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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KERA EVANS,

Petitioner,

v.

JENKINS,

Respondent.

Case No. [18-cv-02716-SI](#)

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

Kera Evans, a federal prisoner at Federal Correctional Institution in Dublin, California, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 to challenge the determination that she is not eligible for a sentence reduction upon completion of a drug abuse treatment program. For the reasons discussed below, the petition will be denied.

**BACKGROUND**

A. Criminal Conviction and Sentence

Kera Evans pled guilty and was convicted in the United States District Court for the District of Montana in 2014 of possession with intent to distribute methamphetamine (21 U.S.C. § 841(b)(1)(A)). Docket No. 17-1 at 11.

The presentence investigation report in her criminal case stated that Evans and the driver of the pickup truck in which she was a passenger were arrested when they arrived at a motel with methamphetamine for a pre-arranged sale. The report also described the guns found in the truck:

A 9 mm pistol was located concealed in [the driver's] back waist[band]. Also inside the vehicle along the driver's side seat was a tactical shotgun which was in plain view.

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The vehicle was searched and law enforcement located a black purse which contained a plastic baggie with a white crystal substance inside, a smaller plastic baggie with a white crystal substance inside, and a glass pipe with white residue. A Ruger M77 22-250 rifle, serial number 78606869, was located on the passenger side front seat. . . .

A High Standard Sport King .22 caliber pistol, serial number 503887 was found between the center counsel [sic] and the front seat. . . . A Marlin Glenfield 60, a .22 caliber rifle, serial number 24378426, was located on the back seat of the vehicle.

Docket No. 17-1 at 51.

In a section labelled “Specific Offense Characteristic,” the presentence investigative report stated: “Pursuant to U.S.S.G. § 2D1.1(b)(1), the offense level is increased by two (2) levels as firearms were possessed during the drug transactions, listed in the Offense Conduct.” Docket No. 17-1 at 53.

Evans was sentenced to a term of 96 months in prison followed by five years of supervised release. *Id.* at 12-13. In calculating Evans’ sentence, the trial court “adopt[ed] the presentence investigation report without change.” *Id.* at 55.

B. The Residential Drug Abuse Treatment Program

The U.S. Bureau of Prisons (BOP) must “make available appropriate substance abuse treatment for each prisoner the BOP determines has a treatable condition of substance addiction or abuse.” 18 U.S.C. § 3621(b). In order to carry out this requirement, “the Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare) . . . for all eligible prisoners . . . , with priority for such treatment accorded based on an eligible prisoner's proximity to release date.” 18 U.S.C. § 3621(e)(1)(C). The BOP offers an intensive nine-month residential treatment program and incentivizes prisoners to enroll in that program by offering a possible reduction in sentence. “The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.” *See* 18 U.S.C. § 3621(e)(2)(A-B). A prisoner may be admitted into the Residential Drug Abuse Treatment Program (RDAP) regardless of her eligibility for early release under the incentivizing provision in § 3621(e)(2)(B).

1           As part of the RDAP admission process, a prisoner is considered for a sentence reduction.  
2 Docket No. 17-1 at 4-5. Various persons at the BOP determine whether the prisoner qualifies for  
3 early release by, among other things, examining information about the prisoner’s current offense.  
4 *Id.* The Designation and Sentence Computation Center (DSCC) Legal Department determines, in  
5 accordance with applicable regulations and BOP Program Statement 5162.05, whether a prisoner is  
6 precluded from receiving early release. To do so, the DSCC Legal Department reviews the  
7 prisoner’s DSCC-maintained electronic sentence computation file, which includes the Judgment and  
8 Commitment Order, Statement of Reasons, Presentence Investigation Report, and any other relevant  
9 sentencing documentation. *Id.* The DSCC also will consider whether early release consideration  
10 is precluded by prior offenses if it is not precluded by the current offense. Docket No. 17-1 at 5.

11           In deciding whether the current offense precludes early release consideration, the DSCC  
12 decides whether any of the prisoner’s current offenses satisfy the criteria in 28 C.F.R. § 550.55(b),  
13 and related BOP Program Statements 5331.02 and 5162.05. The regulation provides, in relevant  
14 part, that, “[a]s an exercise of the Director’s discretion, the following categories of inmates are not  
15 eligible for early release: . . . Inmates who have a current felony conviction for: . . . [a]n offense that  
16 involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives  
17 (including any explosive material or explosive device)” or “[a]n offense that, by its nature or  
18 conduct, presents a serious potential risk of physical force against the person or property of another.”  
19 28 C.F.R. § 550.55(b)(5)(ii-iii).

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21 C.     Evans Was Admitted To RDAP But Denied Early Release Consideration

22           Evans was admitted into the RDAP on May 10, 2016. Docket No. 17-1 at 4.

23           As part of the admission process, Irena Merk, a paralegal specialist in the Designation and  
24 Sentence Computation Center reviewed Evans’ file. *Id.* at 6. Merk found that Evans “is precluded  
25 from receiving § 3621(e) early release due to her current offense conviction for Possession with  
26 Intent to Distribute Methamphetamine, because her guideline level included a two-level specific  
27 offense characteristic (SOC) enhancement as firearms were possessed during the drug transaction.”  
28 Docket No. 17-1 at 6; *see also id.* at 51, 53. This enhancement was reflected in the sentencing

1 court's order adopting the two-level SOC enhancement that had been recommended in the  
2 presentencing report. *See id.* at 6-7, 53, 55. The DSCC Assistant General Counsel approved the  
3 offense review finding that Evans was precluded from receiving early release consideration. *See id.*  
4 at 7, 57-58.

5 The BOP's determination was that Evans was precluded from early release under 18 U.S.C.  
6 § 3621(e)(2)(B) because her current offense conduct "involved the carrying, possession, or use of a  
7 firearm or other dangerous weapon or explosives (including any explosive material or explosive  
8 device)" and "by its nature of conduct, presents a serious risk of physical force against the person  
9 or property of another." Docket No. 17-1 at 57 (citing 28 C.F.R. § 550.55(b)(5)(ii)-(iii)).

10 The BOP also looks to Program Statement 5162.05 to determine whether a current offense  
11 precludes a prisoner from early release eligibility. Program Statement 5162.05 categorizes offenses  
12 to, among other things, "assist in the implementation of various Federal Bureau of Prisons policies  
13 and programs." Docket No. 17-1 at 34. Section 4 of Program Statement 5162.05 lists offenses that,  
14 in the Director's discretion, preclude a prisoner from receiving certain BOP program benefits, "such  
15 as early release pursuant to 18 U.S.C. § 3621(e)." Docket No. 17-1 at 41. Section 4.b describes  
16 convictions with specific offense characteristic (SOC) enhancements that may or may not preclude  
17 the prisoner from receiving certain BOP program benefits. Section 4.b includes an example of a  
18 person whose SOC enhancement will preclude her from receiving certain BOP program benefits –  
19 an example that describes Evans' situation rather closely (except that she was convicted of  
20 possession with intent to distribute rather than manufacturing). Docket No. 17-1 at 43. The example  
21 explains that a person convicted under 21 U.S.C. § 841 can receive a two-level increase in his or her  
22 base offense level because of an SOC if, for example, "a dangerous weapon was possessed during  
23 commission of the offense." Docket No. 17-1 at 43.

24 This particular "Special Offense Characteristic" (possession of a dangerous weapon  
25 during the commission of a drug offense) poses a serious potential risk that force  
26 may be used against persons or property. Specifically, as noted in the U.S.  
27 Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon  
28 possession reflects the increased danger of violence when drug traffickers possess  
weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21  
U.S.C. § 841) and received a two-level enhancement for possession of a firearm has  
been convicted of an offense that will preclude the inmate from receiving certain  
Bureau program benefits.

1 Docket No. 17-1 at 43.

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3 D. Evans’ Petition For Writ Of Habeas Corpus And Response Thereto

4 Evans urges in her petition for writ of habeas corpus that the BOP’s reliance upon her  
5 sentence enhancement to determine that she was ineligible for early release consideration under 18  
6 U.S.C. § 3621(e) was “unconstitutional” because, by “ignoring the offense of conviction and looking  
7 only to sentencing factors, the BOP has attempted to transform a nonviolent offense into a crime of  
8 violence.” Docket No. 1-1 at 1. The court understands this to be a due process claim. Evans also  
9 contends that the BOP’s determination that she was precluded from early release consideration  
10 violated her right to equal protection of the laws because other prisoners purportedly received the  
11 sentence reduction even though they had been convicted of the same offense as hers. Docket No.  
12 1-1 at 2.

13 Respondent makes several arguments in response to the petition. First, Respondent argues  
14 that judicial review is not available for the BOP’s individualized decision to deny early release  
15 consideration for a particular prisoner. Second, he argues that the due process and equal protection  
16 claims are meritless. Finally, he argues that the BOP properly determined that Evans’ conviction  
17 offense precludes her eligibility for early release consideration under § 3621(e) because of the two-  
18 level enhancement Evans received.

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20 **DISCUSSION**

21 A. A Challenge To The Categorical Rule Precluding Early Release Consideration  
22 Or To The Individualized Determination Under That Categorical Rule Fails.

23 A challenge to the BOP’s categorical rule precluding prisoners from early release  
24 consideration based on a special offense characteristic is foreclosed by *Lopez v. Davis*, 531 U.S.  
25 230, 240–43 (2001), which upheld the BOP’s discretion to determine eligibility of inmates for early  
26 release under 18 U.S.C. § 3621(e)(2)(B) and to categorically exclude prisoners based on special  
27 offense characteristic enhancements. The Court explained that § 3621(e)(2)(B) categorically denied  
28 early release eligibility to inmates convicted of violent offenses *and* gave the BOP discretion to

1 impose other limitations as to which prisoners who completed the drug treatment program would be  
2 granted early release. *See Lopez*, 531 U.S. at 239-40. “When an eligible prisoner successfully  
3 completes drug treatment, the Bureau thus has the authority, but not the duty, both to alter the  
4 prisoner’s conditions of confinement and to reduce his term of imprisonment.” *Id.* at 241. The  
5 Court determined that the BOP could categorically exclude prisoners based on pre-conviction  
6 conduct and that the BOP had properly “conclud[ed] that an inmate’s prior involvement with  
7 firearms, in connection with the commission of a felony, suggests his readiness to resort to life-  
8 endangering violence and therefore appropriately determines the early release decision.” *Id.* at 244.  
9 The Court held that the BOP had reasonably exercised its discretion under 18 U.S.C. § 3621(e)(2)(B)  
10 in implementing the regulation (i.e., former 28 C.F.R. § 550.58(a)(1)(vi)(B)) that categorically  
11 precluded early release consideration for an inmate whose current offense involved the carrying,  
12 possession, or use of a firearm or other dangerous weapon. *Id.* at 232. (Former 28 C.F.R. § 550.58  
13 has been redesignated and is now 28 C.F.R. § 550.55. *See* 69 Fed. Reg. 39887–02 (2004).)

14 Contrary to Evans’ argument, the BOP has not attempted to transform a nonviolent offense  
15 into a crime of violence. Rather, the BOP has determined that a category of inmates (i.e., those  
16 whose offenses involved possession of a firearm, as evidenced by the imposition of the SOC  
17 enhancement) who are not excluded by the text of § 3621(e)(2)(B) from consideration for early  
18 release are precluded from consideration for early release in the exercise of the BOP’s discretion.  
19 *Lopez* upheld that exercise of discretion. Evans’ reliance on *Ward v. Booker*, 202 F.3d 1249 (10th  
20 Cir. 2000), for a contrary view is misplaced because that case is no longer good law: it was vacated  
21 and remanded in light of *Lopez*. *See Booker v. Ward*, 531 U.S. 1108 (2001).

22 In sum, the court rejects Evans’ argument that the BOP could not preclude from early release  
23 consideration all of those inmates whose offense involved the possession of a firearm. The next  
24 question is whether there is any merit to Evans’ challenge the BOP’s determination in her particular  
25 case that she was precluded from early release consideration due to her SOC enhancement.

26 The Administrative Procedure Act (APA) provides a cause of action for persons “suffering  
27 legal wrong because of agency action, or adversely affected or aggrieved by agency action within  
28 the meaning of a relevant statute.” 5 U.S.C. § 702. But that cause of action does not exist if the

1 relevant statute precludes judicial review or agency action is committed to agency discretion by law.  
2 *Id.* at § 701(a).

3 The BOP’s discretionary determinations under 18 U.S.C. § 3621 are an instance where  
4 judicial review under the APA is precluded by statute. Congress has specified that the BOP’s  
5 discretionary determinations under 18 U.S.C. § 3621 are not subject to judicial review under the  
6 APA. *See* 18 U.S.C. § 3625.

7 There is no ambiguity in the meaning of 18 U.S.C. § 3625. The plain language of  
8 this statute specifies that the judicial review provisions of the APA, 5 U.S.C. §§ 701–  
9 706, do not apply to “any determination, decision, or order” made pursuant to 18  
10 U.S.C. §§ 3621–3624. The BOP has authority to manage inmate drug treatment  
11 programs, including RDAP, by virtue of 18 U.S.C. § 3621. To find that prisoners  
12 can bring habeas petitions under 28 U.S.C. § 2241 to challenge the BOP’s  
13 discretionary determinations made pursuant to 18 U.S.C. § 3621 would be  
14 inconsistent with the language of 18 U.S.C. § 3625. *Accordingly, any substantive  
15 decision by the BOP to admit a particular prisoner into RDAP, or to grant or deny  
16 a sentence reduction for completion of the program, is not reviewable by the district  
17 court.*

18 *Reeb v. Thomas*, 636 F.3d 1224, 1227 (9th Cir. 2011) (emphasis added); *see, e.g., id.* (BOP’s  
19 decision to expel petitioner from RDAP was not reviewable by the district court).

20 The district court generally “lack[s] jurisdiction to review the BOP’s individualized  
21 determinations made pursuant to 18 U.S.C. § 3621.” *Reeb*, 636 F.3d at 1228. In other words, this  
22 court cannot consider or grant relief on a claim that the BOP did not properly apply the regulations  
23 and program statement when it determined that Evans was precluded from being considered for  
24 early release even if she completed the RDAP. The foregoing thus would be the end of the analysis  
25 but for the fact that Evans asserts that the BOP’s decision violated her rights to due process and  
26 equal protection. Judicial review remains available for allegations that the BOP’s action violated  
27 the United States Constitution., *see Reeb*, 636 F.3d at 1228, so the court next considers the  
28 constitutional claims.

29 **B. Due Process Claim**

30 The first step in a due process analysis is determining whether *any* process is due. To obtain  
31 a constitutionally protectible right, “a person clearly must have more than an abstract need or desire  
32 for it” and instead must have “a legitimate claim of entitlement to it.” *Greenholtz v. Inmates of*

1 *Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). “There is no constitutional or inherent  
2 right of a convicted person to be conditionally released before the expiration of a valid sentence.”  
3 *Id.*

4         The problem for Evans is that there is no federal law that confers a protected right to early  
5 release under § 3621(e). As one court explained, the “hallmark of a statute that has not created a  
6 liberty interest is discretion. Where the statute grants the prison administration discretion, the  
7 government has conferred no right on the inmate.” *Richardson v. Joslin*, 501 F.3d 415, 419 (5th  
8 Cir. 2007). Section 3621(e)(2)(B) plainly grants the BOP discretion in decisions regarding early  
9 release consideration, as it states that the period of custody after successful completion of RDAP  
10 “*may be reduced*” by up to one year. This statutory language shows the discretionary nature of the  
11 BOP’s decisions regarding early release consideration. *See Richardson*, 501 F.3d at 420 (“The grant  
12 of discretion to the BOP in § 3621(e)(2)(B) indicates that no entitlement and, hence, no liberty  
13 interest, was created.”); *see generally Lopez*, 531 U.S. at 241-42 (discussing BOP’s exercise of  
14 discretion under § 3621(e)(2)(B)). The Ninth Circuit rejected a claim of the sort Evans appears to  
15 make when it concluded that a prisoner challenging his removal from RDAP “cannot prevail on his  
16 due process claim because inmates do not have a protected liberty interest in either RDAP  
17 participation or in the associated discretionary early release benefit.” *Reeb*, 636 F.3d at 1228 n.4.  
18 Evans’ due process claim fails because she had no protected liberty interest in obtaining early release  
19 upon completion of RDAP.

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21 C.     Equal Protection Claim

22         The Fourteenth Amendment’s Equal Protection Clause provides that no state shall deny to  
23 any person “the equal protection of the laws.” U.S. Const. amend. XIV. The equal protection  
24 component of the Due Process Clause of the Fifth Amendment imposes a similar obligation on the  
25 federal government. *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563,  
26 570-71 (9th Cir. 1990). The Equal Protection Clause ensures that “all persons similarly situated  
27 should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The  
28 Constitution does not, however, require things that are different to be treated the same. *Plyler v.*



1 *Doe*, 457 U.S. 202, 216 (1982).

2 Evans claims that she has been treated differently from other prisoners who were allowed  
3 early release even though their crimes were similar to hers. Docket No. 1-1 at 2 (“other inmates  
4 have received the reduction and have the same offense. I am entitled to equal treatment under the  
5 law”). She does not provide any evidence to prove this assertion, as she would need to do to have  
6 any hope of showing an equal protection violation. Similarly situated people would be inmates who  
7 had (a) convictions under 21 U.S.C. § 841 for manufacturing or possession for sale or with intent to  
8 distribute, *and* (b) SOC enhancements for firearm possession. A prisoner who merely had a  
9 conviction under § 841 but not the SOC enhancement is not similarly situated to a prisoner who has  
10 both circumstances.

11 Evans cites to several cases that supposedly support her equal protection claim, but none  
12 persuade the court that she has a meritorious claim. The main problem with the cases she cites is  
13 that they are based on an outdated version of the regulations and/or have been overturned. She cites  
14 *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008), in which the Ninth Circuit held that the  
15 2000 version of 28 C.F.R. § 550.58 was invalid under the APA due to the BOP’s failure to articulate  
16 its rationale in the administrative record. This problem no longer exists, as the Ninth Circuit has  
17 since recognized in *Peck v. Thomas*, 697 F.3d 767, 770-72 (9th Cir. 2012) (BOP did not violate the  
18 APA when, in 2009, it exercised its discretion under § 3621(e)(2)(B) by implementing a regulation  
19 (28 C.F.R. § 550.55(b)) that categorically excludes certain classes of inmates from eligibility for  
20 § 3621(e)’s early release incentive). *Arrington* does not support Evans’ equal protection claim.  
21 Next, Evans cites *Kilpatrick v. Houston*, 36 F. Supp. 2d 1328 (N.D. Fla. 1999), but that case is not  
22 helpful because it is no longer good law as it was vacated by *Houston v. Kilpatrick*, 531 U.S. 1108  
23 (2011), in light of *Lopez*. The other two cases Evans cites suffer the same infirmity: they are based  
24 regulations that pre-date the 2009 regulation that *Peck* held was not invalid under the APA and that  
25 was applied to Evans: *Bohner v. Daniels*, 243 F. Supp. 2d 1171 (D. Or. 2003), addressed the 1997  
26 version of the regulation and program statement, and *Byrd v. Hasty*, 142 F.3d 1395 (11th Cir. 1998)  
27 addressed a pre-1997 version of the regulation and program statement.

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Evans fails to show that she was treated differently from similarly situated prisoners when she was determined to be precluded from early release consideration due to her SOC enhancement. Her equal protection claim fails.

**CONCLUSION**

The petition for a writ of habeas corpus is DENIED. The clerk shall close the file.

**IT IS SO ORDERED.**

Dated: August 9, 2019



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SUSAN ILLSTON  
United States District Judge