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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

9 LONDON BRITT,

10 Petitioner,

11 v.

12 BRUCE PLUMLEY,

13 Respondent.

Case No. 1:18-cv-00386-EPG-HC

ORDER DENYING RESPONDENT'S  
MOTION TO DISMISS, DENYING  
PETITION FOR WRIT OF HABEAS  
CORPUS, AND DIRECTING THE CLERK  
OF COURT TO CLOSE CASE

(ECF No. 14)

14  
15 Petitioner Landon Britt is a federal prisoner proceeding *pro se* with a petition for writ of  
16 habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner asserts that the Federal Bureau of  
17 Prison's categorical exclusion of 21 U.S.C. § 846 offenders with firearm enhancements from  
18 early release consideration after completing the Residential Drug Abuse Treatment Program  
19 exceeds its statutory authority under 18 U.S.C. § 3621 and is arbitrary and capricious, in  
20 violation of 5 U.S.C. § 706(2)(A).

21 For the reasons discussed herein, the Court denies Respondent's motion to dismiss and  
22 denies the petition for writ of habeas corpus.

23 **I.**

24 **BACKGROUND**

25 Petitioner is currently incarcerated at the Federal Correctional Institution in Mendota,  
26 California. (ECF No. 20 at 1).<sup>1</sup> Petitioner pleaded guilty to one count of conspiracy to import,  
27 manufacture, distribute, possess with intent to distribute anabolic steroids, marijuana, oxycodone

28 <sup>1</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

1 and hydrocodone, in violation of 21 U.S.C. § 846, and one count of international money  
2 laundering conspiracy, in violation of 18 U.S.C. § 1956(a)(2)(A) and (h). (ECF No. 20-1 at 2;  
3 ECF No. 18 at 3). The sentencing court’s guideline range determination included a two-level  
4 enhancement pursuant to § 2D1.1(b)(1) of the United States Sentencing Guidelines (“USSG”)  
5 for possession of a firearm.<sup>2</sup> (ECF No. 18 at 3). Petitioner is currently serving two concurrent  
6 fifty-seven-month terms of imprisonment.<sup>3</sup> (ECF No. 20-1 at 9–10).

7 On July 19, 2016, an initial offense review found Petitioner to be precluded from early  
8 release due to his current convictions for conspiracy and international money laundering  
9 pursuant to 28 C.F.R. § 550.55(b)(5)(ii)–(iii) and (b)(6). The initial offense review finding was  
10 approved on August 9, 2016. (ECF No. 20 at 5, 7; ECF No. 20-1 at 52–53).

11 On March 22, 2018, Petitioner filed the instant petition for writ of habeas corpus. (ECF  
12 No. 1). On June 8, 2018, Respondent filed a motion to dismiss, or in the alternative, response to  
13 the petition. (ECF No. 14). On July 23, 2018, Petitioner filed an opposition. (ECF No. 21). The  
14 parties have consented to the jurisdiction of a United States magistrate judge to conduct all  
15 proceedings in this case pursuant to 28 U.S.C. § 636(c). (ECF Nos. 5, 7).

## 16 II.

### 17 DISCUSSION

#### 18 A. Residential Drug Abuse Treatment Program (“RDAP”)

19 In 1990, Congress directed the Federal Bureau of Prisons (“BOP” or “Bureau”) to “make  
20 available appropriate substance abuse treatment for each prisoner the Bureau determines has a  
21 treatable condition of substance addiction or abuse.” 18 U.S.C. § 3621(b); Peck v. Thomas, 697  
22 F.3d 767, 770 (9th Cir. 2012). The BOP offers a Residential Drug Abuse Treatment Program  
23 (“RDAP”), which is an intensive drug treatment program for federal inmates with verifiable  
24 substance use disorders. 28 C.F.R. § 550.53(b). As an incentive for successful completion of

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26 <sup>2</sup> The application of the USSG § 2D1.1(b)(1) sentencing enhancement appears to have been incorporated as a part of  
27 Petitioner’s plea agreement. (ECF No. 1 at 7). Petitioner’s presentence report, which was adopted by the sentencing  
28 court without change, noted that when Petitioner was arrested at his residence, law enforcement found five loaded  
firearms and one unloaded firearm in various rooms in addition to ammunition and firearm magazines. (ECF No. 18  
at 2; ECF No. 19 at 2).

<sup>3</sup> Petitioner was originally sentenced to two concurrent seventy-month terms of imprisonment. (ECF No. 20-1 at 2).

1 RDAP, Congress has determined that “[t]he period a prisoner convicted of a nonviolent offense  
2 remains in custody . . . may be reduced by the Bureau of Prisons, but such reduction may not be  
3 more than one year from the term the prisoner must otherwise serve.” 18 U.S.C. § 3621(e)(2)(B).

4 “Under the authority delegated by this statute, the BOP has implemented a regulation that  
5 categorically excludes certain classes of inmates from eligibility for § 3621(e)’s early release  
6 incentive.” Peck, 697 F.3d at 770. The exclusions pertinent to the instant petition include:

7 (5) Inmates who have a current felony conviction for:

8 (i) An offense that has as an element, the actual, attempted, or  
9 threatened use of physical force against the person or property  
of another;

10 (ii) An offense that involved the carrying, possession, or use of  
11 a firearm or other dangerous weapon or explosives (including  
any explosive material or explosive device);

12 (iii) An offense that, by its nature or conduct, presents a serious  
13 potential risk of physical force against the person or property of  
another; or

14 (iv) An offense that, by its nature or conduct, involves sexual  
15 abuse offenses committed upon minors;

16 (6) Inmates who have been convicted of an attempt, conspiracy, or  
17 solicitation to commit an underlying offense listed in paragraph  
(b)(4) and/or (b)(5) of this section;

18 28 C.F.R. § 550.55(b) (2016). Here, the BOP found Petitioner to be precluded from early release  
19 due to his current convictions for conspiracy and international money laundering pursuant to 28  
20 C.F.R. § 550.55(b)(5)(ii)–(iii) and (b)(6). (ECF No. 20 at 5, 7; ECF No. 20-1 at 52–53).

21 “The history of the BOP’s attempts to implement these categorical exclusions is  
22 lengthy . . . . Initially, the regulation defined the term ‘nonviolent offense’ in § 3621(e) with  
23 reference to the statutory definition of ‘crime of violence’ found in 18 U.S.C. § 924(c)(3).” Peck,  
24 697 F.3d at 770 (citing 28 C.F.R. § 550.58 (1995)). There was a circuit split with respect to the  
25 validity of the regulation, and so “[i]n 1997, the BOP published an interim rule, effective  
26 immediately, that categorically excluded from eligibility for early release inmates with current  
27 convictions for felony offenses ‘involv[ing] the carrying, possession, or use of a firearm.’” Peck,  
28 697 F.3d at 770 (quoting 28 C.F.R. § 550.58(a)(1)(vi) (1998)). The Supreme Court held that the

1 1997 rule was a permissible exercise of the BOP’s discretion under § 3621(e)(2)(B). Lopez v.  
2 Davis, 531 U.S. 230, 233 (2001). The Supreme Court in Lopez declined to address whether “the  
3 Bureau violated the notice and comment requirements of the Administrative Procedure Act when  
4 it published the 1997 regulation.” Id. at 244 n.6.

5 The 1997 interim rule was finalized in 2000 without change. The Ninth Circuit “held that  
6 the 2000 rule, insofar as it categorically excluded inmates convicted of firearm-possession  
7 offenses, was arbitrary and capricious under § 706(2)(A) of the APA [Administrative Procedure  
8 Act] because the agency failed to give a reasoned basis for its action.” Peck, 697 F.3d at 770  
9 (citing Arrington v. Daniels, 516 F.3d 1106, 1113–14 (9th Cir. 2008)). The BOP subsequently  
10 enacted identical provisions in a 2009 rule, which the Ninth Circuit held did not violate the APA.  
11 Peck, 697 F.3d at 776.

12 In 2016, the BOP amended 28 C.F.R. § 550.55(b)(6). The 2016 amendments did not  
13 include changes to the relevant provisions of 28 C.F.R. § 550.55(b)(5)(ii)–(iii). As Petitioner’s  
14 early release determination occurred after the 2016 amendments became effective, the Court will  
15 address the regulations in place at that time.

#### 16 **B. Jurisdiction Under 28 U.S.C. § 2241**

17 Petitioner asserts that the BOP’s categorical exclusion of 21 U.S.C. § 846 offenders from  
18 early release consideration after completing RDAP is arbitrary and capricious, in violation of  
19 § 706(2)(A) of the APA. “The APA provides a cause of action for persons ‘suffering legal wrong  
20 because of agency action, or adversely affected or aggrieved by agency action within the  
21 meaning of a relevant statute,’ but withdraws that cause of action to the extent that the relevant  
22 statute ‘preclude[s] judicial review’ or the ‘agency action is committed to agency discretion by  
23 law.’” Reeb v. Thomas, 636 F.3d 1224, 1226 (9th Cir. 2011) (quoting 5 U.S.C. §§ 702, 701(a)).  
24 Relying on 18 U.S.C. § 3625,<sup>4</sup> Respondent argues that this Court lacks subject matter jurisdiction  
25 to entertain a challenge to the BOP’s discretionary determination about whether to grant or deny  
26 a sentence reduction under 18 U.S.C. § 3621(e). (ECF No. 14 at 7).

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28 <sup>4</sup> “The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.” 18 U.S.C. § 3625.

1 With respect to the applicability of the judicial review provisions of the APA to the  
2 BOP's RDAP determinations, the Ninth Circuit has held:

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

18 Reeb, 636 F.3d at 1227. Although “federal courts lack jurisdiction to review the BOP's  
19 *individualized* RDAP determinations made pursuant to 18 U.S.C. § 3621,” the Ninth Circuit has  
20 held that “judicial review remains available for allegations that BOP action is contrary to  
21 established federal law, violates the United States Constitution, or exceeds its statutory  
22 authority.” Reeb, 636 F.3d at 1228 (emphasis added); accord Rodriguez v. Copenhaver, 823 F.3d  
23 1238, 1242 (9th Cir. 2016) (citing Close v. Thomas, 653 F.3d 970, 973–74 (9th Cir. 2011)).  
24 Therefore, “a *categorical* challenge to the BOP's interpretation of its own regulation . . . is not  
25 foreclosed from review.” Abbott v. Fed. Bureau of Prisons, 771 F.3d 512, 514 (9th Cir. 2014)  
26 (emphasis added).

27 In the opposition to the motion to dismiss, Petitioner emphasizes that he is not  
28 challenging the BOP's individualized determination to deny Petitioner early release.  
Accordingly, as Petitioner is only challenging the BOP's categorical exclusion of 21 U.S.C.  
§ 846 offenders with firearms enhancements from early release consideration after completing  
RDAP, Respondent's motion to dismiss is denied.

### 25 C. Merits Analysis

26 Petitioner argues that the BOP had no reasonable basis to categorically exclude § 846  
27 offenders with firearm enhancements from early release consideration and thus exceeded its  
28 statutory authority under 18 U.S.C. § 3621(e) and violated 5 U.S.C. § 706(2)(A). Petitioner

1 requests the Court to “invalidate [28 C.F.R.] § 550.55(b)(6) and bar the preclusive effects of  
2 § 550.55(b)(5)(ii) and (iii) as applied to § 846 offenders.” (ECF No. 1 at 7).

3 1. BOP’s Statutory Authority Under 18 U.S.C. § 3621(e)

4 The Supreme Court has held that the BOP’s implementation of a 1997 regulation that  
5 “categorically denie[d] early release to prisoners whose current offense is a felony attended by  
6 ‘the carrying, possession, or use of a firearm’ . . . [wa]s a permissible exercise of the Bureau’s  
7 discretion under 18 U.S.C. § 3621(e)(2)(B).” Lopez, 531 U.S. at 233 (quoting 28 C.F.R.  
8 § 550.58(a)(1)(vi) (1998)). The Supreme Court framed the issue as follows:

9 Beyond instructing that the Bureau has *discretion* to reduce the  
10 period of imprisonment for a nonviolent offender who successfully  
11 completes drug treatment, *Congress has not identified any further*  
12 *circumstance in which the Bureau either must grant the reduction,*  
13 *or is forbidden to do so.* In this familiar situation, where Congress  
14 has enacted a law that does not answer “the precise question at  
15 issue,” all we must decide is whether the Bureau, the agency  
16 empowered to administer the early release program, has filled the  
17 statutory gap “in a way that is reasonable in light of the  
18 legislature’s revealed design.”

15 Lopez, 531 U.S. at 242 (emphasis added) (quoting NationsBank of N.C., N.A. v. Variable  
16 Annuity Life Ins. Co., 513 U.S. 251, 257 (1995)).

17 Lopez involved a petitioner convicted of possession with intent to distribute  
18 methamphetamine, a nonviolent offense. However, Lopez’s sentence was enhanced by two  
19 levels pursuant to USSG § 2D1.1(b)(1) upon a finding that Lopez possessed a firearm in  
20 connection with the underlying offense. Lopez, 531 U.S. at 236. The Supreme Court held that the  
21 BOP “may categorically exclude prisoners based on their preconviction conduct,” and that “[t]he  
22 Bureau reasonably concluded that an inmate’s prior involvement with firearms, in connection  
23 with the commission of a felony, suggests his readiness to resort to life-endangering violence and  
24 therefore appropriately determines the early release decision.” Lopez, 531 U.S. at 244.

25 Petitioner’s attempts to distinguish Lopez and to differentiate 21 U.S.C. § 846  
26 convictions and 28 C.F.R. § 550.55(b)(6) from 21 U.S.C. § 841 convictions and 28 C.F.R.  
27 § 550.55(b)(5)(ii)–(iii) are not persuasive. For § 846 offenses, a two-level firearm enhancement  
28 pursuant to USSG § 2D1.1(b)(1) is proper even when the defendant did not personally use or

1 possess a firearm so long as the use or possession of the firearm by a coconspirator “was  
2 reasonably foreseeable and furthered jointly undertaken criminal activity.” United States v. Ortiz,  
3 362 F.3d 1274, 1278 (9th Cir. 2004); United States v. Diaz-Lozano, 674 F. App’x 702, 706 (9th  
4 Cir. 2017). Applying the analytical framework of Lopez, it is reasonable to conclude that “an  
5 inmate’s prior involvement with firearms, in connection with the commission of a felony,”  
6 Lopez, 531 U.S. at 244, encompasses the use or possession of the firearm by a coconspirator that  
7 “was reasonably foreseeable and furthered jointly undertaken criminal activity,” Ortiz, 362 F.3d  
8 at 1278, and that such involvement “suggests his readiness to resort to life-endangering violence  
9 and therefore appropriately determines the early release decision,” Lopez, 531 U.S. at 244.

10 Based on Lopez, the Court finds that the BOP did not exceed its statutory authority by  
11 excluding 21 U.S.C. § 846 offenders with firearm enhancements from early release consideration  
12 under 18 U.S.C. § 3621(e). Accordingly, Petitioner is not entitled to habeas relief on this ground.

## 13 2. Administrative Procedure Act

14 Section 706 of the APA provides in pertinent part that a “reviewing court shall hold  
15 unlawful and set aside agency actions, findings, and conclusions found to be arbitrary,  
16 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.  
17 § 706(2)(A). “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a  
18 court is not to substitute its judgment for that of the agency.” Motor Vehicle Mfrs. Ass’n v. State  
19 Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). “Agency action is presumed to be valid and  
20 must be upheld if a reasonable basis exists for the agency decision.” Peck, 697 F.3d at 772  
21 (citing Sacora v. Thomas, 628 F.3d 1059, 1068 (9th Cir. 2010)). “A reasonable basis exists  
22 where the agency ‘considered the relevant factors and articulated a rational connection between  
23 the facts found and the choices made.’” Arrington v. Daniels, 516 F.3d 1106, 1112 (9th Cir.  
24 2008) (quoting Ranchers Cattlemen Action Legal Fund v. U.S. Dep’t of Agric., 415 F.3d 1078,  
25 1093 (9th Cir. 2005)).

26 In Peck, the Ninth Circuit held that the BOP did not violate the APA in enacting the 2009  
27 version of 28 C.F.R. § 550.55(b)(5)(ii). Peck, 697 F.3d at 772–74. The Ninth Circuit found the  
28 following explanations to be sufficient to satisfy the APA:

1 The Bureau clearly stated that, “in the correctional experience of  
2 the Bureau, the offense conduct of both armed offenders and  
3 certain recidivists suggests that they pose a particular risk to the  
4 public.” 74 Fed. Reg. at 1895. The Bureau further explained that it  
5 was exercising its discretion because “[t]here is a significant  
6 potential for violence from criminals who carry, possess or use  
7 firearms” and that “in committing such offenses, these inmates  
8 displayed a readiness to endanger another's life.” *Id.*

9 Peck, 697 F.3d at 773.

10 In enacting the 2016 version of 28 C.F.R. § 550.55(b)(5) without change, the BOP  
11 provided the same explanation as when it addressed the “issue in the final rule published on  
12 January 14, 2009 (74 FR 1892), in which [the BOP] stated the following”:

13 Under 18 U.S.C. 3621(e), the Bureau has the discretion to  
14 determine eligibility for early release consideration (See Lopez v.  
15 Davis, 531 U.S. 230 (2001)). The Director of the Bureau exercises  
16 discretion to deny early release eligibility to inmates who have a  
17 felony conviction for the offenses listed in § 550.55(b)(5)(i)-  
18 (iv) because commission of such offenses illustrates a readiness to  
19 endanger the public. Denial of early release to all inmates  
20 convicted of these offenses rationally reflects the view that, in  
21 committing such offenses, these inmates displayed a readiness to  
22 endanger another’s life.

23 The Director of the Bureau, in his discretion, chooses to preclude  
24 from early release consideration inmates convicted of offenses  
25 involving carrying, possession or use of a firearm and offenses that  
26 present a serious risk of physical force against person or property,  
27 as described in § 550.55(b)(5)(ii) and (iii). Further, in the  
28 correctional experience of the Bureau, the offense conduct of both  
armed offenders and certain recidivists suggests that they pose a  
particular risk to the public. There is a significant potential for  
violence from criminals who carry, possess or use firearms.

As the Supreme Court noted in Lopez v. Davis, “denial of early  
release to all inmates who possessed a firearm in connection with  
their current offense rationally reflects the view that such inmates  
displayed a readiness to endanger another’s life.” *Id.* at 240. The  
Bureau adopts this reasoning. The Bureau recognizes that there is a  
significant potential for violence from criminals who carry, possess  
or use firearms while engaged in felonious activity. Thus, in the  
interest of public safety, these inmates should not be released  
months in advance of completing their sentences.

It is important to note that these inmates are not precluded from  
participating in the drug abuse treatment program. However, these  
inmates are not eligible for early release consideration because the  
specified elements of these offenses pose a significant threat of  
dangerousness or violent behavior to the public. This threat  
presents a potential safety risk to the public if inmates who have



1 demonstrated such behavior are released to the community  
2 prematurely. Also, early release would undermine the seriousness  
3 of these offenses as reflected by the length of the sentence which  
4 the court deemed appropriate to impose.

5 Drug Abuse Treatment Program, 81 Fed. Reg. 24484, 24487 (Apr. 26, 2016).

6 With respect to § 550.55(b)(6), the BOP explained:

7 Also, in § 550.55(b), the Director exercises his discretion to  
8 disallow particular categories of inmates from eligibility for early  
9 release, including, in (6), those who were convicted of an attempt,  
10 conspiracy, or other offense which involved an underlying offense  
11 listed in paragraph (b)(4) and/or (b)(5) of § 550.55. We narrowed  
12 the language of § 550.55(b)(6) to preclude only those inmates  
13 whose prior conviction involved direct knowledge of the  
14 underlying criminal activity and who either participated in or  
15 directed the underlying criminal activity. This change tailors the  
16 regulation to the congressional intent to exclude from early release  
17 consideration only those inmates who have been convicted of a  
18 violent offense. Furthermore, the changed language expands early  
19 release benefits to more inmates.

20 81 Fed. Reg. at 24486. Implicit in the BOP's reasoning regarding § 550.55(b)(6) is the  
21 determination that inmates who were convicted of an attempt, conspiracy, or solicitation of  
22 underlying criminal activity that involved the carrying, possession, or use of firearms "rationally  
23 reflects the view that, in committing such offenses, these inmates displayed a readiness to  
24 endanger another's life." 81 Fed. Reg. at 24487. "Although the Bureau could have proffered a  
25 fuller explanation, the APA does not demand more." Peck, 697 F.3d at 773. As "a reasonable  
26 basis exists for the agency decision," id. at 772, the BOP did not violate the APA in enacting 28  
27 C.F.R. § 550.55(b)(6).

### 28 3. Conclusion

Based on the foregoing, the Court finds the BOP's categorical exclusion of 21 U.S.C.  
§ 846 offenders with firearm enhancements from early release consideration after completing  
RDAP does not exceed the BOP's statutory authority under 18 U.S.C. § 3621 and does not  
violate § 706(2)(A) of the Administrative Procedure Act. See also McQuown v. Ives, No. 3:16-  
cv-01927-KI, 2017 WL 359181 (D. Or. Jan. 24, 2017) (rejecting similar challenge to BOP's  
exclusion of 21 U.S.C. § 846 offenders with firearms enhancements from early release).  
Accordingly, Petitioner is not entitled to habeas relief.

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**III.**  
**ORDER**

Based on the foregoing, the Court HEREBY ORDERS that:

- 1. Respondent’s motion to dismiss (ECF No. 14) is DENIED;
- 2. The petition for writ of habeas corpus is DENIED; and
- 3. The Clerk of Court is DIRECTED to CLOSE the case.

IT IS SO ORDERED.

Dated: December 19, 2018

/s/ Eric P. Gray  
UNITED STATES MAGISTRATE JUDGE