, 2004 WL 102779, at *6-7. Indeed, the fact that a prisoner is entitled to credit against his sentence for time spent in a CCC during the final ten percent of the sentence undermines the assertion that a CCC is not a place of imprisonment. In any event, courts invalidating the BOP position have reasoned that "a general conferral of authority by Congress [in § 3621(b)] does trump a restriction contained in a Guideline." Zucker, 2004 WL 102779, at *7 (emphasis in original).

Having carefully examined the case law on both sides of this issue, I am persuaded by the rationale expressed by those courts that have invalidated the position currently being taken by the BOP, particularly the reasons expressed in Zucker, 2004 WL 102779, at *7-10, Cotton, 2004 WL 86430, at *9-10, Cato, 2003 WL 22725524, at *4-6, and Monahan, 276 F. Supp. 2d at 205-22. If a CCC placement counts against a prison term, and the authority to designate a suitable "correctional facility" includes a CCC, as has been recognized for years, then the BOP necessarily has the authority to designate a CCC for more than the last 10% of an inmate's prison term. Decisions dealing with CCC placement in a split sentence context, in which the law directs that some part of the sentence be "imprisonment," are not applicable to the situation presented here. That case law implies an intent on the part of Congress to preclude CCC placement in split sentences. But there is nothing in the statutory scheme that supports an inference that Congress did not intend to authorize CCC placement in other contexts or for

more than 10% of a prison term. Had Congress intended otherwise, it would not have delegated to the BOP the authority to place an inmate in any appropriate corrections facility.

In view of the time constraints, I will not elaborate further on the reasons for rejecting the new BOP policy that have been so ably and articulately expressed by the judges in the opinions cited above. Instead, I adopt and incorporate by reference the rationale of those cases. As Judge Glasser stated in Cioffoletti, 2003 U.S. Dist. Lexis 21853, at *8, "[t]o do more would be an exercise in creative re-writing and a pretense of originality."

Mr. Serafini is thus entitled to be considered for CCC placement at this time. As the Government has pointed out, however, it does not follow from the fact that the BOP has the statutory authority to place Mr. Serafini in a CCC for the remaining months of his sentence that the BOP would exercise its discretionary authority to do so. As noted above, there is no entitlement to CCC placement for any particular period of time. Accordingly, the appropriate relief here is not to direct Mr. Serafini's transfer to a CCC, but instead to direct the BOP to consider Mr. Serafini's transfer to a CCC, utilizing the factors that it considered prior to the December, 2002 policy change.

An appropriate Order follows.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

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

MICHAEL L. SERAFINI,	:	
	:	
Petitioner	:	
	:	
vs.	:	**CIVIL ACTION NO. 3:CV-04-311**
	:	**(CHIEF JUDGE VANASKIE)**
D. SCOTT DODRILL, in his	:	
Official Capacity as	:	
Warden of USP Lewisburg,	:	
	:	
Respondent	:	

ORDER

NOW, THIS 23rd DAY OF FEBRUARY, 2004, for the reasons set forth in the foregoing Memorandum, **IT IS HEREBY ORDERED THAT:**

1. The petition for a writ of habeas corpus is **GRANTED**.

2. **WITHIN FIFTEEN (15) DAYS FROM THE DATE OF THIS ORDER**, Respondent shall, in good faith, consider petitioner for community corrections center placement in accordance with the factors taken into account by the Federal Bureau of Prisons prior to December, 2002.

3. **NO LATER THAN MARCH 12, 2004**, Respondent shall file with this Court a written report setting forth the results of its consideration of placement of Mr. Serafini in a community corrections center for the remaining balance of his prison term.

4. The Clerk of Court shall mark this matter **CLOSED**.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

H

United States District Court,
M.D. Pennsylvania.

Thomas GAMBINO, Petitioner,
v.
Susan GERLINSKI, Warden, Low Security Correctional Institution--Allenwood,
Respondent.

No. 3:CV-99-2253.

April 6, 2000.

Prisoner filed a petition for writ of habeas corpus, claiming that he had a right to some reasonable period of halfway house or home confinement before his sentence expired. The District Court, Muir, J., held that statute providing a prisoner with a right,if practicable, to some reasonable period of halfway house or home confinement before his sentence expires did not create a liberty interest.

Petition denied.

West Headnotes

[1] United States Magistrates ⇨27
394k27 Most Cited Cases

When objections are filed to a report of a magistrate judge, court makes a de novo determination of those portions of the report or specified proposed findings or recommendations made by the magistrate judge to which there are objections. 28 U.S.C.A. § 636(b)(1); U.S.Dist.Ct.Rules M.D.Pa., Local Rule 72.31.

[2] Habeas Corpus ⇨452
197k452 Most Cited Cases

Necessary predicate for the granting of federal habeas relief to a petitioner is a determination by the federal court that his or her custody violates the Constitution, laws, or treaties of the United States. 28 U.S.C.A. § 2241.

[3] Constitutional Law ⇨272(2)
92k272(2) Most Cited Cases

[3] Prisons ⇨14
310k14 Most Cited Cases

Refusal to provide prisoner with a reasonable period of halfway house or home confinement before his sentence expired did not amount to a violation of defendant's due process rights; furthermore, statute providing a prisoner with a right, if practicable, to some reasonable period of halfway house or home confinement before his sentence expired merely expressed non-binding guidelines and did not create a liberty interest. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 3624(c).

[4] Constitutional Law ⇨254.1
92k254.1 Most Cited Cases

In order for a statute to confer a due process liberty interest it must be explicitly mandatory and provide for specified substantive predicates which dictate a substantive result. U.S.C.A. Const.Amend. 5.

[5] Constitutional Law ⇨252.5
92k252.5 Most Cited Cases

A statute which expresses non-binding procedural guidelines alone does not create a protectable interest under due process clause. U.S.C.A. Const.Amend. 5.

***457** Charles P. Gelso, Wilkes-Barre, PA, Peter Goldberger, Ardmore, PA, Michael Rosen, New York City, for petitioner.

Dulce Donovan, U.S. Attorney's Office, Williamsport, PA, for respondent.

ORDER

MUIR, District Judge.

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 11, 1993, Thomas Gambino was found guilty of a substantive violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), and conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d). On October 29, 1993, Gambino was sentenced to pay a $100,000 fine and serve 60 months in the custody of the Bureau of Prisons. Gambino was released on bail pending the appeal of his conviction. Gambino's appeal was not successful and on January 3, 1996, he reported to the Low Security Correctional Institution at Allenwood in White Deer, Pennsylvania. By that date Gambino had paid his fine in full. His sentence is due to expire on May 10, 2000.

On December 29, 1999, Gambino initiated this action by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. His petition is based on the claim that 18 U.S.C. § 3624(c) provides him with "a right to some 'reasonable' period of halfway house or home confinement before his sentence expires, 'if practicable.' " [FN1] (Petitioner's Reply to Respondent's Brief in Opposition to Objections to Magistrate Judge's Report and Recommendation, ***458** page 3) Gambino specifically contends that the Respondents' refusal to transfer him to a

halfway house or to home confinement for some period within the last 10% of his sentence violates both 18 U.S.C. § 3624(c) and his Fifth Amendment due process rights.

> FN1. Although Gambino's petition originally included a second claim alleging that the Respondents had reassigned him to more rigorous work in retaliation for his pursuit of relief on his first claim, he has withdrawn the second claim.

The Clerk of Court assigned this case to us on December 30, 1999, but referred it to Magistrate Judge Blewitt for preliminary consideration. On March 8, 2000, the Magistrate Judge issued a report recommending, *inter alia*, "that the portion of Gambino's petition relating to pre-release custody be remanded to the Bureau of Prisons for proper consideration of Petitioner's eligibility for home confinement." (Report and Recommendation, pg. 7)

On March 23, 2000, Gambino filed an objection to that report and recommendation. After granting Gambino's motion for expedited briefing of his objection, the matter became ripe for disposition upon the filing of Gambino's reply brief on April 4, 2000.

[1] When objections are filed to a report of a magistrate judge, we make a *de novo* determination of those portions of the report or specified proposed findings or recommendations made by the magistrate judge to which there are objections. *United States vs. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); 28 U.S.C. § 636(b)(1); M.D.Pa. Local Rule 72.3.

[2] It is well-settled that "[a] necessary predicate for the granting of federal habeas relief [to a petitioner] is a determination by the federal court that [his or her] custody violates the Constitution, laws, or treaties of the United States." *Rose vs. Hodges*, 423 U.S. 19, 21, 96 S.Ct. 175, 177, 46 L.Ed.2d 162 (1975) (citing 28 U.S.C. § 2241). We first consider whether Gambino has established that predicate via a constitutional violation.

The United States Supreme Court has

> repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests.... "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." ... Thus, there is no "constitutional or inherent" right to parole, ..., and "the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison," ... despite the undoubted impact of such credits on the freedom of inmates. Finally, in *Meachum v. Fano, supra.*, 427 U.S. [215,] 223, 96 S.Ct. [2532,] 2538, [49 L.Ed.2d 451], the transfer of a prisoner from one institution to another was found unprotected by "the Due Process Clause in and of itself," even though the change in facilities involved a significant modification in conditions of confinement, later characterized by the Court as a "grievous loss."

Hewitt vs. Helms, 459 U.S. 460, 467-68, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983) (citing *Moody v. Daggett*, 429 U.S. 78, 88, n. 9, 97 S.Ct. 274, 279, n. 9, 50 L.Ed.2d 236 (1976)). The Court in *Hewitt* summarized those decisions as holding that

> [a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight.

Id. at 468, 103 S.Ct. 864.

Title 18 U.S.C. § 3624 is entitled "Release of prisoner." Sub-section (c) of that section, entitled "Pre-release custody," provides in relevant part that

> [t]he Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable ***459** opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this sub-section may be used to place a prisoner in home confinement.

[3] The Respondents' refusal to bestow upon Gambino any benefit described in § 3624(c) falls within the scope of the Supreme Court precedent cited above. That refusal does not amount to a violation of Gambino's due process rights. *See Lyle vs. Sivley*, 805 F.Supp. 755, 760 (D.Ariz.1992).

[4][5] The only other potential predicate for awarding Gambino any habeas relief is a showing that his current custody violates the above statute. *See Rose v. Hodges, infra.* In order for a statute to confer a liberty interest it must be "explicitly mandatory" and provide for "specified substantive predicates" which dictate a substantive result. *Hewitt*, 459 U.S. at 471-472, 103 S.Ct. 864; *Tony L. v. Childers*, 71 F.3d 1182 (6th Cir.1995), *cert. denied*, 517 U.S. 1212, 116 S.Ct. 1834, 134 L.Ed.2d 938 (1996). A statute which expresses non-binding procedural guidelines alone does not create a protectable interest. *Culbert v. Young*, 834 F.2d 624, 628 (7th Cir.1987), *cert. denied*, 485 U.S. 990, 108 S.Ct. 1296, 99 L.Ed.2d 506 (1988); *E.B. v. Verniero, et al.*, 119 F.3d 1077, 1105 n. 26 (3d Cir.1997). The sole issue is whether 18 U.S.C. § 3624(c) dictates a substantive result or merely expresses non-binding guidelines.

Gambino asserts that 18 U.S.C. § 3624(c) requires the Bureau of Prisons to provide him with some amount of time, during the last ten percent of his sentence, in pre-release confinement (e.g., a halfway house or home confinement).

Our research indicates that neither the United States Supreme Court nor the Court of Appeals for the Third Circuit has addressed the issue currently before us. However, one other Court of Appeals and five District Courts have considered it.

In *Prows v. Federal Bureau of Prisons*, 981 F.2d 466 (10th Cir.1992), *cert. denied*, 510 U.S. 830, 114 S.Ct. 98, 126 L.Ed.2d 65 (1993), the Court of Appeals for the Tenth Circuit reasoned and concluded that

> [w]hile there is mandatory (albeit qualified) language employed in the statute, it relates only to the general direction to facilitate the prisoner's post-release adjustment through establishment of some unspecified pre-release conditions. Nothing in § 3624(c) indicates any intention to encroach upon the Bureau's authority to decide where the prisoner may be confined during the pre-release period.

Id. at 469 (citing *United States v. Laughlin*, 933 F.2d 786, 789 (9th Cir.1991)). Each district court which has addressed the issue has reached the same conclusion. *Lizarraga-Lopez v. U.S.*, 89 F.Supp.2d 1166 (S.D.Cal.2000) (holding that no relief is available pursuant to § 2255 based on alleged violation of § 3624(c) because it does not guarantee placement into community confinement for any federal prisoner and noting that Bureau of Prisons has been granted vast discretion to determine appropriate conditions under which prisoner shall serve his or her sentence); *U.S. v. Morales- Morales*, 985 F.Supp. 229, 231 (D.Puerto Rico 1997) (§ 3624(c) does not confer upon prisoners the right to seek a particular form or place of pre- release custody); *U.S. v. Mizerka*, 1992 WL 176162 (D.Or. July 16, 1992) (no habeas corpus relief based on an alleged violation of § 3624(c) because that section does not require the Bureau of Prisons to provide for confinement in a community corrections center prior to the end of the term of imprisonment); *Flisk v. U.S. Bureau of Prisons, et al.*, 1992 WL 80523 (N.D.Ill. April 10, 1992) (no relief available pursuant to § 2255 based on alleged violation of § 3624(c) because that section is not mandatory); *Lyle vs. Sivley*, 805 F.Supp. 755 (D.Ariz.1992) (habeas corpus relief denied because, *inter alia*, § 3624(c) does not create a protected liberty interest).

Each of those courts has decided that § 3624(c) does not create a liberty interest because it "refers to no [mandatory] procedures. It is instead a broadly worded statute setting forth a general policy to ***460** guide the prison system." *Badea v. Cox*, 931 F.2d 573, 576 (9th Cir.1991). We agree with the conclusion unanimously reached by those courts and have found no case in which a court has reached a result inconsistent with those cited.

Gambino has failed to state a claim for relief because he has not shown that his confinement is in violation of the constitution or any federal law.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Gambino's petition for writ of habeas corpus (Document 1) is denied.
2. The telephonic status conference to be held on Friday, April 7, 2000, at 4:00 p.m., is now moot and is cancelled.
3. The Clerk of Court shall forthwith transmit a copy of this order by FAX to the offices of those counsel who may be so reached, shall read the dispositive provisions to other counsel over the telephone, and shall mail a copy to each counsel.

96 F.Supp.2d 456

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