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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HANNAH MARIE HENDRICKS,
Petitioner,
v.
WYLEY Z JENKINS,
Respondent.

Case No. [19-cv-04427-EMC](#)

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

I. INTRODUCTION

Hannah Marie Hendricks, formerly a federal prisoner at the Federal Correctional Institution in Dublin, California, and now a prisoner at the Federal Correctional Institution in Victorville, 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.

II. BACKGROUND

A. Criminal Conviction and Sentence

Ms. Hendricks pled guilty and was convicted in the United States District Court for the District of Idaho of possession with intent to distribute methamphetamine, cocaine, and heroin (see 21 U.S.C. § 841(a)(1)). Docket No. 11-1 at 2.

The presentence investigation report in her criminal case described the criminal episode on which her conviction is based: Ms. Hendricks was driving a vehicle that had been rented by passenger Jerod Leon Nielson when she was stopped by an Idaho State Police officer on May 6,

1 2016. Docket No. 110 at 5 in United States v. Hendricks, D. Idaho Case No. 16-cr-146-BLW.
2 The officer contacted the rental company, which requested that the vehicle be impounded. Id.
3 During the stop, Ms. Hendricks walked into a nearby business and was observed disposing of a
4 brown paper sack in the trash and leaving a shoulder bag in the bathroom. Id. “The officer
5 located syringes, including one that had been used which had white flaky residue, and marijuana
6 roaches in the brown paper bag. The shoulder bag had marijuana residue in one of the pockets.”
7 Id. Ms. Hendricks “ultimately told the officer that Jerod Leon Nielson told her to throw the paper
8 bag away and to take the should [sic] bag to the bathroom and take a green box out of the
9 backpack and leave it in the bathroom. The officer located the box in the bathroom and
10 determined that it contained Methamphetamine, cocaine, heroin, marijuana, digital scales and
11 plastic baggies.” Id. The officer also found an “AK47 rifle with five magazines” inside the
12 vehicle. Id. Mr. Neilson was charged with unlawful possession of a firearm. Id. at 3.

13 In a section labelled “Specific Offense Characteristic,” the presentence investigation report
14 for Ms. Hendricks stated: “A dangerous weapon was possessed, the offense level is increased by 2
15 levels. Section 2D1.1(b)(1)” of the U.S. Sentencing Guidelines. Id. at 7.

16 The sentencing court imposed on Ms. Hendricks a 60-month term of imprisonment, to be
17 followed by a three-year term of supervised release. See Docket No. 11-1 at 2-4. In its Statement
18 of Reasons for the sentence imposed, the sentencing court “adopt[ed] the presentence investigation
19 report without change.” Docket No. 120 at 1 in United States v. Hendricks, D. Idaho Case No. 16-
20 cr-146 BLW.

21 B. The Residential Drug Abuse Treatment Program

22 The U.S. Bureau of Prisons (BOP) must “make available appropriate substance abuse
23 treatment for each prisoner the [BOP] determines has a treatable condition of substance addiction
24 or abuse.” 18 U.S.C. § 3621(b). To carry out this requirement, “the Bureau of Prisons shall,
25 subject to the availability of appropriations, provide residential substance abuse treatment (and
26 make arrangements for appropriate aftercare) . . . for all eligible prisoners . . . , with priority for
27 such treatment accorded based on an eligible prisoner’s proximity to release date.” 18 U.S.C.
28 § 3621(e)(1)(C). The BOP offers an intensive nine-month residential treatment program and

1 incentivizes prisoners to enroll in that program by offering a possible reduction in sentence.
2 Docket No. 11 at 2. “The period a prisoner convicted of a nonviolent offense remains in custody
3 after successfully completing a treatment program may be reduced by the Bureau of Prisons, but
4 such reduction may not be more than one year from the term the prisoner must otherwise serve.”
5 See 18 U.S.C. § 3621(e)(2)(B). A prisoner may be admitted into the Residential Drug Abuse
6 Treatment Program (RDAP) regardless of her eligibility for early release under the incentivizing
7 provision in § 3621(e)(2)(B).

8 As part of the RDAP admission process, a prisoner is considered for a sentence reduction.
9 Docket No. 11 at 3. Various persons at the BOP determine whether the prisoner qualifies for early
10 release by, among other things, examining information about the prisoner’s current offense. *Id.* at
11 3-4. The Designation and Sentence Computation Center (DSCC) Legal Department determines,
12 in accordance with applicable regulations and BOP Program Statements 5331.02 and 5162.05,
13 whether a prisoner is precluded from receiving early release. Docket No. 11 at 3. To do so, the
14 DSCC Legal Department reviews the prisoner’s DSCC-maintained electronic sentence
15 computation file, which includes the Judgment and Commitment Order, Statement of Reasons,
16 Presentence Investigation Report, and any other relevant sentencing documentation. *Id.* The
17 DSCC also will consider whether early release consideration is precluded by prior offenses if it is
18 not precluded by the current offense. *Id.* at 3-4.

19 In deciding whether the current offense precludes early release consideration, the DSCC
20 decides whether any of the prisoner’s current offenses satisfy the criteria in 28 C.F.R. § 550.55(b),
21 and related BOP Program Statements 5331.02 and 5162.05.

22 The regulation used by the BOP to decide whether the current offense precludes early release
23 consideration provides, in relevant part, that, “[a]s an exercise of the Director's discretion, the
24 following categories of inmates are not eligible for early release: . . . Inmates who have a current
25 felony conviction for: . . . [a]n offense that involved the carrying, possession, or use of a firearm or
26 other dangerous weapon or explosives (including any explosive material or explosive device)” or
27 “[a]n offense that, by its nature or conduct, presents a serious potential risk of physical force against
28 the person or property of another.” 28 C.F.R. § 550.55(b)(5)(ii-iii).

1 The Program Statement 5162.05 that the BOP looks at to decide whether the current
2 offense precludes a prisoner from early release consideration categorizes offenses to, among other
3 things, “assist in the implementation of various Federal Bureau of Prisons policies and programs.”
4 Docket No. 11-1 at 25. Section 4 of Program Statement 5162.05 lists offenses that, in the BOP
5 Director’s discretion, preclude a prisoner from receiving certain BOP program benefits, “such as
6 early release pursuant to 18 U.S.C. § 3621(e).” Docket No. 11-1 at 32. Section 4.b describes
7 convictions with specific offense characteristic (SOC) enhancements that may preclude the
8 prisoner from receiving certain BOP program benefits. Docket No. 11-1 at 34. Section 4.b
9 includes an example of a person whose SOC enhancement will preclude her from receiving certain
10 BOP program benefits – an example that describes Ms. Hendricks’ situation rather closely (except
11 that she was convicted of possession with intent to distribute rather than manufacturing). Docket
12 No. 11-1 at 34. The example explains that a person convicted under 21 U.S.C. § 841 can receive a
13 two-level increase in his or her base offense level because of an SOC if, for example, “a dangerous
14 weapon was possessed during commission of the offense.” Docket No. 11-1 at 34.

15 This particular “Specific Offense Characteristic” (possession of a
16 dangerous weapon during the commission of a drug offense) poses a
17 serious potential risk that force may be used against persons or
18 property. Specifically, as noted in the U.S. Sentencing Guidelines §
19 2D1.1., application note 3, the enhancement for weapon possession
20 reflects the increased danger of violence when drug traffickers
21 possess weapons. Accordingly, an inmate who was convicted of
22 manufacturing drugs, (21 U.S.C. § 841) and received a two-level
23 enhancement for possession of a firearm has been convicted of an
24 offense that will preclude the inmate from receiving certain Bureau
25 program benefits.

26 Docket No. 11-1 at 34. (The BOP also looks to Program Statement 5331.02 to determine whether
27 early release is precluded; neither party indicates that that program statement applied to the facts
28 of this case.)

29 C. Ms. Hendricks Was Admitted To RDAP But Denied Early Release Consideration

30 Ms. Hendricks completed RDAP on June 29, 2019. Docket No. 1 at 8.

31 As part of Ms. Hendricks’ admission process into RDAP, Lori Cruz, a paralegal specialist
32 in the BOP’s DSCC reviewed Ms. Hendricks’ file. Docket No. 11 at 5-6. Ms. Cruz found that
33 Ms. Hendricks is “precluded from receiving § 3621(e) early release due to her current offense

1 conviction for Possession with Intent to Distribute Methamphetamine, Cocaine and Heroin.” Id.
2 at 5. Applying 28 C.F.R. § 550.55(b)(5)(ii-iii), Ms. Cruz determined that Ms. Hendricks was
3 precluded from early release consideration because her offense “‘involved the carrying,
4 possession, or use of a firearm or other dangerous weapon or explosives,’ that ‘by its nature or
5 conduct, presents a serious potential risk of physical force against the person or property of
6 another.’” Docket No. 11 at 5 (quoting 28 C.F.R. § 550.55(b)(5)(ii-iii)). Ms. Cruz also applied
7 section 4.b of Program Statement 5162.05, and determined that Ms. Hendricks was precluded
8 from early release consideration because the presentence investigation report recommended a two-
9 level specific offense characteristic (SOC) increase due to the possession of a firearm in the
10 criminal episode and the sentencing court adopted the presentence investigation report without
11 change, thereby affirming and adopting the recommended enhancement for possession of a
12 firearm. Docket No. 11 at 5. The DSCC Assistant General Counsel approved the determination
13 by Ms. Cruz that Ms. Hendricks was precluded from early release consideration. See Docket No.
14 11-1 at 42-43.

15 In sum, the BOP’s determination was that Ms. Hendricks was precluded from early release
16 consideration under 18 U.S.C. § 3621(e)(2)(B) because her current offense conduct “involved the
17 carrying, possession, or use of a firearm” and “by its nature of conduct, presents a serious risk of
18 physical force against the person or property of another.” Docket No. 11-1 at 42-43 (citing 28
19 C.F.R. § 550.55(b)(5)(ii)-(iii)). The current offense information that supported the decision was
20 that Ms. Hendricks “was assessed a 2-pt. SOC enhancement for possession of a firearm” and the
21 sentencing court had adopted the SOC in its statement of reasons for the sentence. Id.

22 D. Ms. Hendricks’ Petition For Writ Of Habeas Corpus And Response Thereto

23 In her petition for writ of habeas corpus, Ms. Hendricks contends that the Bureau of
24 Prisons (“BOP”) improperly relied upon the firearm possession enhancement to determine that she
25 was ineligible for a sentence reduction under 18 U.S.C. § 3621(e) upon the completion of the
26 RDAP. She also alleges that the BOP failed to set forth a valid rationale for its categorical
27 exclusion of persons with firearm enhancements from the sentencing benefits of 18 U.S.C. §
28 3621(e)(2), and that this entitles her to relief under 5 U.S.C. § 706, the Administrative Procedure

1 Act. She also argues that a “crime of violence” does not include unlawful possession of a firearm.

2 Respondent makes several arguments in response to the petition. First, Respondent argues
3 that judicial review is not available for the BOP’s individualized decision to deny early release
4 consideration for a particular prisoner. Second, he argues that any due process claim is meritless.
5 Finally, he argues that the BOP properly determined that Ms. Hendricks’ conviction offense
6 precludes her eligibility for early release consideration under § 3621(e) because of the two-level
7 increase for the Specific Offense Characteristic due to the involvement of a firearm during the
8 crime.

9 **III. DISCUSSION**

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

12 A challenge to the BOP’s categorical rule precluding prisoners from early release
13 consideration based on a specific offense characteristic is foreclosed by *Lopez v. Davis*, 531 U.S.
14 230, 240–43 (2001), which upheld the BOP’s discretion to determine eligibility of inmates for
15 early release under 18 U.S.C. § 3621(e)(2)(B) and to categorically exclude prisoners based on
16 specific offense characteristic enhancements. The Court explained that § 3621(e)(2)(B)
17 categorically denies early release eligibility to inmates convicted of violent offenses and gives the
18 BOP discretion to impose other limitations on which prisoners who complete the drug treatment
19 program will be granted early release. See *Lopez*, 531 U.S. at 239-40. “When an eligible prisoner
20 successfully completes drug treatment, the Bureau thus has the authority, but not the duty, both to
21 alter the prisoner’s conditions of confinement and to reduce his term of imprisonment.” *Id.* at 241.
22 The Supreme Court determined that the BOP could categorically exclude prisoners based on pre-
23 conviction conduct and that the BOP properly had “conclud[ed] that an inmate’s prior
24 involvement with firearms, in connection with the commission of a felony, suggests his readiness
25 to resort to life-endangering violence and therefore appropriately determines the early release
26 decision.” *Id.* at 244. The Court held that the BOP had reasonably exercised its discretion under
27 18 U.S.C. § 3621(e)(2)(B) in implementing the regulation (i.e., former 28 C.F.R. §
28 550.58(a)(1)(vi)(B)) that categorically precluded early release consideration for an inmate whose

1 current offense involved the carrying, possession, or use of a firearm or other dangerous weapon.
2 Id. at 232. The particular regulation addressed in Lopez, former 28 C.F.R. § 550.58, has been
3 redesignated and is now 28 C.F.R. § 550.55. See 69 Fed. Reg. 39887–02 (2004).

4 Contrary to Ms. Hendricks’ argument in her petition, the BOP has not determined that her
5 offense was a crime of violence or that her codefendant’s conviction for possession of a firearm
6 was a crime of violence.¹ Rather, the BOP has determined that she was in a category of inmates
7 (i.e., those whose offenses involved possession of a firearm, as evidenced by the imposition of the
8 SOC enhancement) who are not excluded by the text of § 3621(e)(2)(B) from consideration for
9 early release but are nonetheless precluded from consideration for early release in the exercise of
10 the BOP’s discretion. Lopez upheld that exercise of discretion.

11 In sum, the BOP had the discretion to preclude from early release consideration those
12 inmates whose drug offenses under 18 U.S.C. § 841 involved the possession of a firearm. Here,
13 the BOP exercised that discretion to determine that Ms. Hendricks was precluded from early
14 release. The next question is whether there is any merit to Ms. Hendricks’ challenge the BOP’s
15 determination in her particular case that she was precluded from early release consideration due to
16 her SOC enhancement.

17 The Administrative Procedure Act (APA) provides a cause of action for persons “suffering
18 legal wrong because of agency action, or adversely affected or aggrieved by agency action within
19 the meaning of a relevant statute.” 5 U.S.C. § 702. But that cause of action does not exist if the
20 relevant statute precludes judicial review or agency action is committed to agency discretion by
21 law. Id. at § 701(a).

22 The BOP’s discretionary determinations under 18 U.S.C. § 3621 are an instance where
23 judicial review under the APA is precluded by statute. In 18 U.S.C. § 3625, Congress specified

24 _____
25 ¹ Ms. Hendricks’ argument regarding crimes of violence appears to be that her offense was not one
26 of the offenses listed in Section 3.a of the Program Statement 5162.05. Section 3.a has a long list
27 of offenses that are categorized as “crimes of violence,” the conviction of which will make the
28 inmate categorically ineligible for early release under 18 U.S.C. § 3621(e). But BOP officials did
not rely on Section 3.a; rather, they relied on Section 4.b of that same Program Statement, which
pertains to drug offenses under 18 U.S.C. § 841 with the involvement of a firearm. In other
words, Ms. Hendricks’ argument fails because it is directed at a provision that was not applied to
her.

1 that the BOP’s discretionary determinations under 18 U.S.C. § 3621 are not subject to judicial
2 review under the APA.

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 to
14 grant or deny a sentence reduction for completion of the program, is
15 not reviewable by the district court.

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

18 The district court generally “lack[s] jurisdiction to review the BOP’s individualized
19 determinations made pursuant to 18 U.S.C. § 3621.” *Reeb*, 636 F.3d at 1228. This Court
20 therefore cannot consider or grant relief on a claim that the BOP did not properly apply the
21 regulations and program statement when it determined that Ms. Hendricks was precluded from
22 being considered for early release even if she completed the RDAP. Judicial review does,
23 however, “remain[] available for allegations that BOP action is contrary to established federal law,
24 violates the United States Constitution or exceeds the Bureau’s statutory authority.” *Id.* (footnotes
25 omitted). Those exceptions do not apply here.

26 Ms. Hendricks contends that the BOP’s “promulgation of the final rule was arbitrary and
27 capricious because it failed to articulate a rationale for its categorical exclusion of a class of
28 nonviolent offenders from eligibility for early release.” Docket No. 1 at 8. This argument fails to
persuade because the Ninth Circuit has upheld the validity of the 2009 version of the regulation at
issue, 28 C.F.R. § 550.55(b). See *Peck v. Thomas*, 697 F.3d 767 (9th Cir. 2012). In *Peck*, the
petitioners contended that 28 C.F.R. § 550.55 was invalid. Noting “that every other circuit court
to consider the issue has held either the current or prior version of this regulation to be valid under
the APA,” the Ninth Circuit upheld the district court’s finding that, “in enacting the categorical
exclusions at issue in this case, the agency offered a public safety rationale in the administrative

1 record.”² *Id.* at 771-72; see also *Gray v. Feather*, 540 F. App’x 665, 666 (9th Cir. 2013) (“Gray’s
2 claim is foreclosed by our decision in *Peck v. Thomas*, in which we upheld the challenged rule [28
3 C.F.R. § 550.55(b)(5)(ii) (2009)] as procedurally valid under Section 706 of the Administrative
4 Procedure Act”). Ms. Hendricks has not shown that the BOP acted contrary to established law or

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6 ² When enacting 28 C.F.R. § 550.55 in 2009, the BOP provided this public-safety rationale:

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

17 The Director of the Bureau, in his discretion, chooses to preclude
18 from early release consideration inmates convicted of offenses
19 involving carrying, possession or use of a firearm and offenses that
20 present a serious risk of physical force against person or property, as
21 described in § 550.55(b)(5)(ii) and (iii). Further, in the correctional
22 experience of the Bureau, the offense conduct of both armed
23 offenders and certain recidivists suggests that they pose a particular
24 risk to the public. There is a significant potential for violence from
25 criminals who carry, possess or use firearms. As the Supreme Court
26 noted in *Lopez v. Davis*, “denial of early release to all inmates who
27 possessed a firearm in connection with their current offense
28 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
demonstrated such behavior are released to the community
prematurely. Also, early release would undermine the seriousness
of these offenses as reflected by the length of the sentence which the
court deemed appropriate to impose.

74 Fed. Reg. 1892, 1895 (Jan. 14, 2009). The BOP provided the same explanation when it
enacted the 2016 version of 28 C.F.R. § 550.55(b)(5). 81 Fed. Reg. 24484, 24487 (Apr. 26,
2016).

1 exceeded its statutory authority in applying the regulation to preclude Ms. Hendricks from early
2 release eligibility.

3 B. No Due Process Violation Established

4 Finally, Ms. Hendricks has not alleged a violation of her constitutional rights. But even if
5 the Court were to liberally construe her allegations to include a claim for a due process violation,
6 the claim would fail. The first step in a due process analysis is determining whether any process is
7 due. To obtain a constitutionally protectible right, “a person clearly must have more than an
8 abstract need or desire for it” and instead must have “a legitimate claim of entitlement to it.”
9 *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). “There is no
10 constitutional or inherent right of a convicted person to be conditionally released before the
11 expiration of a valid sentence.” *Id.*

12 The problem for Ms. Hendricks is that there is no federal law that confers a protected right
13 to early release under § 3621(e). As one court explained, the “hallmark of a statute that has not
14 created a liberty interest is discretion. Where the statute grants the prison administration
15 discretion, the government has conferred no right on the inmate.” *Richardson v. Joslin*, 501 F.3d
16 415, 419 (5th Cir. 2007). Section 3621(e)(2)(B) plainly grants the BOP discretion in decisions
17 regarding early release consideration, as it states that the period of custody after successful
18 completion of RDAP “*may be reduced*” by up to one year. This statutory language shows the
19 discretionary nature of the BOP’s decisions regarding early release consideration. See
20 *Richardson*, 501 F.3d at 420 (“The grant of discretion to the BOP in § 3621(e)(2)(B) indicates that
21 no entitlement and, hence, no liberty interest, was created.”); see generally *Lopez*, 531 U.S. at 241-
22 42 (discussing BOP’s exercise of discretion under § 3621(e)(2)(B)). The Ninth Circuit also found
23 no basis for a due process claim when it concluded that “inmates do not have a protected liberty
24 interest in either RDAP participation or in the associated discretionary early release benefit.”
25 *Reeb*, 636 F.3d at 1228 n.4 (rejecting challenge to prisoner’s removal from RDAP). Ms.
26 Hendricks’ assumed due process claim fails because she had no protected liberty interest in
27 obtaining early release upon completion of RDAP.

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IV. CONCLUSION

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

IT IS SO ORDERED.

Dated: September 9, 2020



EDWARD M. CHEN
United States District Judge