2024 WL 3973063
Only the Westlaw citation
is currently available.
United States District Court, C.D. California.

Richard Anthony WILFORD, Petitioner
v.
James ENGLEMAN, Respondent.

Case No. 2:24-cv-01470-DDP (GJS)
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Signed June 27, 2024

Attorneys and Law Firms

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REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

GAIL J. STANDISH, UNITED STATES MAGISTRATE JUDGE

***1** This Report and Recommendation is submitted to United States District Judge Dean D. Pregerson, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the Court recommends that habeas relief be denied.

INTRODUCTION

On February 22, 2024, Petitioner – who is represented by counsel – filed a 28 U.S.C. § 2241 habeas petition in this District. [Dkt. 1, "Petition."] On March 24, 2024, Respondent filed an Answer to the Petition. [Dkt. 8.] On April 27, 2024, Petitioner filed a Reply, which raised a new claim that was not included in the Petition. [Dkt. 9.] On April 29, 2024, the Court directed Respondent to respond to the new matter. [Dkt. 10.] On May 15, 2024, Respondent filed a Sur-Reply. [Dkt. 11.]

The case, thus, is briefed and under submission.

BACKGROUND

Petitioner is a federal prisoner incarcerated within this District, who is scheduled to be released on August 4, 2030. [Petition at 1; *see also* Answer, Declaration of Yolanda Sanchez ("Sanchez Decl.") ¶ 4(d).] He is serving a 280-month sentence following his conviction in another District for conspiracy to distribute and possess with intent to distribute cocaine (21 U.S.C. § 846). [1] [Sanchez Decl. ¶ 4(a).]

On December 7, 2022, Petitioner was designated to FCI Terminal Island. [Sanchez Decl. ¶ 6(a).] On May 9, 2023, the Warden at FCI Terminal Island approved Petitioner for home confinement custody pursuant to the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 ("CARES Act"). [*Id.* ¶ 5, Ex. B; Petition at 5.] According to the unverified Petition,

unidentified "BOP staff informed [Petitioner] that he would remain at home for the balance of his sentence" and "never informed [him] that he could be re-imprisoned without a violation of his confinement conditions." [Petition at 5.] On or about June 15, 2023, Petitioner was transferred from FCI Terminal Island to a residential re-entry center in Baltimore, Maryland, and thereafter, he commenced home confinement. [Sanchez Decl. ¶ 6(b), Ex. C and Ex. D at p. 1.]

On August 2, 2023, Petitioner was returned to custodial custody in Baltimore, Maryland. [Sanchez Decl. ¶¶ 6(c), Ex. D at pp. 2-3.] On August 4, 2023, Petitioner filed an emergency motion in the United States District Court for the District of Maryland seeking to prevent his transfer back to FCI Terminal Island and an order returning him to home confinement. [*Id.* ¶ 7, Ex. D at pp. 3-4.] Petitioner alleged that he had not received any incident report or rule violation write-up or otherwise been notified of any rule violation and that the failure to provide him with notice deprived him of due process. [*Id.*, Ex. D at pp. 1-2.] On August 21, 2023, the Maryland District Court denied the emergency motion on the grounds that: Petitioner had failed to exhaust his administrative remedies; and alternatively, the Court lacked jurisdiction to order or direct the Bureau of Prisons ("BOP") regarding the placement of an inmate. [Sanchez Decl. ¶ 8, Ex. E.]

***2** On August 22, 2023, Petitioner was designated to FCI Terminal Island, where he is housed at present. [Sanchez Decl. ¶¶ 4(b), 6(d).] Petitioner alleges that he has not received a hearing regarding his removal from home confinement and return to custody. [Petition at 5.]

PETITIONER'S HABEAS CLAIMS

The Petition alleges that Petitioner's return to incarceration from home confinement violated his right to due process. Petitioner asserts that he had a liberty interest in the home confinement ordered, which arose from: the fact that the conditions of his home confinement (such as being able to interact with family and community members and seek employment) were more favorable than those he experienced while incarcerated; the CARES Act itself; and an April 5, 2023 memorandum issued by the BOP Director to residential reentry managers advising that individuals placed on home confinement under the CARES Act would remain on home confinement for the remainder of their sentences if they were compliant with the rules and regulations of community placement (the "April 2023 Memorandum"). In addition, Petitioner alleges that he relied on communications from BOP staff that he would remain on home confinement unless he committed misconduct or a violation of the home confinement rules.

Petitioner contends that, because he possessed a due process-protected liberty interest in remaining on home confinement, the revocation of his home confinement without a hearing violated procedural due process. Petitioner relies on *Morrissey v. Brewer*, 408 U.S. 471 (1972), arguing that the procedural protections it established for parole revocations are applicable to him by analogy, because his status as someone on home confinement

was akin to someone on parole. [Petition at 8.] Petitioner further relies on *Freeman v. Pullen*, 658 F. Supp. 3d 53 (D. Conn. 2023), which extended the *Morrissey* procedural requirements to inmates on home confinement. [Petition at 6-7.]

In his Reply, Petitioner raises a new claim. He contends that the decision by BOP officials to remove Petitioner from home confinement and return him to prison was ultra vires, because the decision was not made by the BOP's Director. Petitioner contends that: based on the April 2023 Memorandum noted above, the sole authority to make home confinement revocation decisions rests in the BOP's director; the BOP's director has not delegated that authority to BOP subordinates; and thus, unless the BOP Director personally made the decision to revoke Petitioner's home confinement and return him to prison, that decision was ultra vires, because it was "inconsistent" with unspecified "statutory authority." To support this claim, Petitioner relies on *City of Arlington v. FCC*, 569 U.S. 290 (2013). [Reply at 8-9.]

As relief, Petitioner seeks an order from this Court directing the BOP to return Petitioner to home confinement and requiring the BOP to provide Petitioner with procedural due process in the future should there be any further attempt to remove him from home confinement and return him to custody. [Petition at 8.]

DISCUSSION

I. Legal Backdrop

18 U.S.C. § 3621(b) is the statute generally affording the BOP the authority to designate the place at which an inmate will be imprisoned in "any available penal or correctional facility," and it provides that the BOP "shall designate the place of the prisoner's imprisonment." *See also* *U.S. v. Ceballos*, 671 F.3d 852, 855 (9th Cir. 2011) (*per curiam*) ("The Bureau of Prisons has the statutory authority to choose the locations where prisoners serve their sentence."). The BOP has sole authority over designating the place of a prisoner's confinement; a district court lacks jurisdiction to select where a prisoner will serve his sentence. *See United States v. Dragna*, 746 F.2d 457, 458 (9th Cir. 1984) (*per curiam*) ("While a [district court] judge has wide discretion in determining the length and type of sentence, the court has no jurisdiction to select the place where the sentence will be served. Authority to determine place of confinement resides in the executive branch of government and is delegated to the Bureau of Prisons.").

***3** 18 U.S.C. § 3624(c) extends the BOP's statutory authority under Section 3621(b) to designate an inmate's place of imprisonment to prerelease custody situations, which under Section 3624(c)(2), can be home confinement for "the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." The CARES Act expanded the BOP's Section 3624(c) authority to place inmates in home confinement by allowing the BOP to lengthen the period of home confinement as the BOP "determines appropriate." *See* 134 Stat. at 516, § 12003(b)(2).

Section 3621(b) expressly provides that "[n]otwithstanding any other provision of law, a designation of a place of imprisonment under this subsection is not reviewable by any court." Section 3624(c)(4) expressly provides that "[n]othing in this subsection shall be construed to limit or restrict the authority of the Director of the Bureau of Prisons under section 3621."[2] The CARES Act did not alter the above provisions of Sections 3621(b) and 3624(c), nor did the Act vest in the judiciary the power to make home confinement decisions or otherwise remove from the BOP its sole authority to make home confinement decisions. *See Gould v. Warden, FCI Ashland*, No. CV 23-41-DLB, 2023 WL 2868001, at *2 (E.D. Ky. Apr. 10, 2023) (notwithstanding the CARES Act, "courts have uniformly found that the authority to make such a placement [in home confinement] still rests exclusively with the BOP, and district courts have no authority to order such a placement"); *Huihui v. Derr*, No. 22-00508-JAO, 2023 WL 184121, at *2 (D. Haw. Jan. 13, 2023) ("Even after the CARES Act, however, the decision to transfer an inmate to home confinement remains 'within the discretion of the BOP, and is not within the purview of the District Court.' ") (citation omitted); *United States v. Oscar*, No. 6:19-CR-00021-AA, 2021 WL 864948, at *3 (D. Or. Mar. 8, 2021) ("The decision whether to exercise this authority in a particular case and release a defendant to home confinement lies entirely with BOP; the court lacks the power to order that a prisoner be released to home confinement, even under the CARES Act. See 18 U.S.C. §§ 3621(b), 3624(c)(2)."); *Cruz v. Jenkins*, No. 20-cv-03891-LHK, 2020 WL 6822884, at *3 (N.D. Cal. Nov. 20, 2020) ("[T]he BOP's [home confinement] determination remains discretionary and outside the scope of a Section 2241 petition even if the petition purports to rely on the CARES Act."). [3]

In *Reeb v. Thomas*, 636 F.3d 1224, 1227 (9th Cir. 2011), the Ninth Circuit made clear that "federal courts lack jurisdiction to review" the BOP's individualized, discretionary custody determinations made under Section 3621, although clarifying that jurisdiction remains to review claims that BOP action violates federal law or the U.S. Constitution or exceeds its statutory authority. The Ninth Circuit held that the "plain language" of 18 U.S.C. § 3625 precludes judicial review of any substantive decision made by the BOP pursuant to 18 U.S.C. §§ 3621-3624. *Id.* at 1227. As *Reeb* makes clear, no Section 2241 jurisdiction exists to review a claim by a prisoner that "the BOP erred in his particular case." *Id.* at 1228. Insulation from judicial review applies even when a prisoner claims that the BOP's decision as to him does not comply with a BOP Program Statement or other internal agency guidelines. *Id.* at 1227-28 ("A habeas claim cannot be sustained based solely upon the BOP's purported violation of its own program statement because noncompliance with a BOP program statement is not a violation of federal law). "The BOP's purported violation of its own program statement simply is not a violation of federal law such that the district court would have jurisdiction to review" a habeas claim premised on such an asserted violation. *Id.* at 1228.

***4** As a result of *Reeb*, District Courts in this Circuit routinely and consistently have found that there is no jurisdiction under Section 2241 to review the BOP's discretionary inmate placement decisions, including those regarding home confinement. *See, e.g., Albrecht*, 2023 WL 5417099, at *1 (finding no Section 2241 jurisdiction existed to review the petitioner's claim that the BOP wrongfully revoked his home confinement); *Diaz-Lozano v. Trate*, No. 1:22-cv-01403-JLT, 2022 WL 17417716, at *1 (E.D. Cal. Dec. 5, 2022) (finding that a BOP home confinement decision under the CARES act is a discretionary decision that "is outside the scope of a Section 2241 petition," as *Reeb* made clear, and the Court lacked jurisdiction to review it); *Cruz*, 2020 WL 6822884, at *3 (citing *Reeb* and finding that the BOP's exercise of its discretion with respect to a home confinement decision cannot be challenged by a Section 2241 petition).

II. Jurisdiction Over The Petition And The Relief Sought

A. The Petition Itself

The Petition is brought under Section 2241. A Section 2241 habeas petition may be filed by a federal prisoner to attack the "execution of his sentence," but not to attack its validity. *White v. Lambert*, 370 F.3d 1002, 1009 (9th Cir. 2004).

Respondent contends that that there is no Section 2241 jurisdiction over Petitioner's claims, because the claims do not affect "the fact or duration of" Petitioner's sentence and any relief afforded would not necessarily affect the duration of his sentence. The Court does not find this argument persuasive. While it is true that affording Petitioner the relief sought would not shorten his sentence overall, granting habeas relief would affect the manner and location of the execution of his sentence, *i.e.*, alter how and where his sentence is to be served. A Section 2241 petition may be used by a federal prisoner to challenge the "manner" in which his sentence is being executed, as well as the "location" of execution. *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000) ("petitions that challenge the manner, location, or conditions of a sentence's execution must be brought pursuant to § 2241 in the custodial court"). The Petition plainly challenges the manner and location of the execution of Petitioner's sentence and, thus, can be considered under Section 2241. *See Pinson v. Carvajel*, 69 F.4th 1059, 1067-68 (9th Cir. 2023) (in discussing what habeas challenges are available under Section 2241: observing that *Hernandez* "stated that challenges to 'conditions of a sentence's execution' may properly be brought under § 2241" and provided that a "court could review a petition that contested the manner, location or condition of the sentence's execution"; and opining that "execution," for purposes of Section 2241, means that Section 2241 "is available for actions challenging the conditions of carrying out a sentence or putting the sentence into effect").

Significantly, in *Pinson*, 69 F. 4th at 1068, the Ninth Circuit cited *Woodson v. Federal Bureau of Prisoners*, 432 F.3d 235 (3d Cir.

2005), as an example of an instance in which Section 2241 jurisdiction exists. *Woodson* was premised on a claim that the BOP's regulations wrongfully limited the length of time a prisoner could be placed in community confinement. In light of the respondent's objection that the claim did not involve the "fact or duration" of the sentence and thus Section 2241 jurisdiction therefore did not exist, the Third Circuit analyzed whether the claim could be brought under Section 2241 and found that it could, because it related to the "execution" of the petitioner's sentence. *Id.* at 241-42. Here, too, Petitioner's due process claim involves the execution of his sentence.

***5** Moreover, Petitioner labels the claim alleged in the Petition as one based on an asserted due process violation and the new claim alleged in the Reply as one involving BOP action in excess of statutory authority. As *Reeb* indicated, Section 2241 jurisdiction can exist to review claims alleging constitutional or federal law violations by the BOP and/or BOP action in excess of statutory authority. *Reeb*, 636 F.3d at 1227; *see also Rodriguez v. Copenhaver*, 823 F.3d 1238, 1242 (9th Cir. 2016) (when petitioner brought a Section 2241 petition challenging the BOP's discretionary decision to deny designation of a state prison for service of his federal sentence, finding that the district court erred in finding Section 2241 jurisdiction lacking, because "[a]lthough a district court has no jurisdiction over discretionary designation decisions, it does have jurisdiction to decide whether the Bureau of Prisons acted contrary to established federal law, violated the Constitution, or exceeded its statutory authority when it acted pursuant to 18 U.S.C. § 3621" and petitioner alleged that the BOP's consideration of a recused judge's letter violated the law and the Constitution).

Fairly read, the Petition alleges a claim based on an asserted due process violation, and the Reply complains that the BOP exceeded its statutory authority. Petitioner is not asserting a claim based only on asserted BOP error or abuse of discretion. As a result, the Court concludes that Section 2241 jurisdiction exists in this case to the extent that Petitioner claims he was deprived of due process by the revocation of his home confinement and/or that the BOP's revocation of his home confinement was ultra vires.

B. The Relief Requested

As relief, Petitioner asks the Court to order the BOP to: (1) return him to home confinement; and (2) provide him with procedural due process in the future should the BOP again wish to remove him from home confinement and return him to custody.

With respect to relief request (1), the Court lacks jurisdiction to order it. District Courts in this Circuit routinely hold that they lack jurisdiction to order that an inmate be placed on home confinement, whether initially or following a revocation. *See, e.g., Albrecht*, 2023 WL 5417099, at *2 (finding that, under *Reeb*, the court lacked jurisdiction to order the petitioner transferred back to home confinement); *Huihui*, 2023 WL 184121, at *3 (petitioner's request that

the court order the BOP to place her in home confinement was "not cognizable under" Section 2241, because this is a decision that falls entirely within the discretion of the BOP and the Ninth Circuit, in *Reeb*, "has concluded that an exercise of this discretion may not be challenged via a Section 2241 petition"); *Diaz-Lozano*, 2022 WL 17417716, at *1 ("Petitioner cannot base a federal habeas petition on the CARES Act" and the BOP's decision regarding whether an inmate should receive home confinement "remains discretionary and outside the scope of Section 2241 jurisdiction"); *White*, 2022 WL 1173566, at *2-*3 (under *Reeb*, no jurisdiction exists to order a transfer back to home confinement following revocation); *Lustig v. Warden, FCI Lompoc*, No. CV 20-3708-SB (AGR), 2021 WL 1164493, at *2 (C.D. Cal. Jan. 4, 2021), accepted by 2021 WL 1164474 (Mar. 26, 2021) ("The court does not have authority to order a transfer to home confinement under ... the Cares Act via a § 2241 petition.") (citing *Reeb*); *Khouanmany v. Carvajal*, No. 20-cv-02858-LHK, 2021 WL 2186218, at *8 (N.D. Cal. May 28, 2021) ("Courts have consistently found that the CARES Act does not allow judges the authority to order home detention."); *Rand v. Carvajal*, No. 2:21-cv-00720-AB (AFM), 2021 WL 3411198, at *2 (C.D. Cal. May 21, 2021), adopted by 2021 WL 3406471 (Aug. 4, 2021) ("the Court lacks authority" under the CARES Act to grant Petitioner release to home confinement); *Terletsky v. United States*, No. C20-794 RSM, 2020 WL 6132236, at *4 (W.D. Wash. Oct. 19, 2020) ("courts have consistently found that the CARES Act does not provide courts with jurisdiction to order home detention"); *Smith v. Von Blanckensee*, No. CV 20-4642-JVS (JEM), 2020 WL 4370954, at *2 (C.D. Cal. July 2, 2020), accepted by 2020 WL 4368060 (July 30, 2020) ("[T]his Court does not have the authority to order a transfer to home confinement, under the CARES Act or otherwise. Congress gave the Attorney General, and by designation the BOP, exclusive authority to determine custody placements including home confinement. *Reeb v. Thomas*, 636 F.3d 1224, 1226-28 (9th Cir. 2011). Section 12003(b)(2) of the CARES Act authorizes only the BOP to determine whether "to place a prisoner in home confinement under ... [18 U.S.C. §] 3642(c)(2).").

***6** The Ninth Circuit has not held otherwise. Petitioner has not provided any authority that warrants rejecting the conclusions drawn by the above Courts in this Circuit (and numerous others the Court has not included, concluding numerous out-of-Circuit authorities reaching the same conclusions). Accordingly, the Court finds that even if Petitioner succeeded on his claims, the Court would lack the authority to order the BOP to return him to home confinement.

The above conclusion alone would require the dismissal of this action, because the Court lacks jurisdiction to order the relief requested even if his claims could be considered. However, Petitioner also seeks a second type of relief that, on its face, is not so obviously unavailable. Relief request (2) – that the Court order the BOP to provide Petitioner with *Morrissey v. Brewer*-type procedural protections in the future should the BOP ever again decide to revoke his home confinement – is entirely

contingent on a legal finding that Petitioner had a due process-based liberty interest right to receive such procedural protections before his home confinement was revoked. If, in fact, Petitioner's right to due process was violated by the revocation of his home confinement, the Court would need to determine of relief request (2) would be available to Petitioner. Accordingly, the Court will now turn to addressing that legal question before assessing whether this requested relief is one that it would have jurisdiction to order. [4]

III. Petitioner's Due Process Claim Fails.

Petitioner claims that he had a due process-protected liberty interest that entitled him to remain on home confinement for as long as he complied with the conditions for home confinement. According to Petitioner, this liberty interest arose from three things: the more favorable nature of the living conditions he experienced while on home confinement versus those he experienced while incarcerated; the CARES Act itself; and the BOP Director's April 2023 Memorandum. Petitioner contends that, as a result of this asserted liberty interest, the BOP could not revoke his home confinement without first affording him the same procedural protections afforded to parolees in the parole revocation context as required under *Morrissey v. Brewer, supra.*

The Due Process Clause protects prisoners against the deprivation of liberty interests without the procedural protections to which they are entitled under the law. *See* *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). For his due process claim to have merit, Petitioner must show that he was deprived of a constitutionally protected liberty interest. *See* *Buckingham v. Sec'y of U.S. Dep't of Agriculture*, 603 F.3d 1073, 1081 (9th Cir. 2010) ("To be entitled to procedural due process, a party must show a liberty or property interest in the benefit for which protection is sought.") (internal citation omitted).

***7** Generally, an inmate does not have a protected liberty interest in being released from prison to serve the remainder of his sentence in a prerelease custody type program, whether home confinement or other type. As noted above, the BOP's decision whether or not to place an inmate in home confinement is one that is entirely within the BOP's discretion. Thus, the authority afforded the BOP under Section 3624 to order a prisoner to be released to home confinement cannot give rise to a liberty interest. *See* *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) ((("If the decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' ..., the State has not created a constitutionally protected liberty interest.") (citation omitted); *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."); *Mars v. Heisner*, No. CV-22-10922-PHX-SPL (JGB), 2023 WL 4977335, at *7 (D. Ariz. June 26, 2023), adopted by 2023 WL 4960411 (Aug. 3, 2023) ("When a statute confers discretion on government action, no liberty interest is created"; and finding an inmate had no liberty interest in having his credits applied to afford

him release to home confinement); *Matecki v. Thompson*, No. 2:21-cv-0268-WBS-DMC, 2021 WL 2457691, at *3 (E.D. Cal. June 16, 2021), adopted by 2021 WL 3206571 (July 29, 2021) (same). Courts across the country have rejected Section 2241 claims based on the theory that the BOP's decision to deny an inmate release on home confinement implicated, and violated, a due process-protected liberty interest. [5]

Here, however, Petitioner is not challenging a BOP decision to deny him home confinement as an initial matter. Rather, Petitioner argues that his liberty interest in remaining on home confinement arose because he already had been ordered released to, and had commenced serving, home confinement. The caselaw on the question of whether a liberty interest comes into existence once an inmate actually is released to home confinement is scant. *See Cardoza v. Pullen*, No. 3:22-cv-00591 (SVN), 2022 WL 3212408, at *11 (D. Conn. Aug. 9, 2022) (concluding that "there is no controlling authority that answers the question of whether placement in home confinement pursuant to the CARES Act creates a liberty interest that triggers due process protections," and that the same is true as to home confinement placement generally under Section 3624(c)(2) and outside of the CARES Act).

Petitioner's due process/liberty interest claim rests on a March 2023 decision from the District of Connecticut, *i.e., Freeman, supra.* In *Freeman*, under the authority of the CARES Act, inmate Freeman was released to home confinement, where she remained until its revocation nine months later following a positive test result for alcohol consumption. While on home confinement, Freeman reunited with her daughter, secured employment, and enrolled in college courses. After revocation, Freeman filed a Section 2241 petition alleging the same liberty interest/procedural due process deprivation claim made here and sought an order directing the BOP to release her to home confinement. *Freeman*, 658 F. Supp. 3d at 57-58. The Connecticut District Court found that Second Circuit precedent supported Freeman's contention that prisoners released to home confinement have a liberty interest in remaining in home confinement. *Id.* at 61-62. The District Court also found that the purpose of Section 3624(c) is reintegration into society and that this purpose, when coupled with certain statements made by BOP Directors before Congress and in 2020 and 2021 memoranda, gave rise to an "implicit promise" that an individual on home confinement would not be returned to prison absent misconduct. *Id.* at 64-66. The District Court then concluded that this liberty interest entitled inmates on home confinement to receive the two-step procedural protections set forth in *Morrissey* for parole revocations before their home confinement could be revoked, specifically: (1) a preliminary hearing to determine whether probable cause exists to detain the inmate immediately; and (2) a revocation hearing with six attendant procedural requirements, including *inter alia* written notice of alleged violations, disclosure of evidence, the right to evidence presentation and cross-examination, and a written decision with factfinding and a statement of reasons and evidence supporting the decision. *Id.* at 66-69. The District Court determined that because the BOP had failed to provide Freeman with these procedural due process protections before revoking her home

confinement, the BOP was required to return her to home confinement pending compliance with the *Morrissey* procedures. *Id.* at 69. [6]

***8** The Supreme Court has not ruled on the question of whether a revocation of home confinement requires prior adherence to the procedural requirements for parolees set forth in *Morrissey v. Brewer.* The Ninth Circuit also has not ruled on this specific question, but the Ninth Circuit's *Reeb* decision is instructive. In *Reeb*, the BOP placed the petitioner in a residential drug abuse program (RDAP), which like home confinement, affords participating federal prisoners with community-based transitional prerelease custody. The BOP thereafter expelled Reeb from the RDAP. Reeb filed a Section 2241 petition, alleging that the revocation was wrongful and also violated due process, because he was not provided with formal warnings prior to expulsion, and he sought an order reinstating him into the RDAP. As noted earlier, the Ninth Circuit found that it had no jurisdiction to review the petition to the extent that it challenged the substantive nature of the BOP's revocation decision. Of significance to the present question, the Ninth Circuit also flatly rejected Reeb's claim complaining that he had been deprived of due process because his RDAP participation had been revoked without notice or explanation, opining that "inmates do not have a protected liberty interest in either RDAP participation or in the associated discretionary early release benefit." *Reeb*, 636 F.3d at 1228 n.4 (citing *Greenholtz, supra,* 442 U.S. at 7, for the proposition that "a prisoner does not have a constitutional right to be released prior to the expiration of a valid sentence," and *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976), for the proposition that "discretionary determinations regarding conditions of confinement do not create due process rights").

Reeb, thus, provides guidance for courts in this Circuit on the question addressed by the Connecticut District Court in *Freeman.* Other District Courts have reached the opposite conclusion to that drawn in *Freeman*, finding that no liberty interest exists in the revocation of home confinement context.

In *Triplett v. FCI Herlong*, No. 2:22-cv-0083 WBS AC, 2023 WL 2760829 (E.D. Cal. April 3, 2023), adopted by 2023 WL 3467145 (May 15, 2023), petitioner was released to home confinement and then returned to it, without notice or a hearing, after the woman with whom he was staying called the BOP and asked that he be returned to custody. Petitioner complained that the revocation violated due process. The District Court agreed with Respondent's contention that the BOP's placement decisions regarding Petitioner – including the decision to revoke home confinement and return him to prison – were discretionary and, thus, his placement in home confinement did not give rise to a liberty interest subject to due process procedural protections. "Because the BOP has the discretion to return petitioner to home confinement, to keep him in prison, or to place him in a residential reentry program, petitioner was not deprived of any constitutionally protected liberty interest when the BOP opted to have him returned to prison." *Id.*, 2023 WL 2760829, at *3.

In *Tetterton, supra*, a New Jersey District Court dealt with a situation like that involved in

Freeman. Petitioner Tetterton was transferred to home confinement and remained on it for seven months until he tested positive for opioids and was returned to prison. Tetterton did not receive a hearing before his home confinement was revoked and claimed that he never received notice of why revocation had occurred. Tetterton brought a Section 2241 petition alleging that this situation violated his right to due process and asked for an order returning him to home confinement and directing the BOP to provide him with a hearing prior to any further revocation attempts. *Tetterton*, 2023 WL 4045086, at *1-*2. Tetterton made the same argument raised by Petitioner here, *viz.*, that because he had enjoyed the benefits of home confinement, revoking it without a hearing violated a liberty interest. After examining the "sparse" case law bearing on the question of whether a prisoner who is placed in CARES Act home confinement has a liberty interest in remaining in that status that gives rise to procedural protections, the District Court noted the conflict between the decisions in *Freeman/Tompkins* (District of Connecticut,) and *Triplett* (Eastern District of California).[7] The District Court concluded that, in light of the ample authority finding that an inmate has no liberty interest in being placed in home confinement and the lack of controlling authority on the question of whether a liberty interest arises once an inmate was so placed, the revocation of Petitioner's home confinement without notice and a hearing did not violate procedural due process. *Id.*, at *7-*8.[8]

***9** As noted above, Petitioner cites three sources for the liberty interest he claims arose once he was placed on home confinement, namely, the expanded opportunities available to him while on home confinement as opposed to confinement in prison, the CARES Act itself, and the April 2023 Memorandum. As to the latter, the law is clear in this Circuit that the BOP's failure to adhere to an internal operating document, whether Program Statement or memorandum, cannot be the source of a claim of constitutional right or violation. *Reeb*, 636 F.3d at 1227-28; *see also White*, 2022 WL 1173566, at *3 ("To the extent White argues that the BOP is somehow violating an agency memo or policy ..., the claim is not cognizable under" Section 2241 (citing *Reeb* and other decisions); *Poole v. Lothrop*, No. CV-18-0187-PHX-GMS (DMF), 2019 WL 2028993, at *7 (D. Ariz. Feb. 26, 2019), adopted by 2019 WL 2027939 (May 8, 2019) ("The BOP's Program Statements do not give the warden an affirmative duty that is enforceable by a § 2241 petition."; citing *Reeb*). That the BOP said something in the April 2023 Memorandum that Petitioner believes is inconsistent with the home confinement revocation he experienced is not a basis for finding that he had a liberty interest in remaining on home confinement that was protected by due process. If the alleged failure to follow a BOP Program Statement in *Reeb* was an insufficient basis for alleging a due process violation (636 F.3d at 1227-78), so too is the alleged failure to adhere to a BOP memorandum.

As to the CARES Act itself as an alleged source of a liberty interest in remaining on home confinement, Petitioner does not identify any provision of the CARES Act that could be said to trigger a liberty interest once an inmate is place on home confinement.

As to Petitioner's contention that because home confinement affords an inmate more favorable opportunities than when incarcerated, this circumstance itself gives rise to a liberty interest in remaining on home confinement, Petitioner's argument relies entirely on a Connecticut District Court's extension of *Morrissey v. Brewer's* holding in the parole revocation context to home confinement revocations, *i.e.*, the above-noted *Freeman* decision. [*See* Petition at 6-7.] *Freeman*, did so in reliance on its conclusion that "the Second Circuit consistently has found that individuals have a liberty interest in remaining in various community confinement programs." 658 F. Supp. 3d at 61-62 (discussing Second Circuit decisions). This case, however, was filed in a court within the Ninth Circuit. And as discussed above, in *Reeb*, the Ninth Circuit rejected an inmate's complaint that he had been deprived of due process when his participation in another type of prerelease program (RDAP) was revoked without notice or explanation, opining that "inmates do not have a protected liberty interest in either RDAP participation or in the associated discretionary early release benefit" and noting that discretionary determinations of this type do not give rise to due process rights. *Reeb*, 636 F.3d at 1228 n.4.

As a lower court within the Ninth Circuit, this Court is bound to follow and apply the decisions and analyses of the Ninth Circuit. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). Although *Reeb* involved the revocation of RDAP participation rather than home confinement participation, its conclusion – that no liberty interest arises when an inmate's participation in a prerelease custody program is revoked when, as here, participation in such a program falls within the BOP's discretion – governs this case. At a minimum, *Reeb* plainly cautions against extending the procedural due process protections required by *Morrissey v. Brewer* in the parole revocation context – including a preliminary hearing conducted by an independent officer, notice and disclosure of evidence supporting revocation, the right to appear and present evidence at the preliminary hearing, to be followed by a formal revocation hearing and a written decision (408 U.S. at 485-89) – to prerelease custody such as home confinement. As Petitioner had no liberty interest in remaining on home confinement, the failure to provide him with *Morrissey's* protections for parolees did not violate his right to due process. Accordingly, Petitioner is not entitled to federal habeas relief based on the due process claim alleged in the Petition. [9]

IV. Ground Two: Petitioner's Claim That the Decision to Revoke Home Confinement Was Ultra Vires Fails.

***10** As noted above, in his Reply, Petitioner belatedly raised a new claim for habeas relief, namely, that the revocation of his home confinement was "ultra vires," because it was not consistent with a statement made by the BOP Director in the April 2023 Memorandum to the effect that that inmates placed on home confinement under the CARES Act would so remain if they complied with community placement rules and regulations. Petitioner characterizes the pertinent language in the April 2023 Memorandum as a "final" "decision" by the BOP that precludes anyone other than the BOP Director "herself" from deciding when to

revoke a particular inmate's home confinement. [Reply at 3-4.]

At the outset, the Court notes that, in this Circuit, it is improper to omit a habeas claim from a petition and then to raise it for the first time through a reply. *See* *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (claim raised for the first time in a traverse may be disregarded); *Lewis v. Witek*, 927 F. Supp. 2d 1288, 1291 n.2 (C.D. Cal. 1996) (same). Moreover, there is no evidence before the Court that this belatedly-raised "ultra vires" claim has been exhausted, although Respondent has not raised failure to exhaust as a defense. But even if the "ultra vires" claim is treated as properly raised, it plainly fails.

An ultra vires claim requires showing that agency action was taken that exceeded statutory authority. *See, e.g.,* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1940). Petitioner's Reply does not identify any statutory authority that was exceeded or violated by the revocation of his home confinement. As discussed above, the relevant statutes give the BOP full discretion with respect to home confinement decisions and none of them preclude the BOP from revoking an inmate's home confinement. Petitioner fails to cite any statutory authority that would preclude BOP officers or employees other than the Director herself from making the determination that his home confinement should be revoked. The Reply fails to state a viable valid ultra vires claim, because it does not allege any actual violation of statutory authority.

Rather, Petitioner's ultra vires claim rest entirely on the supposed violation of an agency memorandum. Petitioner labels the April 2023 Memorandum as a "final decision" by the BOP and effectively elevates it to the stature of a federal statute, thereby characterizing purported noncompliance with it as a violation of federal law. Petitioner's argument is not persuasive.

The April 2023 Memorandum clearly is not an agency substantive rule, as it did not issue following adherence with the APA's notice and comment requirements as to the substance of the Memorandum itself. The regulation that Petitioner cites and which it was adopted the day before the April 23 Memorandum issued – 28 C.F.R. § 0.96(u) – does not say anything about limiting revocation decisions to the Director herself or about prohibiting BOP staff from making those decisions. At most, Petitioner asserts that there was noncompliance with an internal agency guideline embodied in a memorandum. *Reeb* makes clear that such an event does not equate to a violation of federal law. *Reeb*, 636 F.3d at 1227 ("noncompliance with a BOP program statement is not a violation of federal law" given that "[p]rogram statements are 'internal agency guidelines [that] may be altered by the [BOP] at will' and that are not 'subject to the rigors of the Administrative Procedure Act, including public notice and comment' ") (citation omitted). *See also* *Richardson v. Martinez*, No. CV 18-07242-SVW (AGR), 2019 WL 1581417, at *4 (C.D. Cal. Jan. 17, 2019), adopted by2019 WL 3067197 (July 10, 2019) ("BOP's internal procedures are not federal law and therefore failing to follow these agency protocols do not implicate any protected interests or rights

guaranteed by statute or the constitution."); *Wong v. Ponce*, No. 16-cv-00501 AC, at *9-*10, 2017 WL 784913, at *4 (E.D. Cal. March 1, 2017) (rejecting due process claim based on the BOP's failure to conduce a prerelease assessment within the time frame specified in a BOP memorandum, because: "Even if the BOP failed to conduct the assessment within the timeframe specified in its program statement, this would not violate due process. Like the program statement above, the BOP memorandum is not a federal law and therefore petitioner has no constitutional right to" the time frame required under the memorandum).

***11** Construed as liberally as possible in his favor, Petitioner's ultra vires claim at best alleges that the revocation of his home confinement was inconsistent with a statement made in an agency memorandum. This is insufficient to state the violation of federal law required to support Section 2241 jurisdiction. No viable ultra vires claim is stated and jurisdiction is lacking over the claim belatedly alleged in the Reply. Accordingly, the ultra vires claim cannot provide any basis for federal habeas relief.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court for the Central District of California and review by the United States District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until the District Court enters judgment.

All Citations

Slip Copy, 2024 WL 3973063

Footnotes

1 Following the partial grant of Petitioner's motion for compassionate release, his sentence was reduced to 280 months. *See* *United States v. Wilford*, No. CR ELH-11-258, 2022 WL 2392237, at *50 (D. Md. July 1, 2022).

2 In addition, 18 U.S.C. § 3625 specifically provides that the provisions of the Administrative Procedures Act are inapplicable to BOP decisions made under 18 U.S.C. §§ 3621-3624.

3 *See also, e.g., Albrecht v. Birkholz*, No. CV 23-1587-GW (E), 2023 WL 5417099, at *2) (C.D. Cal. June 23, 2023), accepted by 2023 WL 5409781 (Aug. 21, 2023); *White v. Derr*, No. 22-00127-JAO, 2022 WL 1173566, at *2-*3 (D. Haw. April 29, 2022); *Tetterton v. Warden, FCI Fort Dix*, No. 23-1394 (CPO), 2023 WL 4045086, at *2 (D. N.J. June 16, 2023).

4 The Court has some question as to whether this requested relief is available. Petitioner is asking the Court to essentially order injunctive relief as to a hypothetical future situation that may or may not come to pass. Under the "case or controversy" requirement of Article III, § 2 of the United States Constitution, federal courts may not decide hypothetical issues or render advisory opinions. *See Princeton University v. Schmid*, 455 U.S. 100, 102 (1982); *see also Valley Forge Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (Article III limits the judicial power of courts "to the resolution of 'cases' and 'controversies' "). "The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights." *Id.* But again, the Court only would need to decide whether it has jurisdiction to order such future relief *if* it finds that Petitioner has a liberty interest in remaining on home confinement that was violated by the failure to afford him *Morrissey*-type procedural protections prior to revocation.

5 *See also, e.g., Sills v. FCI Talladega Warden*, No. 22-12686, 2023 WL 1775725, at *5 (11th Cir. Feb. 6 2023) (an inmate "lacks a protected liberty interest in home confinement"); *Chiwocha v. Neely*, No. 7:23-cv-00583, 2024 WL 320095, at *3 (N.D. Ala. Jan. 3, 2024), adopted by 2024 WL 314253 (Jan. 26, 2024) ("a prisoner has no liberty interest in being transferred to home detention"); *Jackson v. Knight*, No. 23-2057 (CPO), 2023 WL 4045050, at *5 (D. N.J. June 16, 2023) (inmates have no liberty interest in being placed in home confinement, whether under the CARES Act or prior to its enactment); *Holt v. Warden*, 539 F. Supp. 3d 1005, 1009 (D. So. Carolina 2021) ("a prisoner does not have a constitutionally protected right to be placed in home confinement"); *United States v. Robledo*, No. 18CR2190-AJB, 2020 WL 2542641, at *7 (S.D. Cal. May 19, 2020) ("A prisoner has no constitutional right to confinement in any particular place, including in home confinement.").

6 *Freeman* was foreshadowed by an earlier decision by the same United States District Court Judge, namely, *Tompkins v. Pullen*, No. 3:22-cv-00339 (OAW), 2022 WL 3212368 (D. Conn. Aug. 8, 2022), which contained a similar analysis and

found the existence of a liberty interest in being free from the revocation of home confinement without *Morrissey*-type procedural protections.

In *Cardoza, supra*, a different United States District Judge from the District of Connecticut also concluded that there were reasons for finding the *Morrissey* procedural protections for parole revocations to be applicable in home confinement revocation situations, but found that the petitioner had failed to satisfy *Morrissey's* additional requirement of showing the existence of an implicit promise that the inmate would remain on home confinement absent violation of the conditions for doing so. 2022 WL 3212408, at *11-*14 (dismissing procedural due process claim alleging petitioner had a liberty interest in remaining on home confinement).

7 The District Judge also cited two additional decisions from other districts: (1) *Cardoza, supra*, describing it as finding that "no liberty interest existed because there was no sign in the petition that the CARES Act included 'an implicit promise of continued liberty absent violation of conditions' "; and (2) *Touzier v. Att'y Gen. of United States*, No. 20-25169, 2021 WL 371593, at *4 (S.D. Fla. Feb. 3, 2021), *aff'd by* 2021 WL 3829618 (11th Cir. Aug. 21, 2021), describing the district court decision as "finding no liberty interest because the BOP has discretion to revoke home confinement." *Tetterton*, 2023 WL 4045086, at *8.

8 In a decision one month earlier, the same New Jersey District Judge reached a similar conclusion with respect to an inmate's claim that the revocation of his home confinement without notice or a hearing violated his procedural due process rights because having enjoyed the benefits of home confinement, he had a liberty interest in remaining in that status. *See Romano v. Warden*, No. 23-1052 (CPO), 2023 WL 3303450, at *8 (D. N.J. May 8, 2023) (finding no due process violation).

9 Given the Court's conclusion, it need not decide whether Petitioner's request for prospective relief could be considered in this Section 2241 action.

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