IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT DISTRICT OF NEW HAMPSHIRE

KENT E. HOVIND

PLAINTIFF / PETITIONER,

VS.

CASE NO. 1:14-fp-62

FCI BERLIN

WARDEN – RESPONDENT / DEFENDANT.

PETITION FOR WRIT OF HABEAS CORPUS

Comes now, the Plaintiff / Petitioner, KENT E HOVIND, Pro Se, and files this Petition for Writ of Habeas Corpus. To support this Petition, the Plaintiff/Petitioner shows the court the following:

(1)

KENT E. HOVIND, Hereafter know as "Petitioner" is serving a sentence of 120 months from the United States District Court of Northern Dist. Florida for Structuring and other Tax Offenses.

The Petitioner has a projected release date of August 11th, 2015 via good conduct time.

(2)

The Second Chance Act of 2007 (Hereinafter referred to as the "THE ACT") Pub. L. No. 110 – 199, was signed into law April 9, 2008. Among its many provisions, the Act changes the

Federal Bureau of prisons' statutory authorities for making pre-release Residential Re-Entry Center (RRC) placement decisions.

The following statutes are affected with the Act: 18 U.S.C. § 3621 and 18 U.S.C. § 3624 (c).

The Act, further titled as the Community Safety through Recidivism Prevention shows the following:

1. 15 to 27 percent of prisoners released expect to go to homeless shelters (Page 5, Section 9, lines 17-19):

2. Transitional job programs have proven to help people with criminal records to successfully return to the workplace and to the community, and therefore can reduce recidivism. (See Page 8, Section 19, lines 9 – 12);

3. Assisting offenders in securing permanent housing upon release or following a stay in transitional housing (See Page 13, Section 7, lines 1-3); and

4. Facilitating and encouraging timely and complete payment of restitution and fines by offenders to victims and the community (See Page 17, lines 4-6).

The Act further states, "The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of such term (not to exceed 12 months), under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's reentry into the community. Such conditions may include a community correctional facility." See Act, pages 107 – 108, Section 1, lines 1 – 5).

On April 14, 2008, five days after the President signed the legislation into law; the Department of Justice issued a "Memorandum for Chief Executive Officers" from Joyce K.

Conley, Assistant Director Correctional Programs Division, and Kathleen M. Kenney, Assistant Director/General Counsel on Pre-Release Residential Re-Entry Center Placements following the Second Chance Act of 2007. This memorandum shows the following: (See Attached).

1. The pre-release RRC place timeframe is increased to a maximum allowable 12 months. There is no percentage of "term to be served" limitations. See 18 U.S.C. § 3624 (c) (1) (amended).

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

3. With minor adjustments, staff should make inmates' pre-release RRC placement decision on an individual basis using current Bureau policy, Program Statement No. 7310.04, Community Corrections Center (CCC) utilization and Transfer Procedure, (12/16/1998), (hereinafter referred to as PS 7310.04).

4. Because the Act increases the maximum available pre-release RRC placement timeframe to 12 months, Bureau staff must review inmates for pre-lease RRC placements earlier than provided in PS 7310.04. Specifically, inmates must now be reviewed for pre-release RRC placements 17-19 months before their projected release dates.

5. The Act requires that inmates be individually considered for pre-release RRC placements using the following five-factor criteria from 18 U.S.C. § 3621 (b):

(1) The resources of the facility contemplated;

(2) The nature and circumstances of the offense;

(3) The history and characteristics of the prisoner;

(4) Any statement by the court that imposed the sentence;

(a) Concerning the purpose for which the sentence to imprisonment was determined to be warranted or;

(b) recommending a type of penal or correctional facility as appropriate; and

(5) Any pertinent policy statement issued by the U.S. Sentencing Commission.

Assessing inmates under the above criteria necessarily includes continuing to consider the more specific, and familiarly, correctional management criteria found in PS 7310.04, including, but not limited to, the inmates needs for services, public safety, and the necessity of the Bureau to manage it's inmate population responsibility. In doing so, staff must not view any of the criteria listed in PS 7310.04, especially Sections 9 and 10, or any other policy, as automatically precluding an inmate's pre-release RRC placement. Rather, in accordance with the Act, each individual inmate's pre-release RRC decision must be analyzed and supported under the five-factor criteria. Additionally the Act requires staff to ensure that each pre-release RRC placement decision is "of sufficient duration to provide the greatest likelihood of successful reintegration into the community." See 18 U.S.C.§ 3624(c)(6) (C) (amended). This means the Bureau staff must approach every individual inmate's assessment with the understanding that he/she is now eligible for a maximum of 12 months pre-release RRC placement. Provisions in PS 73.1004 that reflect any other possible maximum timeframe must be ignored.

(6) While the Act makes inmate's eligible for a maximum of 12 months pre-release RRC placement, Bureau experience reflects inmate's pre-release RRC needs can usually be accommodated by a placement of six months or less. Should staff determine an inmate's pre-

release RRC 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. (See attached memorandum dated April 14, 2008 from Joyce K. Conley to Chief Executive officers).

On July 15, 2008 before the U.S. Sentencing Commission at a Symposium in Washington DC, the Bureau of Prisons Director, Harley Lappin stated that although Congress had passed the Second Chance Act allowing an inmate to spend up to 12 months in an RRC not to expect any mass movement to the halfway houses. Our research, speaking of the BOP's, indicate that any time in an RRC beyond six months is not productive. He further testified that it was cheaper for him to house an inmate in a low security prison than it was to place an inmate in a halfway house/RRC.

(3)

The Sentencing Reform Act, 18 U.S.C. § 3621 (b), governs the BOP's assignment of prisoners to their place of imprisonment, as well as within the Federal Penal system. An analysis begins with the Act, and "where the statutory language provides a clear answer, it ends there as well." See Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 119 S.Ct. 775, 142 L.Ed.2d 881 (1999).

The Act employs the word "shall," and thus obliges the BOP to "ensure that a prisoner serving a term of imprisonment spends a portion of the final months of such term (not to exceed 12 months), under conditions that will afford the prisoner, a reasonable opportunity to adjust to and prepare for the prisoners reentry into the community. Such conditions may include a community correctional facility. "(See Act pages 107 – 108, Section 1, lines 22 – 25), 18 U.S.C. § 3624 (c) (1) (amended) attached.

In reviewing 18 U.S.C. § 3621 (b), the BOP has the authority to designate an inmate's place of confinement. However, that discretion is guided by five factors: (1) The resources of the facility contemplated; (2) The nature and circumstances of the offense; (3) The history and characteristics of the prisoner; (4) Any statement by the court that imposed the sentence; and (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994 (a) (2). In reviewing these five factors under the statute, congress used the word "and" rather than "or" to unify it's five concerns. All of the listed factors must be considered. See Fults v. Sanders, 442, F.3d 1099 m 1092 (8th Cir. 2006). After enumerating the five factors, U.S.C. § 3624 (c) (1) places one additional restriction on the BOP: "the Director of the Bureau of Prison's shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility." This language is mandatory as the word "shall" was used by Congress. The key language in the statute are the words "under conditions that will afford that prisoner a reasonable opportunity to adjust into the community". Had Congress believed that six months was adequate as under the old statute, they would not have increased it to twelve months under the new statute.

Additionally, the Act requires the respondent to ensure that each pre-release RRC placement decision is "of sufficient duration to provide the greatest likelihood of a successful reintegration into the community." 18 U.S.C. 3624 (c) (6) (C) (amended. This means that Bureau staff must approach every individual inmate's assessment with the understanding that he/she is now eligible for a maximum of 12 months pre-release RRC placement. As the author of the Act, Congressman Danny Davis stated,

Director Regarding Cost of Incarceration and Supervision, to Chief Probation and Pretrial services office May 6, 2008).

(4)

A petition for a writ of habeas corpus under 28 U.S.C. § 2241 is correctly used to challenge the manner in which a sentence is executed. See Reyes-Requena v. United States, 243 F.3D 893, 900-01 (5th Cir. 2001). A § 2241 petition that attacks the manner in which a sentence is carried out or a determination affecting the length of it's duration "must be filed in the same district where the prisoner is incarcerated." Pack v. Yusuff, 218 F.3d 448, 451 (5th Cir. 2000). See Spencer v. Kemma, 523, U.S.1, 118 S.Ct. 978, 140 L.Ed. 2nd 43 (1998).

To prevail in a habeas corpus petition, the petitioner must show that he/she is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241 (c) (3). See Wilkinson v. Dotson, 544 U.S. 74, 85, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005); Preiser v. Rodriguez, 411 U.S. 475, 486, 93 S.Ct. 1827,36 L.Ed.2d 439 (1973) (stating that the writ "has been accepted as the specific instrument to obtain release from [unlawful] confinement. Congress, however, amended that statute to provide additionally that the habeas court "shall...dispose of the matter as law and justice require." 28 U.S.C. § 2243. Invoking this broader remedial language" of § 2243; courts have construed federal statutory habeas to offer forms of relief in addition to immediate release. Wilkinson, 544 U.S. at 85, 125 S.Ct. 1242. For example, a § 2241 may issue to shorten a prisoner's sentence.

Preisner, 411 U.S. at 489, 93 S.Ct. 1827, to effect a "quantum change in the level of custody, "Graham v. Broglin, 922 F. 2d 379, 381 (7th Cir. 1991); United States v. Jalili, 925 F.2d 889, 893 (6th Cir. 1991) (Challenges to the placement, and not to the fact of federal conviction, are properly brought under § 2241).

> "Today, few of those who return to their communities are prepared for their release or receive any supportive services. When the prison door swings open, an ex-offender may receive a bus ticket and spending money for a day or two. He/she generally has no place to stay..."

. Senator Joseph Biden, now Vice President Biden stated,

> "The Reducing Recidivism and Second Chance Act of 2007 will help make communities safer and ensure that former offenders successfully transition back into society providing...and other services to help ex-offenders reintegrate into the community and become productive contributing members of our community. The only way to close a revolving door is to open another one. The Bill strengthens the BOP's ability to provide reentry services to federal prisoners...:

For these benefits to take place, the BOP has to be willing to transfer inmate's to the RRC centers beyond the six months that Director Harley Lappin is attempting to limit inmate's too. Mr. Lappin cites "Our research that we've don for many reflects that many offenders who spend more than six months in a halfway house tend to do worse rather than better. The six months seems to be a limit for most of the folks, at which time if they go much beyond that, they tend to fail more often than offenders that serve up to six months." (U.S.S.C. Proceedings from the Symposium on Alternatives to Incarceration at 267, July 14-15, 2008). As of this filing, Mr. Lappin has not been able to produce the "research" and an answer from FOIA states there is no research. Mr. Lappin further resists full implementation of the Act citing costs. At the same symposium, he stated halfway house placement actually cost more per day than a minimum or low security institution. As to the latter, the assertion is plainly wrong. According to the Administrative Office of Courts' most recent data, the per day cost of placement at a halfway house is $62.66 as opposed to $68.28 at other BOP facilities.

The halfway house per day figure is before the inmate pays 25% of his gross pay from employment. (See attached Memorandum from Matthew Roland, A.O.C. Deputy Assistant

It is clear that the proper vehicle for this action is § 2241. The Eleventh Circuit relied upon Lopez v. Davis, 531 U.S. 230, 236, 121 S.Ct. 714, 718, 148 L.Ed.2d 635 (2001) in it's holding in United States v. Warmus, 151 Fed. Appx. 783, 786, (11th Cir. 2005) ("A prisoner in federal custody may bring an action under § 2241 to attack, inter alia, Bureau regulations.") Williams v. Pearson, 197 Fed. Appx. 872,876, (11th Cir. 2006) (citing Warmus and holding that § 2241 was the proper statute for bringing a suit challenging BOP regulations concerning collection of special assessment). Also see McDonald v. Sawyer, No 1:03-cv-235- RWS, 2003 WL 24046340, at *2 (N.D. Ga. Feb. 14, 2003). See collection of cases: Chambers v. U.S., 106 F.3d 472, 475 (2nd Cir. 1997); Coady v. Vaughn, 251 F.3d 480, 485 (3rd Cir. 2001); Jiminian v. Nash, 245 F.3d 144, 146 (2nd Cir. 2001); Hernandez v. Cambell, 204 F.3d 861, 864 (9th Cir. 2001); Montez v. McKinna, 208 F.2d 862, 865 (10th Cir. 2000).

As Judge Calabresi stated in Levine v. Apker, 455 F.3d 71, 78-79 (2nd Cir. 2006), "Levine's petition challenges the place of his imprisonment, including the differences in the manner and conditions of imprisonment (such as the degree of physical restriction and rules governing prisoner's activities) that distinguish CCC's from other BOP penal facilities. Levine's claim is therefore not an attack on the lawfulness of his sentence, and is such governed by § 2241.". Here, the Petitioner is also attacking the manner in which the sentence is being carried out and not the lawfulness of the sentence. Therefore, as in Levine v. Apker , the appropriate vehicle to attack this issue is under 28 U.S.C. § 2241.

(5)

The BOP established a three-tiered administrative remedy procedure for federal prisoner's. See 28 C.F.R. § 542.10 542.19 (2003). Under this system, an inmate may file a formal grievance with the Warden if informal resolutions are not successful. See id. At § 542.13.

Once the Warden denies an inmate's grievance, the prisoner may appeal to the Regional Director. If dissatisfied with that response, the inmate may pursue a final appeal to the BOP's Office of General Counsel. See id. At § 542.15 (a). Administrative remedies have not been exhausted until the inmate's claim has been filed and denied at all levels. This process without any request for extensions and any delays will take approximately 120 days (4 months) without either tier requesting an extension.

However, it must be noted, that each tier generally request's an extension which can push the time frame for full exhaustion of the remedies to 180 days (six months).

Extensions are automatic for each level as follows: 20 days for the Warden, 30 days for Regional Director, and 20 days for General Counsel. While exhaustion of administrative remedies generally bar direct resort to the courts, that is not true where pursuing administrative remedies would be futile because it is clear the claim will be rejected. Where an agency, such as the BOP, has adopted a new rule or policy and announced that it will follow that policy, especially where that policy has it's origin above the Bureau's General Counsel Office, it is pointless to require a complainant to follow the administrative procedure. The people who would review the Petitioner's claim in the Bureau have absolutely no power to alter his placement in an RRC for more than six months, up to twelve months. The policy which would have to be overturned is the policy by the Bureau of Prisoner's Director, Harley Lappin.

Mr. Lappin is the top person in the BOP. Thus, an administrative appeal could only work to delay this matter. See Tasby v. Pratt, 2002 WL 1160071 at *2 (N.D. TEX. 2002) (where the Bureau has adopted the policy and instructed it's staff in the form of a Program Statement that inmates are ineligible for early release under the circumstances for this case, the court finds that presentation of the claims to the Bureau at the regional and national levels would, in fact, be

futile).

In fact, an administrative appeal would be more than futile in this case; it would completely destroy any hope that the Petitioner has of receiving twelve months in an RRC, or more than six months. Even if the Petitioner could put together his complaint and appeals in the proper form in no time at all, the Bureau would still have ninety days without any extensions to respond to his request for relief. As stated in James v. United States Dept. of Health and Human Services, 824 F.2d 1132, 1139 (D.C. Cir. 1987), resort to administrative remedies is futile if there has been "a prior indication from the agency that it does not have jurisdiction over the matter or it has evidenced a strong position on the issue together with an unwillingness to reconsider." Here, the BOP Director, Harley Lappin has taken a strong position on the issue and has thus far been unwilling to reconsider. See Aron v. LaManna, 4 Fed. Appx. 232, 2001 WL 128349 (6th Cir. 2001); Goar v. Civilet, 668 F.2d 27, 28-29 (6th Cir. 1982); Gutierrez v. United States, No. 03-cv-1232 (FB), 2003 WL 21521759 (E.D.N.Y., July 3, 2003); McKart v. United States, 395 U.S. 185, 200, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) ("petitioner must show that the administrative remedy is inadequate or cannot provide the relief requested for exception requirement to apply").

The Petitioner asserts that he should be excused from exhausting the administrative remedies, or better said, excused from even attempting to "tilt at the administrative windmills," Howard v. Ashcroft, 248 F.Supp.2d 518, 533 (M.D. La. 2003), because the adoption of Mr. Lappin's statement by the underlings at the BOP clearly demonstrates that the effort would be futile.

The Petitioner finds support for a futility exception in McCarthy v. Madigan, 503 U.S. 140, 144 (1992), superseded by statute, 42 U.S.C. § 1997 (e) (a), which held, prior to the enactment of the PLRA, that a judicially-imposed exhaustion requirement in Bivens actions could be waived for futility. The court drew a distinction between statutorily-imposed

exhaustion requirement, and judicially-imposed exhaustion requirement, explaining that "where Congress specifically mandates, exhaustion, is required. Id at 144. But "where Congress has not clearly required exhaustion, sound judicial discretion governs." Id.

Delineating the bounds of "sound judicial discretion," the court noted that at least three broad sets of circumstances" excused administrative exhaustion: (1) where prejudice to the prisoner's subsequent court action "may result, for example from an unreasonable or indefinite timeframe for administrative actions;" (2) where the administrative agency may not have the authority "to grant effective relief;" or (3) "where the administrative body is shown to be biased or has otherwise predetermined the issue before it." Id. At 146-48. The Supreme Court has stated that a party may not be required to exhaust administrative procedures from were there is no possibility of receiving any type of relief. Booth v. Chuner, 532, U.S. 731, 741 n.6 (2001) (stating the "without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint leaving the petitioner with nothing to exhaust")

In number three of these exceptions – where "requiring administrative review...,'would be to demand a futile act' "that Petitioner claims entitlement to judicial waiver. Id. At 148 (quoting Houghton v. Sharver, 392, U.S. 639, 640 (1968). The Eleventh Circuit recognized the statutory/judicial distinction given in McCarthy, indicating that exceptions to judicially/imposed exhaustion requirements remain available. See Richardson v. Reno, 162 F3d 1338, 1374 (11th Cir. 1998), vacated on other grounds, 526, U.S. 1142 (1999) ("Although judicially developed exhaustion requirements might be waived for discretionary reasons by courts, statutorily created exhaustion requirements bind the parties and the courts.); Hicks v. Jordon, 165 Fed. Appx. 7907, 7909 n.2 (11th Cir. 2006) (citing Richardson with approval and recognizing distinction between

statutorily mandated and thus non-waivable exhaustion requirements, and judicially developed and thus potentially waivable exhaustion requirements): Thomas v. Crosby, 371 F.3d 782, 814 n.11 (11th Cir. 2004) (Tjoflat, C..J. concurring) (noting that, in § 2254 cases, "a Petitioner may overcome a procedural bar by demonstrating 'cause and prejudice' for failure to exhaust state remedies.").

The important difference between "statutory" and "judicially-imposed" exhaustion, as explained in McCarthy, is that the failure to comply with the statutory exhaustion requirement precludes jurisdiction, whereas failure to exhaust a judicially-imposed requirement counsels the court to decline jurisdiction exception in it's "sound judicial discretion. McCarthy, 503 U.S. at 144. Any doubt left by McCarthy whether the judicially imposed exhaustion requirement in § 2241 cases is a jurisdictional prerequisite has been resolved by the Supreme Court's opinion in Bowles v. Russell, U.S. 127 S.Ct. 2360, 168 L.Ed.3=2d 96 (2007). The court in Bowles determined that the deadlines for filing a federal notice of appeal were mandatory and jurisdictional because they were statutorily, and not judicially, imposed; thus, no exceptions such as waiver or equitable tolling could apply. Id. At 2362. In coming to this conclusion, the Court drew a distinction between statutory time requirements and court-fashioned tie requirements, finding that only the former could properly characterized as "jurisdictional." Id. At 2363. The Court reasoned that under Article III, Section 1 of the Constitution, "only Congress may determine a lower federal court's subject-matter jurisdiction; and thus "it was improper for courts to use the term "jurisdictional" to describe [judicially imposed] time prescriptions in rules of court." Id. At 2365-66 (quoting Kontrick v. Ryan, 540 U.S. 443, 452, 124 S.Ct. 906, 157, L.Ed.2d 867 (2004).

The exhaustion requirement imposed in § 2241 cases has judicial, and not statutory

underpinnings. Skinner v. Wiley, 355 F.3d 1293, 1295 (11th Cir. 2004). In accordance with Article III, Section 1 of the Constitution, that requirement may not be considered a limitation on the Court's subject-matter jurisdiction. Bowles, 127 S.Ct. at 2365-66. Because the exhaustion requirement is judicially fashioned, a court has discretion to waive the requirement in it's "sound judicial discretion." McCarthy, 503, U.S. at 144, 112 S.Ct. 1081. Thus the exceptions recognized in McCarthy, including the futility exception, apply to the exhaustion requirement in § 2241 cases. See collection of cases; Beharry v. Ashcroft, 329, F.3d 51, 58 (2nd Cir. 2003); Woodall v. Federal Bureau of Prisons, 432, F.3d 235, 239 n.2 (3rd Cir. 2005); Fuller v. Rich, 11 F.3d 61, 62 (5th Cir. 1994); Fazzini v. Northeast Ohio Correctional Center, 473 F.3d 229, 236 (6th Cir. 2006); Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004); Holman v. Booker, 166 F.3d 347, 1998 WL 8644018, at *3 (10th Cir. 1998) (Table); Rodriguez v. Lamer, 60 F.3d 745, 747 (11th Cir. 1995) (stating that, although federal prisoners must exhaust BOP administrative remedies, exhaustion requirement could be waived).

Petitioner's failure to exhaust administrative remedies should be excused due to futility. Here, the BOP's Director, Harley Lappin has publicly announced his position on the Second Chance Act. He publicly on July 15, 2008, stated that although Congress had enacted a new statute allowing up to twelve months in an RRC/halfway house, do not expect any substantial move to increase to those facilities as he is relying on "our research that showed for most inmates greater than six months in a halfway house or RRC was not productive. He further went on to say that is was cheaper to house an inmate in a low-security prison than it was to place him/her in an RRC. He quoted the following figures: $48.00 per day for a low security bed, and $64.00 per day for an RRC/halfway house bed (Sentencing Commission Symposium held Washington D.C. July 15, 2008). Just two months prior to Mr. Lappin making this comment, his

office forwarded figures to the Administrative Office of the Court's Deputy Assistant Director, Matthew Roland stating the following figures: $2,076.83 fro a low security prison bed per month, $1.905.92 for a halfway house bed, and $301.80 for home confinement. These figures are before an inmate pays 25% of his weekly salary to the RRC facility for room and board. (See memo from Matthew Roland, Deputy Assistant Director of Administrative Office of the Court's dated May 6, 2008). Based upon Mr. Lappin's public comments regarding the Act ,the BOP has taken a position that they are not placing anyone in an RRC for longer than six months despite the Act granting all inmates the right to be considered for up to twelvemonths. What is further evidence that the BOP is not considering inmates in good faith for more than six months, the Community Corrections Managers, Case Managers, and Counselors are enforcing that position by not following the guidelines set forth. In summary, having the Petitioner to exhaust administrative remedies would be futile. Mr. Lappin has made it clear in his public comment and through the practices of his underlings that he does not support anyone going to an RRC for more than six months.

Were the Petitioner be required to pursue administrative remedies despite the position that Mr. Lappin and his staff has taken on the issue, the Petitioner would likely be near his last twelve months. Further, the Director, Mr. Lappin has already denied the Petitioner his requested relief when he went public with his comments. Therefore, the exhaustion of administrative remedies should be subject to a futility and irreparable harm exception.

(6)

Turning to the second of the three circumstances, the McCarthy Court said exhaustion of administrative remedies could be excused. "Where prejudice to the prisoner's subsequent court action may result, for example from an unreasonable or indefinite timeframe for administrative

actions," the petitioner should be excused.

The BOP's administrative remedy is set-up like so: 1) The Petitioner must first file for an informal resolution under BP-8 1/2. The staff has 10 days to respond to this informal resolution request, 2) The Petitioner then files a BP-9 to the Warden giving the Warden 20 days to respond, 3) The decision of the Warden is appealed to the Regional Director under a BP-10 giving them 30 days to respond, and 4) The Regional Director's decision is appealed to the General Counsel under BP-11 giving him 30 days to respond. Taking these factors the administrative remedies are as such:

1) Informal Resolution 8-1/2 – 10 days to respond.
2) Inmate files BP-9 to Warden – 20 days to respond.
3) Inmate has 20 days to appeal the BP-9 to Regional Director with BP-10.
4) Regional Director has 30 days to respond to BP-10.
5) Inmate has 30 days to appeal the BP-10 decision to General Counsel with a BP-11.
6) General Counsel has 30 days to respond to BP-11.

Keeping in mind, the inmate does not get an extension, but the BOP can extend each level as follows: 20 days for Warden, 30 days for Regional Director, and 30 days for General Counsel. It is almost always certain that the Regional Director and General Counsel ask for extensions. The total time for exhaustion could potentially take 140 days without extensions, and up to 220 days with extensions. For example of Exhaustion on the issue see Strong v. Schultz, 599 F. Supp 2d 556 (D.N.J. 2005). In Strong, the court excused exhaustion for a second time stating it took five months to exhaust the first time, and forcing exhaustion again would effectively moot his § 2241 claim through no fault of his own. Id. at 561.

Under BOP policy, the Petitioner must be considered for RRC placement between 17 – 19 months before his projected release date. With these set guidelines, the Petitioner cannot begin his administrative remedies until he is below 17 months from release. The Petitioner is prevented from beginning his administrative remedies before this time because neither his RRC packet has been processed nor has the Warden had the opportunity to review it. This should be done before the Administrative Remedies Program is utilized, as placement in an RRC would be the remedy sought and without yet appropriate review by the Warden and/or his designee, the Petitioner has not been denied a 12 month RRC placement.

Citing Strong, at 558, he filed Administrative Remedies before the appropriate time frame, and General Counsel responded as follows:

> "...As a result of the Second Chance Act of 2007, you will be reviewed for RRC placement by your unit team between 17-19 months of your projected release date. If you are not satisfied with the recommendation by staff when rendered, you may initiate a Request for Administrative Remedy at your local institution." (Administrative remedy Response No. 477229-AL, by Harrell Watts dated May 19, 2008). Mr. Watts is the National Inmate Appeals Administrator.

Based upon these factors, the Petitioner has shown that the consideration period under BOP policy of 17-19 months before the projected release date is set to prevent the Petitioner from having ample time for exhaustion of the internal remedies and the taking his issue to court. By the time a full exhaustion could be had, the Petitioner would then be inside the twelve months before his release date making his petition essentially moot. Again, the exhaustion requirement should be subject to a futility and irreparable harm exception. Because, if this petition is granted, Petitioner's 12 months in RRC confinement would begin before he would have time to fully exhaust the remedies in this case. If required to exhaust, Petitioner would likely be irreparably harmed in that he may lose the opportunity for 12 months in RRC confinement. Therefore, lack

of exhaustion should not foreclose the exercise of this Court's jurisdiction, as it is the BOP's policy that prevents adequate time for exhaustion not the actions of the Petitioner.

CONCLUSION

When congress passed the Second Chance Act 2007, it was their intent that a prisoner returning to society after serving a lengthy prison sentence would be afforded the greatest amount of time in an RRC to assist him/her in succeeding in his/her reintegration back into the community. When Congress modified 18 U.S.C. § 3624 (c), it is clear that "an underlying premise of these amendments is that more time an inmate spends in a CCC before he or she is released from BOP custody, the more likely it is that his or her community reintegration will be successful." Strong at 562.

Although Congress granted the BOP discretion in deciding each inmate's placement, that discretion is limited by requiring that each placement is "of sufficient duration [not to exceed 12 months] to provide the greatest likelihood of successful reintegration into the community." 18 U.S.C. § 3624 (c) (6). By increasing the placement period to 12 months and requiring the BOP to ensure that placements are long enough to provide "the greatest likelihood of successful reintegration." Congress intended that each inmate would be considered for a placement of the longest duration 12 months although the ultimate may be less than 12 months, if warranted by application of the § 3621 (b) factors. See Strong at 562.

Wherefore, the Petitioner asks this Honorable Court to GRANT this Writ of Habeas Corpus and ORDER the BOP in good faith to consider Petitioner on an individualize basis using the five factors set forth in 18 U.S.C. § 3621 (b) plus take into account the language in 18 U.S.C. § 3624 (c) (6) (C) granting him the maximum amount of time in the RRC to provide the "greatest likelihood of successful reintegration into the community." § 3624 (c) (6) (C).

This 28th day of January, 2014.

Kent E Hovind

Kent E. Hovind

06452-017

Berlin Federal Prison Camp

PO BOX 9000, Berlin, NH 03570

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JANUARY 16, 2014

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : KENT E HOVIND, 06452-017
BERLIN FCI UNT: G UNIT QTR: G01-018L
P.O. BOX 69
BERLIN, NH 03570

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 754923-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : DECEMBER 30, 2013
SUBJECT 1 : RESIDENTIAL REENTRY CENTER REFERRALS
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

HOVIND, Kent
Reg. No. 06452-017
Appeal No. 754923-R1
Page One

Part B - Response

You appeal the decision of the Warden at FCI Berlin and request additional Residential Re-entry Center (RRC) placement in conjunction with Home Confinement placement under the Second Chance Act (SCA).

Placement in community programs are designed to provide transition for inmates reintegrating into society near the end of their sentences. Under Program Statement 7310.04, CCC Utilization and Transfer Procedures, a number of factors are weighed in determining a recommendation for RRC placement. Determinations are based on the inmate's needs, existing community resources, institutional adjustment, length of sentence, and the need to provide for the safety and security of the general public. Inmates are also considered under the SCA which looks at the resources of the facility, nature and circumstances of the offense, history and characteristics of the inmate, statement of the court imposing the sentence, and any pertinent policy statement by the U.S. Sentencing Commission.

A review of your appeal reveals you have an August 11, 2015, projected release date. Your Unit Team considered your individual situation, programming and transitional needs pursuant to the above criteria and recommended 182 days of Home Confinement placement. This placement was determined to be sufficient to provide you the greatest likelihood of successful reintegration into the community. Staff are afforded broad discretion in reaching this decision and you present no evidence this discretion was abused. Accordingly, your appeal is denied.

If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons. Your appeal must be received in the Administrative Remedy Section, Office of General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C. 20534, within 30 calendar days of the date of this response.

Date: December 12, 2013

C. L. NORWOOD
Regional Director

REQUEST FOR ADMINISTRATIVE REMEDY
Part B - Response

Name: HOVIND, Kent E. **Admin. Remedy Case Number:** 754923-F1

Reg. No.: 06452-017 **Unit:** G Unit

This is in response to your Request for Administrative Remedy, dated October 2, 2013, in which you request consideration for six months of Residential Reentry Center (RRC) placement in addition to six months of Home Detention placement.

Records reflect that you were reviewed in accordance with the Second Chance Act of 2007 on October 15, 2013, and recommended for six months of Home Detention placement to begin on your Home Detention Eligibility date of February 11, 2015. The Unit Team noted your strong family ties, lack of substantial transitional needs, and overall low risk assessment as the rationale for the recommendation. The Unit Team believes this placement is of sufficient duration and will provide the greatest likelihood of successful reintegration.

Accordingly, your Request for Administrative Remedy is denied.

If you are not satisfied with this decision, you may appeal to the Regional Director at Bureau of Prisons, Northeast Regional Office, U.S. Customs House, 7th Floor, 2nd and Chestnut Streets, Philadelphia, Pennsylvania, 19106. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

Deborah G. Schult

Deborah G. Schult, Ph.D., Warden

10·30·13
Date

BER 1330.17
02/11/2003
Administrative Remedy Program
Page 6

ATTACHMENT A

FEDERAL CORRECTIONAL INSTITUTION
BERLIN, NEW HAMPSHIRE
INFORMAL RESOLUTION

Inmate Name: Hovind, Kent Reg. No. 06452-017
Unit: G Date: 10-15-2013

NOTICE TO INMATE: You are advised that normally prior to filing a Request for Administrative Remedy, BP-229(13), you must attempt to informally resolve your complaint through your Correctional Counselor. Please follow the three steps listed below:

1. State your complaint: Today at team I was told that I was being approved for 6 months home confinement. Per the Second Chance Act, I asked if I could also be given 6 months halfway house time, for a total of 12 months combined. I was told that that is not possible, and I dispute that determination.

2. State what actions you have made to informally resolve your complaint: I spoke to my case manager in an effort to resolve the issue.

3. State what resolution you expect: I would like the additional 6 months halfway house placement.

Inmate's Signature: Kent Hovind Date: 10/15/2013

4. Correctional Counselor's Comments (Steps Taken to Resolve):
On October 15, 2013, you were reviewed in accordance with the Second Chance Act of 2007. The Unit Team considered your need for services, public safety, and the necessity of the Bureau to manage its inmate population. You were determined to be appropriate for Home Detention placement based on your limited transitional needs. This placement recommendation is of sufficient duration to provide the greatest likelihood of successful reintegration into the community.

5. Informal Resolution WAS / WAS NOT accomplished. (Circle One)

Correctional Counselor — Unit Manager

10-24-2013 — 10/24/13
Date — Date

	BP-8 ISSUED	BP-8 RETURNED	BP-9 ISSUED	BP-9 RETURNED	REMEDY CLERK
DATE	10-15-2013	10-16-2013	10-25-2013	10-28-2013	10-29-13
TIME	3:41 pm	9:12 am	9:18 am	11:00 am	9:30
COUNSELOR					KH