

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DOUGLAS STRONG

:

v.

:

Civil No. 08-3821 (RMB)

:

PAUL SCHULTZ

:

PETITIONER'S REPLY

RICHARD COUGHLIN
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Attorney for the Petitioner,
Douglas Strong

Introduction

A. Petitioner's Federal Sentence

On November 9, 2007, the United States District Court for the Southern District of California sentenced Petitioner Douglas Strong to a prison term of 33 months, to be followed by two years of supervised release. (*Declaration of Joseph Denby* (hereinafter *Denby Declaration*), at ¶4, filed with the Government's October 15, 2008 Response) One condition of the supervised release term was that Mr. Strong serve 120 days in a Residential Re-entry Center (RRC). On August 20, 2008, the District Court amended Mr. Strong's sentence by eliminating the 120 day RRC placement. (*Denby Declaration*, Exhibit 7) Mr. Strong's projected release date is December 7, 2009.

B. The Second Chance Act

On April 9, 2008, the Second Chance Act of 2007 became effective. 18 U.S.C. § 3624(c)(1). The purpose of the Act was to increase the maximum time for RRC placement to twelve months. The Act was deemed necessary in part to address Bureau of Prisons (BOP) intransigence with respect to implementation of prior legislation designed to increase the use of RRC placements.¹ See e.g., *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005);

¹ The appalling circumstances that form the backdrop for the legislation are well documented and include the following issues identified at an October 4, 2007 hearing chaired by Senator Jim Webb (D.VA):

1. The United States has the highest reported incarceration rate in the world. (750 inmates per 100,000 persons - United States
166 inmates per 100,000 persons - world average)
2. Growth in prison population is due to changing policy, not increased crime. (Changes in sentencing, both in terms of time served and the range of offenses meriting incarceration, have driven the growth.)

Levine v. Apker, 455 F.3d 71 (2d Cir. 2006); *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006); *Elwood v. Jeter*, 386 F.3d 842 (8th Cir. 2004); *Rodriguez v. Smith*, 2007 WL 628663 (EDCal. 2007). As amended, § 3624(c)(6) provides:

- (6) Issuance of regulations - The Director of the Bureau of Prisons shall issue regulations pursuant to this subsection not later than 90 days after the date of enactment of the Second Chance Act of 2007, which shall ensure that placement in a community correctional facility by the Bureau of Prisons is -
 - (A) conducted in a manner consistent with Section 3621(b) of this title;
 - (B) determined on an individual basis; and
 - (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community (emphasis added).

18 U.S.C. § 3624(c)(6) (as amended by the Second Chance Act of 2007, Pub.L. No. 110-199, April 9, 2008.)

Before issuing the new regulations ordered by Congress, the BOP issued an internal memorandum on April 14, 2008. (*Denby Declaration*, Exhibit 3) Although the memorandum did advise Wardens that, under the Second Chance Act, the pre-release placement time frame was increased to a maximum of 12 months and indicated that individual consideration was required, the BOP memorandum explicitly undermined both of these Congressionally driven directives as well as the overarching purpose of the Act. That is, instead of developing regulations designed to

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- 3. The U.S. prison system has enormous economic costs associated with prison construction and operation, productivity losses and wage effects. The large numbers of seriously ill inmates raise costs and questions about allocation of health care reserves.
 - 4. The United States faces enormous problems of offender reentry and recidivism. (The number of ex-offenders reentering communities has increased fourfold in the past two decades. On average, one in two will return to prison.)
<http://Webb.Senate.gov/pdf/prisonfactsheet4.html>

implement the intent of Congress to make greater use of community confinement “to provide the greatest likelihood of successful reintegration in to the community,” the BOP instead chose to contradict that legislative directive by declaring “[w]hile the act makes inmates eligible for a maximum of 12 months pre-release placement, Bureau experience reflects that inmates’ pre-release RRC needs can usually be accommodated by a placement of six months or less. Should staff determine an inmate’s pre-release placement may require greater than six months, the Warden must obtain the Regional Director’s written concurrence before submitting the placement to the Community Corrections Manager.” (*Denby Declaration*, Exhibit 3); BOP PS 7310.04(D). It is this improper criteria that was in place when Mr. Strong was evaluated for RRC placement on May 29, 2008 and October 2, 2008.

It was not until October 21, 2008 - long after the 90 day window established by Congress - that the BOP finally issued proposed regulations. Notably, the proposed regulations do not contain the limiting directive purportedly based on BOP RRC experience. Instead, the proposals reflect a straight-forward application of the statute. *See* BOP Interim Rules Implementing Second Chance Act of 2007, attached hereto as Petitioner’s Exhibit A.

C. Mr. Strong’s Habeas Corpus Issue

The staff at FCI Fairton has twice considered Mr. Strong’s RRC placement issue. The first review was conducted on May 29, 2008. That review resulted in a 60-day placement, which when combined with the 120 day RRC condition of supervised release, would have produced a total RRC placement of 180 days. (*Denby Declaration*, Exhibits 5, 6)

Following the entry of the amended judgment, which eliminated the 120 day RRC condition, Mr. Strong was “reevaluated”. That review was also conducted under the April 14,

2008 memorandum which included the “six months is plenty” directive. Not surprisingly, the “individualized” FCI Fairton assessment resulted in a recommended placement of 180 days.

(*Denby Declaration*, Exhibit 7)

Mr. Strong filed his initial habeas petition on July 31, 2008. Following the entry of the amended judgment and subsequent to the second review, he filed supplemental materials which in effect adjusted the petition to reflect the changed circumstances, but which nevertheless framed the same fundamental issue; *i.e.*, the BOP had failed to implement and apply the Second Chance Act and that failure had deprived him of the opportunity to be individually considered for RRC placement for a period of up to one year on the basis of the neutral criteria identified by Congress in 18 U.S.C. § 3621(b). (Dkt. No. 15, 16)

D. Discovery and Appointment of Counsel

On October 31, 2008, the Court entered an Order appointing the Federal Public Defender to represent Mr. Strong. The Order required that discovery be provided. Following the appointment, counsel contacted Mr. Strong to narrow the discovery issues. Efforts to contact Respondent’s counsel eventually resulted in a series of telephone conversations which culminated in an agreement by the government to produce relevant information concerning implementation of the Second Chance Act at FCI Fairton. It was anticipated that the information would be produced by mid-December.

On December 9, 2008, however, the Court, apparently without an application by the Respondent, *sua sponte* issued an Order rescinding the discovery requirement in the earlier Order.

POINT I

THE BUREAU OF PRISONS SHOULD BE DIRECTED TO RECONSIDER MR. STRONG FOR RRC PLACEMENT UNDER THE CRITERIA SET FORTH IN THE OCTOBER 21, 2008 REGULATIONS AND WITHOUT REGARD TO THE APRIL 19, 2008 MEMORANDUM.

The Second Chance Act of 2007 required the Bureau of Prisons to alter its approach to RRC placement and reflected a congressional finding that greater use of RRC placement was appropriate. The Act became effective on April 9, 2008. Five days later, the BOP issued a memorandum which essentially instructed staff to ignore Congress. Instead of striving to implement the intent of Congress “to provide the greatest likelihood of successful reintegration into the community,” the BOP, in a bit of institutional arrogance, announced that, notwithstanding the will of Congress, the presumptive norm would continue to be a maximum six months RRC placement. (*Denby Declaration*, Exhibit 3) Any doubt about the willingness of the BOP to apply the law as directed was eliminated when BOP officials testified before the United States Sentencing Commission in July 2008, and stated the following:

A lot of talk about Second Chance Act here, so I wanted to mention it just briefly. For us, the biggest change, of course, was that it eliminated the previous restrictions that we had on the length of the prerelease placement and inmates are eligible to be placed in halfway houses during the final 12 months of their sentence.

What we have determined internally is that most inmates, our experience has shown that most inmates’ reentry needs can be addressed during a six-month placement so we are doing placements of greater than 180 days only in unusual circumstances, and I probably shouldn’t have used the word extraordinary there. Probably a better word would have been unusual circumstances, and they require the approval of the affected regional director. Our previous restrictions, the regulations that had bound us previously to the final ten percent, were eliminated with the enactment of the Second Chance Act.

See Symposium on Alternative to Incarceration, United States Sentencing Commission July 14-

15, 2008 (Testimony by Jerrig Vroegh, Administration, Community Corrections and Detention Services Branch, Federal Bureau of Prisons,

www.ussc.gov/sympo2008/material114_final_formsreentry.pdf. Near the end of the symposium,

the BOP official engaged in the following colloquy:

QUESTIONER: Given that the costs of keeping one prisoner for a year is about 25,000 and a halfway house is about 23,000, and home confinement is about 3,500, and that the Bureau of Prisons has determined that six months is about how long a person should be in a halfway house, is there any bar in the Second Chance Act to starting the period of time in the halfway house between the six and twelve months and allowing the last six months in home confinement?

MR. VROEGH: I don't know if I totally understood. The Bureau has decided — our experience has been that inmates generally do not need more than six months to address their reentry needs, and so any placement of more than — basically the Second Chance Act, the most important message of the Second Chance Act is you must assess each inmate individually. That's what it tells the Bureau to do. It's that each inmate's needs must be assessed individually. But — within that framework, any place — we have determined that any placement of over six months will only be done in unusual circumstances, but the eligibility for home confinement is still pegged at the ten percent, or six months, whichever is less.

QUESTIONER: And it's your view that that's a requirement of law?

MR. VROEGH: Of the Second Chance Act?

QUESTIONER: Yes.

MR. VROEGH: The home confinement?

QUESTIONER: Yes.

MR. VROEGH: Yes.

QUESTIONER: But you could start the time earlier in a halfway house so that the person could get the full time available in home detention where the person doesn't have other issues, public safety issues, that would prevent him from being in the community on home confinement rather than in community corrections?

MR. VROEGH: I mean, theoretically I guess what you're saying is correct. Could

an inmate come out for a certain amount of time and then go on home confinement for six months?

QUESTIONER: Exactly.

MR. VROEGH: That would have to be an offender serving a very long sentence.

QUESTIONER: Anything over 60 months?

MR. VROEGH: Right.

QUESTIONER: So anybody who's serving over 60 months could end up starting at 12 months, finish the period of home confinement and then go to home detention for the last —

MR. VROEGH: I don't know that we are placing any offenders for 12 months at this point.

Id.

Besides the obvious problem of the BOP authority to disregard Congress, there are two other issues raised by the BOP position. First, there is no empirical data identified to support the BOP position concerning RRC placements in excess of six months. One reason for this, of course, is that the BOP has no relevant experience because in the past, placements in excess of six months have not occurred. As a result, the conclusion that such placements will generally be counterproductive - whatever that means in this context - has no factual support.

Likewise, the supposed cost difference was never explained. By most publicly available accounts, RRC placement is a less expensive alternative to prison. As of June 6, 2008, the costs of federal incarceration were \$23, 431.92 for prison and \$20, 843.78 for RRC.

www.uscourts.gov/newsroom/prisoncost.html. Absent an explicit showing to the contrary, therefore, the BOP statement must be viewed with suspicion.

The more fundamental problem, of course, is that the BOP has no authority to set a

presumptive RRC ceiling of six months and require inmates to offer proof - based on some secret criteria - that they are different and, therefore, worthy of more RRC time. That is simply not what the Second Chance Act provides, and cannot, therefore, be regarded as an application of the individualized assessment Mr. Strong - and others - should receive. It is instead a weighted and rigged criteria which reflects the institutional bias and prerogative of the BOP.²

In short, by establishing criteria and “guidance” that is at odds with the Second Chance Act, the BOP cannot be deemed to have properly exercised its discretion. The perfunctory use of forms (*Denby Declaration*, Exhibits 5-7), which superficially reflect the appropriate criteria, cannot be considered in a vacuum, but must be viewed in light of the direction provided by the April 14, 2008 memorandum. That memorandum established a *de facto* ceiling of six months - the exact length of time the Bureau coincidentally concluded provided the “greatest” likelihood of successful re-entry for Mr. Strong. At a minimum, the Petitioner should be reconsidered for placement under the October 21, 2008 regulations and the BOP should be required to provide an explanation for the application of the relevant criteria, and should submit a sworn declaration that the April 14, 2008 memorandum played no role in the process.

² The BOP has a history of similar institutional responses that have required judicial intervention to correct. *See Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005) (rejecting BOP rules that prohibit placement in community corrections except within last 10% of the term of imprisonment); *Paulsen v. Daniels*, 431 F.3d 999 (9th Cir. 2005) (rule that prisoners whose crime of conviction involved firearms were ineligible for early release for completion of drug treatment was invalid based on Bureau of Prisons' violation of Administrative Procedure Act (APA) by adopting rule without first providing required notice and comment period); *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72 (2d Cir. 2005) (affirming dismissal of habeas petition requesting that BOP be ordered to designate state facility as federal facility under 18 U.S.C. § 3621 for purposes of effectuating concurrent sentence, but ordering that a copy of the opinion be forwarded to the Members of the Judiciary Committee of both houses of Congress because the BOP policy raises serious separation of power questions when it has sole authority over whether to recognize a state concurrent sentence).

POINT II

THE REQUIREMENT THAT PETITIONER EXHAUST HIS ADMINISTRATIVE REMEDIES SHOULD BE DISMISSED AS FUTILE.

The government argues that this Court is precluded from taking any action in this matter because Petitioner has failed to exhaust his administrative remedies. Petitioner respectfully submits that this Court has the discretion to excuse the exhaustion requirement in this case. It is true that federal prisoners must ordinarily exhaust available administrative remedies before seeking judicial relief. *See e.g., Callwood v. Enos*, 230 F.3d 627, 634 (3d Cir. 2000); *Lyons v. U.S. Marshals*, 840 F.2d 202, 204 (3d Cir. 1988) (citing *Waddell v. Alldredge*, 480 F.2d 1078, 1079 (3d Cir. 1973)). The exhaustion doctrine, however, is “not supposed to preclude judicial relief, but merely postpone the timing of the judicial determination.” *Lyons*, 840 F.2d at 205. Moreover, the Third Circuit has identified several exceptions to the exhaustion requirement. It holds that

[e]xhaustion is not required if the administrative remedies would be futile, if the actions of the agency clearly and unambiguously violate statutory or constitutional rights, or if the administrative procedure is clearly shown to be inadequate to prevent irreparable injury.

Id. (citing *Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128, 1138 (3d Cir. 1979)). Accordingly, this Court has the discretion to excuse Petitioner’s failure to exhaust his administrative remedies and to reach the merits if this Court concludes that requiring exhaustion would be futile. *See Woodall v. Federal Bureau of Prisons*, 432 F.3d 235, 239 n. 2 (3d Cir. 2005) (affirming district court’s decision to excuse failure to exhaust administrative remedies in case challenging validity of Bureau of Prisons’ regulations regarding halfway house placement after concluding that exhaustion would be futile).

Here, Petitioner alleges that the Bureau of Prisons (BOP) has failed to comply with the Second Chance Act of 2007 in determining the amount of time he will spend in a Residential Re-Entry Center (RRC) at the end of his term of imprisonment. Petitioner specifically claims that he is being denied any more than 6 months in pre-release RRC placement due to an illegal BOP policy limiting all pre-release RRC placements to six months or less. Petitioner's current projected release date from prison is December 7, 2009. Currently, he has been granted 6 months pre-release RRC placement and is scheduled for release on June 7, 2009. If he is required to exhaust his administrative remedies first, it is likely that he will be released from custody prior to the finality of the administrative process. Additionally, if he were granted the relief he seeks in this petition - namely, 12 months pre-release RRC placement - that placement would have begun on December 7, 2008. Thus, Petitioner has already suffered potentially irreparable injury as a result of the BOP's actions. Accordingly, the exhaustion of administrative remedies should not be required. *See Pimentel v. Gonzales*, 367 F.Supp.2d 365, 371-72 (E.D.N.Y. 2005) (excusing exhaustion of administrative remedies where administrative appeal through BOP's administrative remedy procedure would be futile given BOP's categorical exercise of its discretion regarding pre-release placement and prisoner might suffer irreparable harm without immediate judicial review); *Buggs v. Crabtree*, 32 F.Supp.2d 1215, 1217 (D.Or. 1998) (excusing prisoner's exhaustion of administrative remedies because government had announced its disagreement with prisoner's request for credit and prisoner would be entitled to immediate relief if credit was granted); *Rodriguez v. Smith*, 2007 WL 628663 at *2 (E.D.Cal. 2007) (exhaustion of administrative remedies in challenge to BOP's RRC placement policies would be futile in light of BOP policy and due to the fact that petitioner would likely be released prior to finality of

administrative process).

CONCLUSION

For all these reasons, Petitioner's habeas petition should be granted and the Bureau of Prisons should be ordered to evaluate Petitioner for RRC placement under the October 21, 2008 regulations, should be required to provide an explanation for the application of the relevant criteria, and a should be required to submit a sworn declaration that the April 14, 2008 memorandum played no role in the process.

Respectfully submitted,

s/ Richard Coughlin

Richard Coughlin
Federal Public Defender

Dated: December 22, 2008