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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CHARLES SPEARS,  Petitioner,  v.  H.A. RIOS, JR., Warden,  Respondent.	}	1:09-cv-01253 MJS HC  ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS  [Doc. 16]
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Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to 28 U.S.C. § 636(c)(1), Both parties have consented to the jurisdiction of the United States Magistrate Judge. Local Rule 305(b).

**I. FACTUAL BACKGROUND**

Petitioner was convicted in the Northern District of Illinois to a term of 102 months for violations of 18 U.S.C. § 922(g), Felon in Possession of a Firearm, and 18 U.S.C. § 2 and § 922(a)(1)(A), Aiding and Abetting the Dealing in Firearms without a License. He was committed to the custody of the Bureau of Prisons (BOP) as of August 30, 2004. Petitioner’s projected release date was July 10, 2011.

On February 3, 2009, Petitioner requested a transfer to a residential re-entry center

1 (RRC) for the remainder of his sentence. His request was denied, but the matter was again  
2 discussed at ensuing program review meetings in January 2010, and June, 2010,  
3 respectively. On June 30, 2010, Petitioner was recommended for a 150-180 day placement  
4 in the RCC program.<sup>1</sup> (Answer, Ex. 1, Attachment 3, ECF No. 16.)

5 After Petitioner was denied placement in February, 2009, he initiated and completed  
6 the administrative remedy process. Respondent does not assert that Petitioner failed to  
7 exhaust his administrative remedies.

8 On July 20, 2009, Petitioner filed the instant federal habeas petition. Petitioner appears  
9 to make two arguments in his federal habeas petition. First, Petitioner argues that the BOP  
10 policy with respect to analyzing an inmate's request to transfer to an RRC before Petitioner's  
11 sentence has twelve months remaining is in conflict with the Second Chance Act. (See Pet.  
12 at p. 4-6.) Second, Petitioner argues Respondent failed to consider the individual factors in  
13 determining Petitioner's eligibility for the RCC program. (See id. at p. 5.) Respondent filed an  
14 answer to the petition on August 13, 2010.

15 **II. APPLICABLE STANDARD OF HABEAS CORPUS REVIEW**

16 Writ of habeas corpus relief extends to a person in custody under the authority of the  
17 United States. See 28 U.S.C. § 2241. Relief is available if a federal prisoner can show he is  
18 "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.  
19 § 2241(c)(3). Petitioner's claims are proper under 28 U.S.C. § 2241 and not 28 U.S.C. § 2255  
20 because they concern the manner, location, or conditions of the execution of petitioner's  
21 sentence and not the fact of petitioner's conviction or sentence. See Tucker v. Carlson, 925  
22 F.2d 330, 331 (9th Cir. 1991) (stating that a challenge to the execution of a sentence is  
23 "maintainable only in a petition for habeas corpus filed pursuant to 28 U.S.C. § 2241"). Venue  
24 is proper in this District as Petitioner is challenging the execution of his sentence at Taft  
25 Correctional Institution, which is within the Eastern District of California.

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26  
27 <sup>1</sup>The Court notes that the subsequent decision to recommend placement in the RCC program may cause  
28 the present petition to be moot. However, as described herein, this Court does not have authority to review such  
determinations and so need not address whether the present claim is moot.

1 **III. STATUTORY AND REGULATORY BACKGROUND**

2 In Sacora v Thomas, 628 F.3d 1059 (9th Cir. 2010), petition for cert filed, (U.S. May 16,  
3 2011) (No. 10-10580), the Ninth Circuit laid out the relevant statutory background applicable  
4 in this case:

5 Two statutory provisions govern the BOP's authority to place inmates in  
6 its custody in RRCs: 18 U.S.C. §§ 3621(b) and 3624(c). Section 3621 governs  
7 the authority of the BOP to designate a prisoner's placement in general while he  
8 or she is in the BOP's custody. In the context RRCs, this section governs the  
9 BOP's authority in cases where a prisoner who has more than a year left to  
10 serve of his or her prison sentence requests a transfer to such a facility. [FN 2]

11 [FN 2] That governing statute provides:

12 The Bureau of Prisons shall designate the place of the prisoner's imprisonment.  
13 The Bureau may designate any available penal or correctional facility that meets  
14 minimum standards of health and habitability established by the Bureau . . . that  
15 the Bureau determines to be appropriate and suitable, considering —

- 16 (1) the resources of the facility contemplated;
- 17 (2) the nature and circumstances of the offense;
- 18 (3) the history and characteristics of the prisoner;
- 19 (4) any statement by the court that imposed the sentence -
  - 20 (A) concerning the purposes for which the sentence to  
21 imprisonment was determined to be warranted; or
  - 22 (B) recommending a type of penal or correctional facility as  
23 appropriate; and
- 24 (5) any pertinent policy statement issued by the Sentencing Commission  
25 pursuant to section 994(a)(2) of title 28.

26 .... The Bureau may at any time, having regard for the same matters, direct the  
27 transfer of a prisoner from one penal correctional facility to another . . . .  
28 18 U.S.C. § 3621(b).

18 Sacora, 628 F.3d at 1061-62.

19 On April 14, 2008, five days after the [Second Chance Act] went into  
20 effect, BOP officials issued a memorandum (the "April 14 Memorandum")  
21 explaining the changes to the law and setting forth guidance to BOP staff about  
22 how to administer the law. On October 21, 2008 . . . the BOP issued the  
23 regulations required by the statute . . . .

24 Substantively, the regulations: (1) define the terms "community  
25 confinement" and "home detention"; (2) provide that inmates may be designated  
26 to community confinement as a condition of prerelease custody for a period not  
27 to exceed 12 months and to home detention for a period not to exceed the  
28 shorter often percent of the inmate's term of imprisonment or six months; and  
29 (3) provide that inmates will be considered for community confinement in an  
30 manner consistent with § 3621(b) on an individual basis, with placements of  
31 sufficient duration to provide the greatest likelihood of successful reintegration  
32 into the community.

27 Sacora, 628 F.3d at 1063 (footnote omitted).

28 On November 14, 2008, BOP officials issued another memorandum (the  
"November 14 Memorandum") [\*9] which provides guidance to BOP staff when

1 considering inmate requests for transfers to RRCs before the final 12 months of  
2 the inmate's sentence. It notes that "[i]nmates are legally eligible to be placed  
3 in an RRC at any time during their prison sentence[s]," and that "[s]taff cannot,  
4 therefore, automatically deny an inmate's request for transfer to a RRC."  
5 Instead, "inmate requests for RRC placement must receive individualized  
6 consideration." The memorandum further notes that "[t]elling an inmate that  
7 he/she is ineligible for RRC placement is the same as automatically denying the  
8 inmate from even being considered for such placement, and is not in accord with  
9 Bureau policy." However, as in the April 14 Memorandum, the November 14  
10 Memorandum advises BOP staff that "a RRC placement beyond six months  
11 should only occur when there are unusual or extraordinary circumstances  
12 justifying such placement, and the Regional Director concurs."

13 Id. at 1064.

#### 14 **IV. ANALYSIS OF PETITIONER'S CLAIMS**

##### 15 **A. Does BOP Policy Violate the Second Chance Act?**

16 First, Petitioner appears to challenge the BOP's policy regarding transfers of prisoners  
17 to RRCs prior to the final twelve months of a prisoner's sentence. Petitioner contends that  
18 Respondent's interpretation of the Second Chance Act conflicts with the individualized factors  
19 set forth under 18 U.S.C. § 3621(b). For the reasons discussed below, this argument is without  
20 merit.

21 In Sacora, the Ninth Circuit specifically analyzed the current BOP policy with respect  
22 to inmates requesting a transfer to a RRC prior to their final twelve months of imprisonment.  
23 The Court specifically found that the BOP's policy did not violate the Second Chance Act by  
24 explaining that:

25 The . . . policy set forth in the November 14 Memorandum is consistent  
26 with § 3621(b) . . . Petitioners argue, however, that the policy as set forth in the  
27 November 14, Memorandum is contrary to our decision in Rodriguez v. Smith,  
28 541 F.3d 1180 (9th Cir. 2008). We disagree.

29 In Rodriguez, we held that the prior version of the regulations codified at  
30 28 C.F.R. §§ 570.20 and 570.21 was invalid, because it "categorically exclude[d]  
31 inmates from RRC eligibility without considering the mandatory factors  
32 articulated in § 3621(b)." 541 F.3d at 1187. No such problem exists here.  
33 Although the November 14 Memorandum does set forth a presumption that  
34 RRC placements of longer than six months should occur only "when there are  
35 unusual or extraordinary circumstances justifying such placement[ ] and the  
36 Regional Director concurs," the Memorandum also admonishes BOP staff that  
37 they "cannot . . . automatically deny an inmate's request for transfer to a RRC"  
38 because "[i]nmates are legally eligible to be placed in an RRC at any time during  
39 their prison sentence[s]." The memorandum also reminds the BOP staff that  
40 they "must individually consider the request, just as they would any other request  
41 for lower security transfer." Further, the memorandum reminds the staff that  
42 when they review an inmate's transfer request, they should review the five

1 factors set forth in 18 U.S.C. § 3621(b) that, we noted in Rodriguez, are  
2 "mandatory." Rodriguez, 541 F.3d at 1187. Accordingly, we conclude that the  
3 BOP's policy as set forth in the November 14 Memorandum does not violate the  
4 SCA.  
5 Sacora, 628 F.3d at 1068. For the reasons outlined in Sacora, Petitioner's challenge to the  
6 BOP's current policy is without merit. The policy does not violate the Second Chance Act, and  
7 Petitioner's claim is denied.

8 **B. The Court Lacks Jurisdiction to Consider Individualized Determinations**  
9 **Regarding RCC Placement**

10 Petitioner asserts that BOP's denial of his transfer request was arbitrary and capricious  
11 under 5 U.S.C. § 706(2) (A) of the Administrative Procedure Act (APA). However, this Court  
12 lacks jurisdiction to hear Petitioner's claim.

13 The APA provides a cause of action for persons suffering a legal wrong because of  
14 adverse agency action, and agency actions can be held unlawful when those actions are  
15 arbitrary, capricious, or an abuse of discretion. 5 U.S.C. §§ 702, 706(2) (A); Reeb v. Thomas,  
16 636 F.3d 1224, 1226 (9th Cir. 2011).

17 The Ninth Circuit recently determined that 18 U.S.C. § 3625 precludes judicial review  
18 under the APA of certain individualized determinations by the BOP. Reeb, 636 F.3d at 1226-  
19 27. In Reeb, the petitioner challenged the BOP's decision to expel him from an intensive drug  
20 treatment program for federal inmates know as the Residential Drug Abuse Program (RDAP).  
21 As the Reeb court discussed, the BOP has broad statutory discretion over the entire RDAP  
22 program under 18 U.S.C. § 3621(e), and inmates who successfully complete RDAP are  
23 eligible for a up to a one year sentence reduction. Id. at 1225. The petitioner in Reeb  
24 contended the BOP lacked a rational basis for expelling him from RDAP under § 706(2)(A) of  
25 the APA. Id. at 1227-28.

26 The Reeb court concluded that it lacked jurisdiction to hear the claim, holding that 18  
27 U.S.C. § 3625 unambiguously specified that judicial review under the APA was precluded.  
28 Section 3625 states that the APA does not apply to decisions relating to imprisonment  
governed by U.S.C. § 3621. Specifically, the court stated:

To find that prisoners can bring habeas petitions under 28 U.S.C. § 2241  
to challenge the BOP's discretionary determinations made pursuant to 18 U.S.C.  
§ 3621 would be inconsistent with the language of 18 U.S.C. § 3625.  
Accordingly, any substantive decision by the BOP to admit a particular prisoner

1 into RDAP, or to grant or deny a sentence reduction for completion of the  
2 program, is not reviewable by the district court. The BOP's substantive decisions  
3 to remove particular inmates from the RDAP program are likewise not subject  
4 to judicial review.  
5 Reeb, 636 F.3d at 1227.

6 Reeb is also instructive with regard to determinations to the RCC. Like the RDAP  
7 program, the BOP administers under § 3621(e), the BOP in this case has the sole authority  
8 to make RRC placement determinations under § 3621(b). And, like the RDAP determination  
9 in Reeb, the BOP's decision to deny Petitioner's RRC transfer request in this case is a  
10 substantive, discretionary determination by the BOP. Therefore, like the RDAP decisions in  
11 Reeb, RRC placement decisions are properly left to the BOP's discretion.

12 Accordingly, the BOP's substantive, discretionary RRC decision adverse to Petitioner  
13 is not reviewable in the district court pursuant to § 706(2)(A) of the APA. Reeb, 636 F.3d at  
14 1227; see also Binford v. Thomas, 2011 U.S. Dist. LEXIS 50242 (D. Or. May 10, 2011). Thus,  
15 this Court lacks jurisdiction to review an individualized determination regarding Petitioner's  
16 RCC placement. As this Court lacks jurisdiction to review Respondent's determination,  
17 Petitioner is not entitled to habeas relief and the claim is denied.

18 **V. ORDER**

19 Accordingly, IT IS HEREBY ORDERED:

- 20 1) The petition for a writ of habeas corpus is DENIED;
- 21 2) The Clerk of Court is DIRECTED to enter judgment and close the case; and
- 22 3) A certificate of appealability is not required in this case. Forde v. U.S. Parole  
23 Comm'n, 114 F.3d 879 (9th Cir.1997).

24  
25 IT IS SO ORDERED.

26 Dated: September 10, 2011

27 /s/ Michael J. Seng  
28 UNITED STATES MAGISTRATE JUDGE