IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| UNITED STATES OF AMERICA | § | |
| v. | § | Criminal Action No. H-01-914 |
| DAVID KAY and DOUGLAS MURPHY, | § | |
| Defendants. | § | |

ORDER

On April 3, 2008, the Court held a hearing in the above-referenced matter. Defendants David Kay ("Kay") and Douglas Murphy ("Murphy") (collectively, "Defendants"), represented by counsel, requested that the Court make a recommendation to the Bureau of Prisons ("BOP") regarding each Defendant's BOP placement. Having considered each Defendant's memorandum and the applicable law, the Court determines the Defendants' respective requests should be granted in part and denied in part.

BACKGROUND

Defendants, former executives at a rice-exporting company, were convicted of violating the Foreign Corrupt Practices Act when they paid Haitian officials to reduce duties and taxes on rice exported to Haiti in the 1990's. Kay was sentenced to a total

term of thirty-seven months imprisonment, and Murphy was sentenced to a total term of sixty-three months imprisonment. Defendants remained on bond pending their respective appeals.[1] Ultimately, however, the United States Court of Appeals for the Fifth Circuit upheld the Defendants' convictions and sentences. *See United States v. Kay*, 513 F.3d 432 (5th Cir. 2007), *reh'g denied*, 513 F.3d 461 (5th Cir. 2008).

With the appeal process completed and each Defendant's term of imprisonment imminent, Defendants' attorneys appeared at the above-referenced hearing and asked the Court to make specific recommendations to the BOP regarding each Defendant's placement. Defendants' requests were predicated upon events that had transpired between the Defendants' sentencing in 2005 and imminent surrender to the BOP in 2008. Defendants subsequently filed briefs outlining their respective requests.

According to Kay, although he does not hold an executive position as he did prior to his conviction, he is currently employed and supports his family. His wife, Dawn Kay ("Mrs. Kay"), was seriously injured in a car accident in August 2007. Kay avers that Mrs. Kay not only depends upon Kay for financial support, but also depends on the medical insurance provided by his employer. Kay's medical insurance provides for Mrs. Kay's physical and psychiatric care. Kay avers that if he

[1]Shortly after sentencing, Kay was inadvertently ordered to surrender to the custody of the BOP at USP Pollock facility in Pollock, Louisiana. Kay did not and was not required to report to the BOP at that time.

is incarcerated during his thirty-seven month sentence, Mrs. Kay will be dependent upon her siblings to provide her care because she is unable to care for herself.[2] Based upon these facts, Kay requests that the Court recommend to the BOP that Kay be placed in a community corrections center ("CCC") which would allow Kay to continue working to provide Mrs. Kay's financial support, medical insurance, and personal care at home.[3] Alternatively, if the Court declines to recommend a CCC, Kay requests that the Court recommend Kay be designated to the federal corrections institute at Bastrop, Texas, a minimum security facility 150 miles from Houston.[4]

With respect to Murphy, he avers he "has realized the severity of his alcohol abuse and is in treatment for it." He requests that 1) the Court allow him to remain on bond pending resolution of his petition for writ of certiorari to the United States Supreme Court; 2) the Court recommend that the BOP designate him to the federal facility in Beaumont, Texas; and/or 3) that the BOP include him in its Comprehensive

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[2]Kay informs the Court that Mrs. Kay's brother lives in Germany and her sister lives in Nevada.

[3]A CCC is also known as a "halfway house." *See Tischendorf v. Van Buren*, 526 F. Supp. 2d 606, 609 (N.D. Tex. 2007) (citing 28 C.F.R. § 570.20(b)); *Briggs v. Van Buren*, Civ. A. No. 4:06-CV-800-Y, 2007 WL 3019238, at *1 n.1 (N.D. Tex. Oct. 16, 2007).

[4]According to Kay, the Bastrop facility would be a reasonably convenient distance from the Houston airport, where Mrs. Kay could arrive from out of state in order to visit her husband during his incarceration.

Residential Drug Abuse Program at the Beaumont facility.[5] The Government did not oppose Defendants' requests at the hearing and did not respond to Defendants' briefs. Accordingly, the Court must determine whether to make the recommendations Defendants seek.

The first issue before the Court is whether to recommend that the BOP designate Kay to a CCC. The statute governing a defendant's initial designation of the place of imprisonment and any subsequent transfers to a different penal or correctional facility is 18 U.S.C. § 3621 (2006) ("§ 3621"). *See Tischendorf*, 526 F. Supp. 2d at 608. This statute affords the BOP wide discretion to choose any appropriate and suitable facility considering five factors.[6] *Muniz v. Sabol*, 517 F.3d 29, 32 (1st Cir. 2008). However, courts disagree whether the current BOP regulations regarding CCC designation are a valid exercise of the BOP's discretion.

Historically, the BOP had a longstanding practice of transferring inmates to CCCs to serve the last six months of a sentence. *Id.* The BOP would sometimes

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[5]Murphy avers both Defendants filed a petition for writ of certiorari with the United States Supreme Court on April 9, 2008.

[6]Under § 3621(b), the BOP considers five factors to determine a person's placement: 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 § 994(a)(2) of title 28. *See* § 3621(b). Moreover, the statute provides that in designating the place of imprisonment, the BOP is not to show favoritism to prisoners of high social or economic status. *See id.*

place short-time convicts serving sentences longer than six months in CCCs for their entire sentence, relying on the recommendation of the sentencing judge. *Id.* However, in December 2002, the BOP implemented a new policy ("the 2002 policy") that CCCs were only available to inmates during the last ten percent of their sentences ("ten percent rule"), regardless of a sentencing judge's recommendation. *Id.* at 33 (citing *Goldings v. Winn*, 383 F.3d 17, 20 (1st Cir. 2004)).

Contrary to the expectation of those convicted and the judges who sentenced them, the 2002 policy was applied to, among others, those who have been sentenced but not yet assigned. *See id.* In 2005, the BOP promulgated regulations ("BOP regulations"), specifically, 28 U.S.C. § 570.20 ("§ 570.20"), claiming it has discretion broad enough to allow it to make a categorical rule preventing placements in CCCs that did not conform with the ten percent rule.[7] *Id.* (citing §§ 570.20(a) and 570.21(a)).

A flurry of lawsuits followed and created a division among the circuits over the issue of whether the BOP may deny placement in a CCC to all prisoners during the

[7]Specifically, § 570.20 provides: "(a) this subpart provides the Bureau of Prisons' (Bureau) categorical exercise of discretion for designating inmates to community confinement. The Bureau designates inmates to community confinement only as part of pre-release custody and programming which will afford the prisoner a reasonable opportunity to adjust to and prepare for re-entry into the community." *See* § 570.20(a).

first ninety percent of their sentences.[8] *See Muniz*, 517 F.3d at 31 ("While we are loath to create a circuit split, we respectfully side with the dissenters."). Four circuits have held the BOP regulations, that create a categorical rule regarding a prisoner's designated facility, are contrary to Congress' clear and unambiguous intent that the BOP assess a prisoner's designation based upon the five factors articulated in § 3621(b), and are therefore, invalid. *See Wedelstedt v. Wiley*, 477 F.3d 1160, 1168 (10th Cir. 2007) ("This court's determination that the BOP regulations are invalid entitles [the petitioner] to be considered for transfer to a CCC prior to the last ten percent of his sentence . . . , [and] the BOP must consider the factors set forth in 18 U.S.C. § 3621(b) without regard to the invalid regulations."); *Fults v. Sanders*, 442 F.3d 1088, 1092 (8th Cir. 2006) (finding that the decision not to transfer an inmate to a CCC requires the same consideration of the five factors as the decision to transfer an inmate to a CCC); *Levine v. Apker*, 455 F.3d 71, 87 (2d Cir. 2006) (finding that by sorting prisoners' eligibility for a correctional facility only according to the portion of time served, the BOP unlawfully excised the parameters of § 3621(b)); *Woodall*

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[8]District courts in the northern district of Texas are also divided on the issue. *See Tischendorf*, 526 F. Supp. 2d at 613 (upholding the BOP's authority to designate inmates to community confinement during the last ten percent of their prison sentence); *Briggs*, 2007 WL 3019238, at *4 (finding the BOP regulations are invalid because they do not permit the BOP to consider community confinement prior to the last ten percent of a sentence).

*v. Fed. Bureau of Prisons*, 432 F.3d 235, 249–51 (3d Cir. 2005).[9]

The most recent circuit to address the issue held the BOP regulations are not invalid but are a reasonable exercise of the BOP's discretion in carrying out its duties under § 3621(b). *See Muniz*, 517 F.3d at 40 ("The BOP may make rules of general applicability to guide the individualized application of its discretion."). The United States Court of Appeals for the First Circuit agreed that Congress instructed the BOP to place each prisoner in an appropriate facility, considering the five factors. *See id.* at 38. However, it reasoned that "[i]n carrying out that responsibility, the BOP has made the reasonable determination that some facilities are simply categorically inappropriate for prisoners during the first ninety percent of their sentences or for periods of longer than six months." *See id.*

Although Kay asks the Court to recommend that the BOP place him in a CCC facility, such recommendation is contrary to BOP regulations regarding the availability of the CCC as a facility prior to the last ten percent of his sentence. *See* § 570.21. Absent a definitive ruling from this circuit and a split of authority among

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[9]Although the Fifth Circuit has not specifically addressed the validity of the BOP regulations, it recently affirmed a district court's denial of a prisoner's complaint that the BOP failed to comply with the sentencing court's order that he be incarcerated in a facility where he could receive psychological testing and treatment. *See Antonelli v. Mukasey*, No. 07-40491, 2008 WL 1790380, at *1 (Apr. 18, 2008). The Fifth Circuit affirmed the district court's dismissal noting a prisoner has no constitutional right to be housed in a particular facility. *Id.* (citing *Tighe v. Wall*, 100 F.3d 41, 42 (5th Cir. 1996)).

its district courts, the Court declines to recommend a CCC placement for Kay contrary to the BOP regulations. Although the Court is sympathetic to the needs of Kay's family, a plight shared by other similarly-situated families, the Court leaves to the BOP to determine whether and when a CCC designation is appropriate for Kay.

Notwithstanding the Court's reticence to recommend a CCC designation, a sentencing court may recommend that a sentence be served in a particular prison or jail, even though the BOP has the actual authority to designate the place of incarceration. *United States v. Voda*, 994 F.2d 148, 151 (5th Cir. 1993). Based upon Kay's alternate request and the foregoing circumstances, the Court recommends that Kay be incarcerated at the federal correctional institute at Bastrop, Texas.

Regarding Murphy's requests, he asks the Court to recommend that the BOP designate him to the minimum security facility in Beaumont, Texas and that the BOP allow him to participate in its Comprehensive Residential Drug Abuse Program ("RDAP") at the Beaumont facility.[10]

BOP officials have full discretion to determine prisoners' eligibility for a drug treatment program. *Gibson v. Fed. Bureau of Prisons*, 121 F. App'x 549, 551 (5th

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[10]Although Murphy respectfully requests that the Court allow him to remain on bond pending resolution of his writ of certiorari to the United States Supreme Court, the Court, in its discretion, denies this request. *See United States v. Williams*, 822 F.2d 512, 517 (1987) (upholding a district court's denial of bail pending appeal because, *inter alia*, the defendant had no constitutional right to bail after his conviction and sentencing).

Cir. 2004). Thus, a sentencing judge's recommendation that a prisoner be allowed to participate in the program is not binding on BOP officers.[11] *Id.*

Murphy avers his physical condition has changed since a pre-sentence report was prepared in his case, and he is now being treated for alcohol abuse. In support of his contention, Murphy includes two letters from local physicians. In one letter, dated March 28, 2008, Murphy's physician avers he is treating Murphy for health consequences from drinking, and he referred Murphy to a psychiatric therapist. The second letter, submitted by the psychiatric specialist, dated March 31, 2008, reports that Murphy meets the diagnostic criteria for alcohol dependence. Based upon this evidence, the Court finds that a recommendation to the BOP that Murphy be allowed to participate in the RDAP is warranted. Moreover, the Court recommends Murphy be designated to the Beaumont, Texas facility. *See Voda*, 994 F.2d at 151. Based upon the foregoing, the Court hereby

RECOMMENDS that the Bureau of Prisons incarcerate Defendant David Kay at the federal correctional institute at Bastrop, Texas. The Court further

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[11]The RDAP program grants discretion to the BOP to provide alternative conditions of confinement for prisoners who have completed the program. *Richardson v. Joslin*, 501 F.3d 415, 417 n.1 (5th Cir. 2007). Upon completion of the program, the BOP may reduce a prisoner's sentence if he qualifies for early release under the BOP regulations. *Id.* However, the BOP has the authority, but not the duty, both to alter the prisoner's conditions of confinement and to reduce his term of imprisonment. *Id.* at 420 (citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001)).

RECOMMENDS that the Bureau of Prisons designate Douglas Murphy to the minimum security facility in Beaumont, Texas and allow him to participate in its Comprehensive Residential Drug Abuse Program at the Beaumont facility.

SIGNED at Houston, Texas, on this 7 day of May, 2008.

DAVID HITTNER
United States District Judge