

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DIEGO GIL,

Petitioner,

v.

RICARDO MARTINEZ,

Respondent.

ORDER

07-C-215-C

This is a petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2241. Petitioner Diego Gil, a federal prisoner, contends that respondent Ricardo Martinez has violated his rights under the ex post facto, due process and equal protection clauses of the Constitution by refusing to grant him early release under 18 U.S.C. § 3621(e), which grants the Federal Bureau of Prisons discretion to reduce the time served of certain prisoners who complete a drug treatment program.

Petitioner has satisfied the preliminary requirements for bring his petitioner. Because petitioner argues that he is entitled to early release, he is challenging the duration of his confinement, making a habeas corpus petition the proper vehicle for raising his challenge Richmond v. Scibana, 387 F.3d 602 (7th Cir. 2004). In addition, because he is challenging

the execution of his sentence rather than the imposition of his sentence, § 2241 is the proper statute under which to proceed. Kramer v. Olson, 347 F.3d 214, 217 (7th Cir. 2003) (Section 2241 is "usually reserved for attacking the execution, not [the] imposition, of a sentence"). Finally, he has paid the \$5 filing fee and has submitted documents showing that he has exhausted his federal administrative remedies as required by Sanchez v. Miller, 792 F.2d 694, 699 (7th Cir. 1986).

Nevertheless, I must deny the petition on its merits. The bureau's decision to deny petitioner early release under § 3621(e) did not violate the ex post facto clause, the equal protection clause or the due process clause.

From the petition and the documents attached to it, I draw the following facts.

FACTS

Petitioner Diego Gil is a prisoner at the Federal Correctional Institution in Oxford, Wisconsin. In 1994, petitioner was convicted of possession of cocaine with an intent to distribute, in violation of 21 U.S.C. § 846.

In early 2004, petitioner was accepted into the Residential Drug Abuse Program. Under 18 U.S.C. § 3621(e), "a prisoner convicted of a nonviolent offense" may receive up to a one-year reduction in the time he is required to serve if he completes the drug program. At the time petitioner was accepted into the program, he received a notice of the

requirements for eligibility for early release, including that he “not be an INS detainee.” The notice states: “you appear to be provisionally eligible for assignment of a 3621(e) early release.” The same notice includes the following statement, signed by petitioner: “If applicable, I understand that a determination of early release for me is always provisional, and may change” (emphasis in original).

In February 2006, petitioner received a notice from the Department of Homeland Security that a detainer had been filed against him, “charging possible deportation” upon his release from prison. Petitioner began the drug abuse treatment program in March 2006. In June 2006, petitioner received a memorandum from the drug abuse treatment coordinator, informing petitioner that he was not eligible for early release under § 3621(e):

You do, however, currently have a detainer filed against you. This detainer makes you ineligible for residential re-entry center placement, which, in turn, make you ineligible to complete the required Community Transitional Drug Treatment portion of the program and thus ineligible for assignment of a 3621(e) release date.

Petitioner filed a request for an administrative remedy, which was denied at each level for the same reason articulated in the June 2006 letter.

Petitioner successfully completed the residential drug treatment program in December 2006.

DISCUSSION

Petitioner challenges the decision to deny him early release under 18 U.S.C. § 3621(e) on several grounds. First, he says that it violated the ex post facto clause, Art. I, § 9, because when he was convicted, the bureau's policy permitted early release to prisoners who had detainers lodged against them. It was not until 1995 that the bureau adopted its current policy to categorically exclude from early release prisoners who have an INS detainer lodged against them. 28 C.F.R. § 550.58(a)(1)(i). Also, petitioner says that the new policy violates his right to equal protection and due process, though it is less clear how he thinks these rights are implicated. Unfortunately, each of petitioner's challenges appears to rest on a misunderstanding of the scope of the right he is asserting.

As an initial matter, I do not understand petitioner to argue that the bureau's current policy is contrary to 18 U.S.C. § 3621(e). As the Supreme Court pointed out in Lopez v. Davis, 531 U.S. 230 (2001), the bureau has considerable discretion in deciding which prisoners should receive early release. The statute says that the bureau "may" grant a sentence reduction to those who complete a drug treatment program; it does not require early release under any circumstance. Thus, any categorical exclusion is permissible under § 3621(e) so long as it is "reasonable in light of the legislature's revealed design." Id. at 242 (internal citations and quotations omitted). Other courts have concluded that excluding prisoners with detainers is a reasonable exercise of discretion, e.g., United States v. Lopez-Salas, 266 F.3d 842, 848 (8th Cir. 2001), McLean v. Crabtree, 173 F.3d 1176, 1184 (9th

Cir. 1999), though it does not appear that the Court of Appeals for the Seventh Circuit has considered the question. In any event, because petitioner does not raise the issue, I need not resolve it.

Each of the arguments petitioner does raise have been rejected by courts as well. E.g. Wottlin v. Fleming, 136 F.3d 1032, 1036 -38 (5th Cir. 1998)(rejecting challenges under the ex post facto, equal protection and due process clauses). The ex post facto clause prohibits laws that “retroactively alter the definition of crimes or increase the punishment for criminal acts.” Collins v. Youngblood, 497 U.S. 37, 43 (1990). In other words, the clause guarantees persons advance notice of the punishment they may incur as a result of engaging in particular conduct. Weaver v. Graham, 450 U.S. 24, 28-29 (1981). The government may not make up new crimes or increase the punishment for a crime after the crime was committed.

But that is not what happened in this case. The bureau’s new policy did not increase the sentence petitioner received for his conviction. Rather, it took away one way that petitioner could obtain early release. The Supreme Court has held expressly that the clause does not protect “a prisoner’s opportunity to take advantage of provisions for early release.” California Dept. of Corrections v. Morales, 514 U.S. 499, 506 (1995).

There is a narrow exception to this rule, recognized in Lynce v. Mathis, 519 U.S. 433 (1997), when a law is enacted that takes away something that has already been earned, such

as good time credits. Although petitioner says that his “right” to early release “remain[s] vested,” petitioner had not earned early release at the time the new policy was enacted (which appears to have been in 1995) . He had not been awarded a sentence reduction. In fact, he was still more than 10 years away from beginning participation in the program that could potentially qualify him for early release.

It is true that petitioner was told in 2004 that he appeared to be “eligible” for early release. But at the same time, petitioner signed a statement acknowledging that his eligibility for early release was “provisional, and may change.” Further, petitioner received the notice more than six months before completing the program that he was no longer eligible for a sentence reduction. In short, petitioner’s punishment was not increased.

With respect to his equal protection argument, petitioner says only that the “detainer exclusion violates equal protection rights by allegedly operating to the peculiar disadvantage of US legal permanent residents with an D.H.S.-I.N.S. possible deportation detainer.” Petitioner is correct that prisoners with detainers lodged against them are treated differently from other groups of prisoners who remain eligible for early release. However, not all differential treatment violates the Constitution; the reason for treating two groups differently is key. The bureau explains its rationale 61 Fed. Reg. 25121-01. Under current regulations, all prisoners who complete the drug treatment program are required to participate in “transitional treatment programming” at a halfway house or in home confinement. 28

C.F.R. § 550.59. Prisoners with detainers lodged against them may not participate in the community-based treatment because the bureau considers such prisoners to be a flight risk. Because these prisoners cannot complete all the requirements of the treatment program, they cannot receive early release. 61 Fed. Reg. 25121-01. (Although petitioner alleges that he completed the residential portion of the drug treatment program, he does not say that he completed the community-based portion.) Reducing flight risk is a legitimate interest for the government to have. Further, it is rational for the bureau to believe that prisoners with detainers lodged against them are greater flight risks than other prisoners and that keeping such prisoners out of community-based programs will help reduce the risk. As several other courts have concluded, this is sufficient to satisfy the requirements of equal protection in this context. McClean v. Crabtree, 173 F.3d 1176, 1186 (9th Cir. 1999) (en banc); Rublee v. Fleming, 160 F.3d 213, 217 (5th Cir. 1998).

Finally, I cannot conclude that the bureau violated petitioner's due process rights. As an initial matter, it is not clear what sort of process petitioner believes he was due. He does not deny that he has a detainer lodged against him that could lead to his deportation. Because that is the only fact relevant to the bureau's decision, a hearing could not have any effect on the bureau's decision. Mathews v. Eldridge, 424 U.S. 319 (1976) (in determining what process is due, court should consider whether additional procedure would improve accuracy of decision).

In any event, petitioner did not suffer a deprivation that would trigger due process protections. In Sandin v. Conner, 515 U.S. 472, 484 (1995), the Supreme Court held that prisoners are not entitled to any process under the Constitution unless their duration of confinement is increased or they are subjected to an "atypical and significant" hardship. Petitioner was not subjected to an atypical and significant hardship because his conditions of confinement were not affected at all by the bureau's decision. Petitioner may believe that his duration of confinement was increased, but it was not. Due process applies when a prisoner's *sentence* is lengthened; "[t]here is no constitutional or inherent right of a convicted person to be . . . released before the expiration of a valid sentence." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979).

Also, due process applies when the government gives a prisoner a statutory *right* to earlier release, such as when a prisoner earns good conduct time. Montgomery v. Anderson, 262 F.3d 641, 644-45 (7th Cir. 2001). As described above, however, petitioner did not have a legal entitlement to early release. Section 3621(e) gives the bureau discretion to decide which prisoners receive a sentence reduction. Although the bureau informed petitioner in 2004 that it appeared he met the criteria for early release, petitioner himself acknowledged in his statement that his eligibility could change at any time.

ORDER

IT IS ORDERED that petitioner Diego Gil's petitioner for a writ of habeas corpus is DENIED for petitioner's failure to show that he is custody in violation of federal law.

Entered this 16th day of May, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge