

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 CORINA CUNNINGHAM,

No. C 09-4950 CW (PR)

5 Petitioner,

6 v.

7 RANDY TEWS, Warden,

ORDER DENYING
PETITION FOR WRIT OF
HABEAS CORPUS;
DENYING CERTIFICATE
OF APPEALABILITY

8 Respondent.
9 _____/

10 Petitioner Corina Cunningham brings this action seeking a writ
11 of habeas corpus under 28 U.S.C. § 2241. In opposing the petition,
12 Respondent Randy Tews¹ argues, among other things, that it should
13 be denied because Petitioner has not exhausted her administrative
14 remedies. Petitioner has not filed a traverse, although she was
15 provided with the opportunity to do so. Having considered the
16 arguments raised in the petition and the answer thereto, the Court
17 denies the petition.

18 BACKGROUND

19 Petitioner is serving a seventy-two month sentence for
20 conspiracy to distribute methamphetamine and possession with intent
21 to distribute five grams or more of methamphetamine. She is
22 incarcerated at the satellite Federal Prison Camp at Camp Parks
23 (SCP) in Dublin, California, where Respondent is warden. Her
24 projected release date is July 30, 2013.

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26 _____
27 ¹In accordance with Rule 2(a) of the Rules Governing § 2254
28 Proceedings and Rule 25(d)(1) of the Federal Rules of Civil
Procedure, the Court substitutes Randy Tews as Respondent because
he is now Petitioner's custodian.

1 In the instant petition, Petitioner claims the Bureau of
2 Prisons (BOP) has failed to apply its regulations properly to
3 designate her placement in a Residential Re-entry Center (RRC).
4 Specifically, she argues that, even though federal regulations
5 require that the BOP consider inmates for twelve months of
6 community confinement in an RRC prior to release, BOP policy
7 provides otherwise. Consequently, she asks the Court to order the
8 BOP to exercise its discretion to place her in an RRC for twelve
9 months prior to six months of home confinement. She concedes that
10 she has not exhausted her administrative remedies through the BOP's
11 administrative appeals process concerning this issue, but maintains
12 that BOP staff have told inmates at SCP that all requests
13 concerning RRC placement will be denied categorically.

14 DISCUSSION

15 The Ninth Circuit requires, "as a prudential matter, that
16 habeas petitioners exhaust available judicial and administrative
17 remedies before seeking relief under § 2241." Castro-Cortez v.
18 INS, 239 F.3d 1037, 1047 (9th Cir. 2001).² The requirement may be
19 waived in limited circumstances, including when pursuit of
20 administrative remedies would be futile. See Laing v. Ashcroft,
21 370 F.3d 994, 1000-01 (9th Cir. 2004) (listing circumstances when
22 waiver of exhaustion requirement may be appropriate).

23 The BOP has established procedures by which inmates can seek
24 review of "an issue relating to any aspect" of an inmate's
25

26 ²Because exhaustion is required under this authority, the
27 Court need not consider Respondent's argument that the Prison
28 Litigation Reform Act, 42 U.S.C. § 1997e, also requires exhaustion
of administrative remedies in this case.

1 confinement. 28 C.F.R. § 542.10. The procedures apply to all
2 inmates in programs operated by the BOP. Id. The inmate first
3 must attempt informal resolution of the issue with prison staff.
4 28 C.F.R. § 542.13(a). If the inmate is unable to resolve the
5 issue informally, the inmate must submit a written administrative
6 appeal to the warden. 28 C.F.R. § 542.14(d). An inmate who is not
7 satisfied with the warden's response at the institutional level may
8 then submit an appeal to the Regional Director. 28 C.F.R.
9 § 542.15(a). Finally, an inmate who is not satisfied with the
10 Regional Director's response may submit an appeal to the General
11 Counsel of the BOP. Id.

12 Petitioner argues in her petition that pursuing administrative
13 remedies would be futile because BOP staff have stated publicly at
14 meetings with SCP inmates that it would be a waste of inmates' time
15 to pursue administrative remedies regarding RRC decisions. For the
16 reasons discussed below, Petitioner's unsupported contention that
17 administrative remedies would be futile does not persuade the Court
18 to waive the exhaustion requirement herein.

19 As an initial matter, although Petitioner states in her
20 petition that she is in the process of exhausting her
21 administrative remedies (Pet. at 3 ¶ 5) she provides no additional
22 facts or evidence to support her assertion. Respondent, however,
23 has submitted a declaration from Bobbi Butler, a Correctional
24 Program Specialist employed by the BOP, who attests that
25 Petitioner, who filed the instant petition approximately three and
26 one-half years before her projected release date, has not been
27 considered yet for RRC placement and under BOP policy she will not
28

1 be considered for such placement until seventeen to nineteen months
2 before her projected release date. Dec. Bobbi Butler Supp. Answer
3 (Butler Dec.) ¶ 4. Additionally, Butler states that she has
4 reviewed the administrative remedy logs maintained on the BOP
5 computerized record-keeping database called SENTRY, and based on
6 her review she has found no administrative remedy requests filed by
7 Petitioner on this matter. Butler Dec. ¶¶ 1-3, 7.

8 Further, Respondent submits persuasive evidence that, even if
9 BOP staff did tell Petitioner and other inmates that administrative
10 requests for relief concerning RRC decisions would be denied
11 categorically, such a statement is contrary to established BOP
12 policy and cannot be relied upon by Petitioner to avoid exhaustion
13 by assuming the BOP will deny her request for RRC placement. In
14 particular, Respondent has submitted two BOP policy statements
15 relevant to the BOP's consideration of inmates for RRC placement.
16 Both statements were issued in response to implementation of the
17 Second Chance Act of 2007.

18 The first statement, issued on April 14, 2008, concerns the
19 consideration of inmates for pre-release RRC placement during their
20 last twelve months of incarceration and explains that
21 individualized placement decisions are required:

22 The Act requires that pre-release RRC placement decisions
23 be made on an individual basis in every inmate's case,
24 according to new criteria in the Act, as well as the
25 criteria in 18 U.S.C. § 3621(b). See 18 U.S.C.
26 § 3624(c)(6)(amended). As a result, the Bureau's categorical
27 timeframe limitations on pre-release community confinement,
28 found at 28 C.F.R. §§ 570.20 and 570.21, are no longer
applicable, and must no longer be followed.

Butler Dec., Ex. 1 at 2 ¶ I(B) (emphasis in original).

Similarly, the second statement, issued on November 14, 2008,

1 concerns the consideration of inmates for pre-release RRC placement
2 when more than twelve months remain from their projected release
3 date and explains that individualized consideration must be given
4 to each inmate's request for RRC placement:

5 Inmates are legally eligible to be placed in an RRC at
6 any time during their prison sentence. Federal Courts
7 have made clear that RRCs are penal or correctional
8 facilities within the meaning of the applicable statutes.
9 Staff cannot, therefore, automatically deny an inmate's
10 request for transfer to a[n] RRC. Rather, inmate
11 requests for RRC placement must receive individualized
12 consideration. In other words, staff cannot say that an
13 inmate, whatever the circumstances, is automatically
14 ineligible for transfer to a[n] RRC. Rather, staff must
15 first review the inmate's request on its individual
16 merits, in accordance with policy, and as explained in
17 this guidance.

18 Butler Dec., Ex. 2 at 1-2 (emphasis in original).

19 The Court finds that the undisputed evidence presented by the
20 parties in this matter shows that Petitioner has not yet been
21 considered for RRC placement, BOP policy requires the
22 individualized consideration of each inmate's request for such
23 placement and Petitioner has not pursued any administrative
24 remedies concerning her RRC placement. Based on this evidence, the
25 Court concludes that Petitioner is not entitled to waiver of the
26 exhaustion requirement. Accordingly, the petition for a writ of
27 habeas corpus will be DENIED for failure to exhaust administrative
28 remedies.³

CERTIFICATE OF APPEALABILITY

29 A petitioner may not appeal a final order in a federal habeas
30 corpus proceeding without first obtaining a certificate of

31 _____

32 ³Because the Court has denied the petition for failure to
33 exhaust, the Court does not reach Respondent's other arguments
34 raised in opposition to the petition.

1 appealability (COA). See 28 U.S.C. § 2253(c); Fed. R. App. P.
2 22(b). Section 2253(c)(1) applies to an appeal of a final order
3 entered on a procedural question antecedent to the merits. See
4 Slack v. McDaniel, 529 U.S. 473, 483 (2000).

5 "Determining whether a COA should issue where the petition was
6 dismissed on procedural grounds has two components, one directed at
7 the underlying constitutional claims and one directed at the
8 district court's procedural holding." Id. at 484-85. "When the
9 district court denies a habeas petition on procedural grounds
10 without reaching the prisoner's underlying constitutional claim, a
11 COA should issue when the prisoner shows, at least, that jurists of
12 reason would find it debatable whether the petition states a valid
13 claim of the denial of a constitutional right and that jurists of
14 reason would find it debatable whether the district court was
15 correct in its procedural ruling." Id. at 484.

16 Here, jurists of reason would not find it debatable whether
17 the Court was correct in its procedural ruling. Accordingly, a COA
18 will not issue. Petitioner may seek a COA from the Court of
19 Appeals.

20 CONCLUSION

21 For the foregoing reasons, the Court DENIES the petition for
22 a writ of habeas corpus without prejudice to Petitioner filing a
23 new one after exhausting the BOP's administrative appeals process.
24 The Clerk of the Court shall enter judgment and close the file.

25 IT IS SO ORDERED.

26 Dated: 9/12/2011



CLAUDIA WILKEN
United States District Judge

28

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 CORINA CUNNINGHAM,

5 Plaintiff,

6 v.

7 PAUL COPENHAVER et al,

8 Defendant.

Case Number: CV09-04950 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
10 Northern District of California.

11 That on September 12, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
14 in the Clerk's office.

15 Corina Cunningham Reg. No. 15248-006
16 Satellite Prison Camp
17 5675 8th Street - Camp Parks
18 Dublin, CA 94568

19 Dated: September 12, 2011

20 Richard W. Wieking, Clerk
21 By: Nikki Riley, Deputy Clerk
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