Slip Copy, 2010 WL 4918896 (S.D.W.Va.)
**(Cite as: 2010 WL 4918896 (S.D.W.Va.))**

**H**
Only the Westlaw citation is currently available.

**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court, S.D. West Virginia.
Milton E. DODD, Petitioner,
v.
T.R. CRAIG, Warden, FCI Beckley, West Virginia, Respondent.
**Civil Action No. 5:08-0128.**

Oct. 26, 2010.

Milton E. Dodd, Beaver, WV, pro se.

***PROPOSED FINDINGS AND RECOMMENDATION***

R. CLARKE VANDERVORT, United States Magistrate Judge.

***1** On February 25, 2008, Petitioner,[FN1] acting *pro se,* filed an Application Under 28 U.S.C. § 2241 for Writ of Habeas Corpus by a Person in State or Federal Custody.[FN2] (Document No. 1.) Petitioner alleges that the BOP is improperly denying him placement in the Residential Drug Abuse Treatment Program [ RDAP]. Specifically, Petitioner states as follows:

> FN1. On September 24, 1997, Petitioner pled guilty in the United States District Court for the Western District of North Carolina to one count of conspiring to distribute narcotics in violation of 21 U .S.C. § 846. *United States v. Dodd,* Case No. 3:97-cr-0116 (W.D.N.C. Oct. 27, 1998), Document No. 56. On October 27, 1998, the District Court sentenced Petitioner to a 168 month term of imprisonment, to be followed by a three year term of supervised release. *Id.,* Document No. 101. Petitioner did not appeal his conviction or sentence. On March 11, 2003, the United States filed a Motion for Downward Departure pursuant to Rule 35. *Id.,* Document No. 136. By Order entered on March 20, 2003, the District Court granted the motion and reduced Petitioner's sentence to a 130 month term of imprisonment. *Id.,* Document No. 137. Petitioner subsequently filed a Motion for Retroactive Application of Sentencing Guidelines regarding his Crack Cocaine Offense. By Order entered on February 9, 2009, the District Court granted his request for a sentence reduction under 18 U.S.C. § 3582(c)(2) and reduced his sentence of imprisonment to "120 months." *Id.,* Document No. 157. The Bureau of Prisons' Inmate Locator indicates that Petitioner was released from custody on May 28, 2010.
>
> FN2. Because Petitioner is acting *pro se,* the documents which he has filed are held to a less stringent standard than if they were prepared by a lawyer and therefore construed liberally. *See Haines v. Kerner,* 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

I plead guilty with the understanding that I would be interviewed for participation in the 500 hour Residential Drug Abuse Treatment Program offered by the Federal Bureau of Prisons, and with the promise that I would be given the opportunity to complete the program and receive up to one year sentence reduction pursuant to Title 18, U.S.C.. Section 3621(e)(2)(B), once determination of said eligibility was determined by the Bureau. Whereof, on February 21, 2007, I was notified of the Bureau's determination that I was eligible to complete the program and receive up to one year sentence reduction under the controlling statute. (*See* Residential Drug Abuse No-

tice to Inmate dated 02-21-2007, copy attached hereto). However, the Director of the Federal Bureau of Prisons (BOP), does not implement this program uniformly through the Bureau by accommodating eligible convicted prisoners into the program within proximity to their release dates, Bureau wide; i.e. as required of the Director of the BOP under the plain language of the statute, and pursuant to the clear expressed intent of congress. 18 U.S.C., Section 3621(e)(2)(B). Rather, some eligible convicted prisoners are routinely accommodated into the program within proximity to their release dates, so as to afford them the opportunity to complete the 500 hour residential and the six month community transitional aftercare components of the program, prior to one year before their release dates. Whereas other eligible convicted prisoners are routinely designated to FCI Beckley, where everyone is categorically excluded from completing both components of the program within one year of their release dates. Thereby excluding all eligible convicted prisoners designated to FCI Beckley to complete the program from receiving an individualized determination for up to one year sentence reduction to which they are obviously entitled to under the plain language of the statute and the clear intent of Congress. Whereof, the court should grant habeas corpus remedy so as to secure Petitioner's "settled expectation" to early release, and so as to prohibit the custodian, T.R. Craig, Warden and/or the Director of the BOP, from retrospectively altering Petitioner's eligibility to receive up to one year sentence reduction pursuant to Title 18 U.S.C. Section 3621(e)(2)(B) , in violation of the retroactivity doctrine. *See Bowen v. Crabtree,* 22 F.Supp.2d 1131 (D.Org.2000), affirmed, 202 F.3d 1211 (9th Cir.2000). Additionally, declare FCI Beckley unfit to host this program.[FN3]

FN3. The undersigned notes that Petitioner does not possess a constitutionally protected expectation interest in receiving a sentence reduction. Such a subjective expectation does not arise to the level of a constitutional claim. *See Mallette v. Arlington County Employees' Supplemental Ret. Sys. II,* 91 F.3d 630, 635 (4th Cir.1996)("[A] mere expectation of a benefit-even if that expectation is supported by consistent government practice-is not sufficient to create an interest protected by procedural due process. Instead, the statute at issue must create an entitlement to the benefit before procedural due process rights are triggered."). Neither Section 3621(e), the BOP's Program Statement (P.S. 5162.04), nor the Code of Federal Regulations (28 C.F.R. § 550.58), contain explicit mandatory language or standards limiting the BOP's discretion, which may have given rise to a protected liberty interest in early release. *See Kentucky Dept. of Corr. v. Thompson,* 490 U.S. 454, 109 S.Ct. 1904, 1909-10, 104 L.Ed.2d 506 (1989) (Regulations must contain "explicitly mandatory language" to create a liberty interest.). Accordingly, Petitioner does not possess a statutorily protected expectation interest in early release.

(*Id.*, pp. 7-8.) In support of his Petition, Petitioner attaches as an Exhibit a copy of his "Residential Drug Abuse Program Notice to Inmate." (*Id.*, pp. 11-12.)

***ANALYSIS***

***2** The undersigned finds that Petitioner's Section 2241 Application must be dismissed as moot. Article III, Section 2 of the United States Constitution provides that federal Courts may adjudicate only live cases or controversies. *See Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477, 110 S.Ct. 1249, 1253, 108 L.Ed.2d 400 (1990); *Nakell v. Attorney General of North Carolina,* 15 F.3d 319, 322 (4th Cir.), *cert. denied,* 513 U.S. 866, 115 S.Ct. 184, 130 L.Ed.2d 118 (1994). This means that the "litigant must have suffered, or be threatened with,

an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* In the context of a *habeas corpus* proceeding, the writ "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494-95, 93 S.Ct. 1123, 1129, 35 L.Ed.2d 443 (1973). In this case, by virtue of Petitioner's release from custody, the Respondent can no longer provide the requested relief. Consequently, the Court can no longer consider Petitioner's Application under Section 2241.

> An incarcerated convict's (or a parolee's) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction. Once the convict's sentence has expired, however, some concrete and continuing injury other than the now-ended incarceration or parole-some "collateral consequence" of the conviction-must exist if the suit is to be maintained.

*Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 983, 140 L.Ed.2d 43 (1998). Accordingly, Petitioner's claims are rendered moot by virtue of his release from custody and the absence of collateral consequences, and therefore, his Section 2241 Application must be dismissed.[FN4] *See e.g., Alston v. Adams*, 178 Fed.Appx. 295, 2006 WL 1194751 (C.A.4 (Va.)); *Alvarez v. Conley*, 145 Fed.Appx. 428, 2005 WL 2500659 (C.A.4 (W.Va.); *Smithhart v. Gutierrez*, 2007 WL 2897942 (N.D.W.Va.).

> FN4. Furthermore, Petitioner acknowledges that he failed to exhaust his administrative remedies. Specifically, Petitioner states that "[o]ther similarly situated convicted prisoners at FCI Beckley have exhausted all administrative remedies concerning these grounds, to no avail, and found them to be futile." (Document No. 1, p. 5.)

***PROPOSAL AND RECOMMENDATION***

Based upon the foregoing, it is therefore respectfully **PROPOSED** that the District Court confirm and accept the foregoing factual findings and legal conclusions and **RECOMMENDED** that the District Court **DISMISS** Petitioner's Application under 28 U.S.C. § 2241 for Writ of Habeas Corpus by a Person in State or Federal Custody (Document No. 1.) and **REMOVE** this matter from the Court's docket.

Petitioner is notified that this Proposed Findings and Recommendation is hereby **FILED,** and a copy will be submitted to the Honorable United States District Judge Irene C. Berger. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), Rule 8(b) of the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code , and Rule 45(e) of the Federal Rules of Criminal Procedure, Petitioner shall have seventeen days (fourteen days, filing of objections and three days, mailing/service) from the date of filing of these Findings and Recommendation within which to file with the Clerk of this Court, written objections, identifying the portions of the Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

***3** Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir.1989); *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir.1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir.1984), *cert. denied*, 467 U.S. 1208, 104 S.Ct. 2395, 81 L.Ed.2d 352 (1984). Copies of such objections shall be served on opposing parties, District Judge Berger, and this Magistrate Judge.

The Clerk is requested to send a copy of this Proposed Findings and Recommendation to Petitioner, who is acting *pro se.*

S.D.W.Va.,2010.
Dodd v. Craig
Slip Copy, 2010 WL 4918896 (S.D.W.Va.)

END OF DOCUMENT

Slip Copy, 2009 WL 2982927 (D.Minn.)
**(Cite as: 2009 WL 2982927 (D.Minn.))**

Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
Anthony J. GRAY-BEY, Petitioner,
v.
W. CRUZ, Warden, Respondent.
**Civil No. 07-4196 (JNE/JSM).**

Sept. 14, 2009.

Anthony J. Gray-Bey, Milwaukee, WI, pro se.

Leshia M. Lee-Dixon, United States Attorney's Office, Mpls, MN, for Respondent.

*ORDER*

JOAN N. ERICKSEN, District Judge.

***1** The above-entitled matter comes before the Court upon the Report and Recommendation of United States Magistrate Judge Janie S. Mayeron dated August 20, 2009. No objections have been filed to that Report and Recommendation in the time period permitted.

Based upon the Report and Recommendation of the Magistrate Judge, and all of the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 as Moot [Docket No. 13] is GRANTED.

2. The Petition for Writ of Habeas Corpus [Docket No. 1] is DISMISSED.

*REPORT AND RECOMMENDATION*

JANIE S. MAYERON, United States Magistrate Judge.

This matter is before the undersigned Magistrate Judge upon respondent's Motion to Dismiss Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 as Moot. [Docket No. 13]. This matter was decided on the submissions of the parties.

This matter has been referred to this Court for a Report and Recommendation pursuant 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.1(c).

Petitioner appears *pro se;* Respondent appears by Leshia M. Lee-Dixon of the United States Attorney's Office.

For the reasons discussed below, it is recommended that Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 as Moot [Docket No. 13] be granted, and that the Petition for Writ of Habeas Corpus [Docket No. 1] be dismissed.

## I. BACKGROUND

On August 27, 1990, Petitioner was sentenced to 256 months in prison followed by five years supervised release for conspiring to distribute cocaine in violation of 21 U.S.C. § 846, possessing cocaine with an intent to distribute in violation of 21 U.S.C. § 841(a)(1), using a telephone to facilitate drug trafficking in violation of 21 U.S.C. § 843(b), and using a firearm during drug trafficking in violation of 18 U.S.C. § 924(c). *See Gray-Bey v. United States,* 156 F.3d 733, 735 (7th Cir.1998); Declaration of Ann Norenberg ("Norenberg Decl."), p. 2, ¶ 3.

It is within the Bureau of Prison's ("BOP") discretion to reduce an inmate's sentence by up to twelve months if the inmate completes a Residential Drug Abuse Program ("RDAP"). Norenberg Decl., p. 2, ¶ 4. However, certain violent crimes convictions preclude an inmate from receiving the early release benefit. *Id.* at pp. 2-3, ¶ 5. Petitioner's conviction under 18 U.S.C. § 924(c) was determined by the BOP

to fall within the category of violent crimes that precludes receipt of the early release benefit. *Id.*

On January 19, 1993, Petitioner began participating in the RDAP program. Norenberg Decl., p. 3, ¶ 7. Petitioner completed the required residential and non-residential components by January 26, 1995. *Id.* On July 19, 1995, Petitioner's eligibility for early release under 18 U.S.C. § 3621(e) was assessed and he was found not eligible due to his conviction pursuant to 18 U.S.C. § 924(c).[FN1] *Id.* Petitioner appealed this decision and sought an administrative remedy at the institutional level, and his request was denied. *Id.* at p. 4, ¶ 8. Petitioner also appealed to the Regional Office where his request was denied because it was improperly formatted. *Id.* Petitioner's subsequent appeal to the Regional Office was untimely and therefore denied. *Id.* Petitioner sought no further action through the administrative remedy program to pursue his appeal. *Id.* According to Respondent, "[p]etitioner has acknowledged that he has not properly exhausted the administrative remedy program, and merely states it would be futile." *Id.*

> FN1. According to Ann Norenberg, in a sworn declaration, the BOP's determination of Petitioner's ineligibility was based on Program Statement 5162.02, Definition of Term, "Crimes of Violence." Norenberg Decl., p. 4, ¶ 7.

***2** Petitioner's projected release date was March 30, 2009. Norenberg Decl., p. 2, ¶ 3. On October 9, 2007, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to § 2241 [Docket No. 1]. Petitioner claimed that his statutory and due process rights under 18 U.S.C. § 3621, 5 U.S.C. § 706, and the Due Process Clause of the Fifth Amendment were violated by Respondent's refusal to find him eligible for a reduction in his sentence. *See* Petition at pp. 3, 3a. Petitioner sought "declaratory and injunctive relief, granting him a one-year reduction on his sentence, on the grounds that the BOP's interim rule, P.S. 5162.02, together with 18 U.S.C. § 924(c)(3), is void, and the BOP's application of it to the facts of Petitioner's case, are arbitrary and capricious for its failure to comply with the Administrative Procedures Act (APA)." *Id.* at p. 3f.

Respondent filed a response to the Petition asserting that Petitioner did not have a due process right to a sentence reduction, and the Petition should be dismissed for failure to exhaust administrative remedies. *See* Gov't Response to Petition [Docket No. 6].

Petitioner was released from custody on March 30, 2009.[FN2] On May 13, 2009, Respondent filed a Motion to Dismiss Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. 2241 as Moot. [Docket No. 13]. Respondent asserted that Petitioner's "challenge for early release is now moot" because Petitioner had been completely released from custody, including home confinement. *Id.* at 1-2. Petitioner did not file a reply to Respondent's motion to dismiss. [FN3]

> FN2. *See* http://www.bop.gov (using "Inmate Locator" and Petitioner's Register Number 01078-424).

> FN3. When Respondent originally filed its motion to dismiss on May 13, 2009, it sent a copy to Petitioner at the Federal Prison Camp in Duluth, Minnesota. Because Petitioner had already been released from FPC-Duluth, Respondent subsequently mailed Petitioner notice of the motion at his last known address. *See* Certificate of Service dated June 8, 2009 [Docket No. 14]. On June 9, 2009, this Court entered an Order directing Petitioner to show cause why his Petition should not be summarily dismissed, and gave Petitioner until July 3, 2009 to respond to the Motion to Dismiss. *See* Order dated June 9, 2009 [Docket No. 15]. To date, Petitioner has not filed a response.

**II. DISCUSSION**

The Court need not address the merits of this Petition or address Respondent's earlier arguments that Petitioner did not exhaust his administrative remedies because the Court finds that this Petition must be dismissed as moot. "Article III of the Constitution only allows federal courts to adjudicate actual, ongoing cases or controversies ... [w]hen an action no longer satisfies the case or controversy requirement, the action is moot and a federal court must dismiss the action." *Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608, 611 (8th Cir.2003); *see Hickman v. Missouri*, 144 F .3d 1141, 1142 (8th Cir.1998); *Ali v. Cangemi*, 419 F.3d 722, 723-24 (8th Cir.2005). This requirement exists at all stages of the federal judicial proceedings. *Potter*, 329 F.3d at 611.

It is insufficient that Petitioner's claim was active when he filed his Petition. In order for the Petition to meet the case or controversy requirement, the Petitioner "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). The case or controversy requirement is satisfied while a habeas corpus petitioner is incarcerated because petitioner could receive meaningful relief, *i.e.* release from custody. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). However, once a petitioner has served his or her sentence and has been released from custody, "concrete and continuing injury other than the now-ended incarceration or parole-some 'collateral consequence' of the conviction-must exist if the suit is to be maintained." *Id.* Examples of collateral consequences may include restrictions on voting rights, the right to serve as a juror, the right to take part in certain businesses, or the right to take part in certain labor union activities. *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968). "However, a habeas petitioner cannot rely on the collateral consequences of his conviction to save his case from mootness if he is not actually challenging the validity of his conviction." *Woodard v. Fondren*, 2008 WL 5214396 at *1 (D.Minn. Dec. 12, 2008); *see also Lane v. Williams*, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

***3** In the present case, Petitioner is not challenging his conviction under 18 U.S.C. § 924(c). Rather, he is seeking a writ of habeas corpus that would invalidate the BOP's discretionary decision, which ultimately denied Petitioner a one-year reduction in his prison sentence. Because Petitioner has already been released from prison, allowing a one-year reduction in his sentence would confer no benefit on Petitioner. Therefore, there is no longer a live case or controversy in this matter and the instant petition is now moot. *See Gore v. Fondren*, 2008 WL 4787652 at *5 (D.Minn. Oct. 31, 2008) ("For purposes of determining whether there still is a 'live' case or controversy, that is presented by this case, it does not matter that the Petitioner may still be subject to conditions of probation, and that he may still be returned to prison if he violates those conditions. The Petitioner's future probation status is governed by the terms of his original sentence, which is not at issue here. The decision as to whether the Petitioner was entitled to a reduction in sentence under Title U.S.C. § 3621(e), following completion of the RDAP, will no longer affect the Petitioner, now that he has been released from prison."); *see also Walton v. Holinka*, 2008 WL 495523 at *1 (D.Minn. Feb. 21, 2008) ("Where the habeas petition only challenges the continued detention, there is no actual case or controversy for the court to decide because the petitioner is no longer being detained and any order from the court requiring release of such a petitioner would not have any effect.").

## IV. RECOMMENDATION

Based on the foregoing reasons, the Court recommends that Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 as Moot [Docket No. 13] be **GRANTED** and Petitioner's Petition for a Writ of Habeas Corpus [Docket No. 1] be **DISMISSED** as moot.

Slip Copy, 2009 WL 2982927 (D.Minn.)
**(Cite as: 2009 WL 2982927 (D.Minn.))**

D.Minn.,2009.
Gray-Bey v. Cruz
Slip Copy, 2009 WL 2982927 (D.Minn.)

END OF DOCUMENT