UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| ERIC PAGANI-GALLEGO, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Civ. A. No. 07-40016-PBS |
| | ) | |
| CAROLYN A. SABOL, Warden, | ) | |
| | ) | |
| Respondent. | ) | |

**MEMORANDUM AND ORDER**

March 27, 2008

Saris, U.S.D.J.

Pro se habeas petitioner Eric Pagani-Gallego brings this habeas petition pursuant to 28 U.S.C. § 2241, claiming that the Bureau of Prisons ("BOP") violated his due process rights by assigning him a security classification based upon false information about an alleged escape plot, which prevents him from being transferred to a prison camp. For the reasons set forth below, the Respondent's motion to dismiss is **ALLOWED**.

## I. BACKGROUND

On January 9, 2007, Pagani-Gallego, a prisoner confined at FMC Devens, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. According to the petition and the exhibits attached thereto, in 1996, when Pagani-Gallego was incarcerated at FCI Jesup, prison officials investigated Pagani-Gallego's possible involvement in a suspected escape plot involving a helicopter. After a seven month investigation, prison officials

determined that there was insufficient evidence to discipline Pagani-Gallego, and he was released back into the general population. According to petitioner, his security classification was reduced at Jesup because there was a finding that the allegations of an escape plot were unfounded. However, because BOP still had security concerns about the petitioner, who was serving a twenty year sentence, it assigned Pagani-Gallego a greater security management variable. This management variable assignment apparently precludes Pagani-Gallego from being transferred to the camp at FMC Devens. Pagani-Gallego unsuccessfully appealed the application of this management variable.

Pagani-Gallego alleges that because he never was afforded a hearing on the allegations of his involvement in the escape plot, prison officials violated his right to due process by assigning him the greater security management variable. Pagani-Gallego also argues that, under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA"), this Court has jurisdiction to review the Bureau of Prison's classification decision, and that the decision was arbitrary and capricious. Finally, Pagani-Gallego alleges that, under the Privacy Act, 5 U.S.C. § 552a, prison officials must correct Pagani-Gallego's records to show that the allegations of his involvement in an escape plot are entirely baseless.

The warden of FMC Devens filed a motion to dismiss or, in

the alternative, for summary judgment. The government also filed the Declaration of Kara N. Lundy ("Lundy Decl."), the Declaration of Cheryl Magnusson ("Magnusson Decl."), and various sealed documents.

## II. ANALYSIS

### A. Due Process

The Due Process Clause of the Fifth Amendment "protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (concerning an inmate's rights under the Due Process Clause of the Fourteenth Amendment). An inmate does not, however, have a liberty interest in avoiding a particular condition of confinement, including a particular security classification or placement in a particular facility, unless the condition "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 222-23 (quoting Sandin v. Conner, 515 U.S. 472, 483-84 (1995)).

In Sandin, for example, the Court held that a prisoner did not have a liberty interest in avoiding disciplinary segregation. See Sandin, 515 U.S. at 485-86. The Court explained that the disciplinary segregation did not impose an atypical, significant departure from the basic conditions of the inmate's sentence.

See id. at 486. Similarly, in Dominique v. Weld, 73 F.3d 1156, 1159-60 (1st Cir. 1996), the First Circuit, applying Sandin, held that an inmate who was participating in a work release program did not have a liberty interest in avoiding transfer to a higher security facility. Acknowledging that "there is a considerable difference between the freedoms [the inmate] enjoyed when he was in work release status and the conditions of incarceration at a medium security facility," the First Circuit nonetheless concluded that the transfer did not constitute an atypical hardship as compared to the ordinary incidents of prison life. Id. at 1160. The court reasoned that the transfer did not affect the duration of his sentence, and the prisoner was subjected to "conditions no different from those ordinarily experienced by large numbers of other inmates serving their sentences in customary fashion." Id.

Under Sandin, denial of a lower security classification, without more, does not impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 545 U.S. at 484. Pagani-Gallego's "confinement within four walls" of FMC Devens is an ordinary incident of prison life which large numbers of other inmates must also endure. See Dominique, 73 F.3d at 1160. Further, Pagani-Gallego has not alleged that the denial of the lower security classification affects the duration of his sentence. See id. Assignment of greater security management variable does not

implicate liberty interest protected by Due Process Clause. See Davis v. Kastner, No. 5:06-CV-220, 2008 WL 53604 at *2-3 (E.D. Tex. Jan. 3, 2008).

Pagani-Gallego's core claim, though, is that he has been unfairly classified based on false allegations that he participated in a prison escape plot without a name-clearing hearing in violation of his due process rights. Generally speaking, mere harm to reputation, without an accompanying injury to more tangible interests, does not provide the basis for a due process claim. See Paul v. Davis, 424 U.S. 693, 701 (1976) (stating that "reputation alone, apart from some more tangible interests such as employment, is neither 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."); see also Dupree v. Hobbs, No. 1:05-cv-65, 2005 WL 2464679, at *3 (E.D. Tenn. Oct. 4, 2005) (because mere injury to reputation alone does not result in the deprivation of "liberty" or "property" protected by the Due Process Clause, prisoner did not enjoy constitutional protection from false accusations by prison guard).

However, an inmate can assert a due process claim based on harm to his reputation if he can demonstrate that:

> (1) the government made a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she asserts is false, and

> (2) the plaintiff experienced some governmentally imposed burden that 'significantly altered [his or] her status as a matter of law.'"

Gwinn v. Awmiller, 354 F.3d 1211, 1216 (10th Cir. 2004) (quoting Paul, 424 U.S. at 710-11) (emphasis added). This is known as the "stigma plus standard." See id.

It is unclear whether the statement at issue in this case, that plaintiff was involved in an escaped plot, is "sufficiently derogatory." The classification is more derogatory than being called "disrespectful." See Cardoso v. Calbone, 490 F.3d 1194, 1198 (10th Cir. 2007) ("[T]he characterization of Mr. Cardoso's conduct as disrespectful to prison staff does not rise to the level necessary to injure his reputation."). However, it is far less derogatory than being falsely classified a sex offender. See, e.g., Gwinn, 354 F.3d at 1216-18 (finding sex offender classification sufficient injury to reputation); see also Chambers v. Colo. Dep't of Corrections, 205 F.3d 1237, 1242-43 (10th Cir. 2000) (same); Kirby v. Siegelman, 195 F.3d 1285, 1292 (11th Cir. 1999) (same); Neal v. Shimoda, 131 F.3d 818, 829-31 (9th Cir. 1997) (same).

Even if the classification was sufficiently derogatory, however, the petitioner's increased greater security management variable is probably not a "significant[] alter[ation]" that triggers a due process hearing. For example, in Grennier v. Frank, the petitioner, sentenced to life in prison for murdering

a hitchhiker, was classified a sex offender, and petitioner claimed that the label prevented him from being eligible for parole. 453 F.3d 442, 444 (7th Cir. 2006). Under Wisconsin law, whether a "lifer[]" is entitled to release on parole is "wholly discretionary." Id. Citing Paul v. Davis, the Seventh Circuit held that "[o]nly when the state goes further and makes a concrete decision that affects liberty or property . . . is a hearing essential." Id. at 445. Thus, the Court rejected the petitioner's claim, holding that "Grennier does not have a liberty or property interest in the prospect of parole under Wisconsin's discretionary system." Id. at 446; see also Williams v. Ballard, No. 3-02-cv-0270, 2004 WL 1499457, at *5 (N.D. Tex. Jun. 18, 2004), aff'd, 466 F.3d 330 (5th Cir. 2006) (in determining whether classification as sex offender deprived plaintiff of right or status previously conferred by law, noting that "[A] State creates a protected liberty interest by placing substantive limitations on official discretion.") (citations omitted). Consistent with Grennier, many courts have found that the "plus" prong is only satisfied when it implicates an otherwise protected property or liberty interest. See, e.g., Ballard, 2004 WL 1499457, at *6 (finding sufficient infringement to trigger due process claim from being labeled sex offender where conditions of parole caused by sex offender status constituted an "atypical and significant" hardship.); Stevens v. Robles, No. 06-cv-2072, 2008 WL 667407, at *7 (S.D. Cal. Mar. 7,

2008) (stating that "The 'R' suffix classification designating Stevens as a sex offender could give rise to a liberty interest only if the Sandin deprivations are implicated.").

The BOP has established procedures to address the problem of the application of security management variables based upon adverse information not supported by a finding of guilt after a disciplinary hearing. Program Statement 5100.07 provides that when the greater security management variable "is applied based on institutional behavior which is **not** supported by [disciplinary] finding of guilt, staff shall ensure compliance with the criteria as set forth in the Program Statement on Inmate Discipline and Special Housing Units." (Lundy Decl. Ex. M, P.S. 5100.07 at ch. 7, p. 13 (emphasis in original)). The criteria listed in the Inmate Discipline Program Statement are as follows:

> References to significant Prohibited Acts which are not supported by disciplinary actions and hearings may not be utilized by the Bureau of Prisons so as to have an adverse impact on an inmate, specifically the forfeiture or disallowance of good time or good conduct time or a parole recommendation. Staff may still maintain such references in an inmate's central file for use by staff in making classification, administrative transfer and other decisions involving the security and good order of the institution if the following conditions are met:
>
> (1) References included in an inmate's central file must be maintained in an accurate manner. For example, an inmate suspected of being involved in an escape attempt who was never found to have committed a violation of institution disciplinary

> regulations or was never charged with an offense due to lack of evidence would have this lack of evidence noted in any reference to his alleged involvement in the escape attempt.
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> (2) Placement of a reference to 100 or 200 severity level offenses not supported by disciplinary action in an inmate's central file may only be done with the written approval of the Warden of the institution where the incident occurred. The Warden's written approval must be documented in the inmate's central file. Approval of the Warden will signify that in the Warden's judgment this information is necessary for the proper management of the inmate.

(Magnusson Decl., Exhibit D, Program Statement 5270.07 at Ch. 7, pp. 10-11 (emphasis added)).

While the Program Statement limits how inmates can be classified with respect to their security management variable, it does give prison officials significant discretion in classifying inmates for purposes of security. All that is needed is an accurate central file and, in some cases, written permission from the warden. Moreover, an inmate does not otherwise have a protected liberty or property interest in his or her greater security management variable. Accordingly, as based on this record, the Court finds that the petitioner has not sufficiently alleged a due process claim.

**B. The Administrative Procedures Act**

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by

agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. However, this general cause of action does not exist where "statutes preclude judicial review." 5 U.S.C. § 701(a)(1).

Here, Congress has excluded from review under the APA the BOP's decisions regarding the placement of individual prisoners. Congress has explicitly authorized the BOP to designate where prisoners serve their sentences. This authority includes the power to transfer prisoners between facilities:

> (b) Place of imprisonment.--The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, Whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering--
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> (1) the resources of the facility contemplated;
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> (2) the nature and circumstances of the offense;
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> (3) the history and characteristics of the prisoner;
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> (4) any statement by the court that imposed the sentence--
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> (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
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> (B) recommending a type of penal or correctional facility as appropriate; and
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> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.
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> In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or

> economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.

18 U.S.C. § 3621(b) ("§ 3621(b)"). In a separate statute, Congress excluded inmate designations and transfers from those agency actions that are subject to judicial review under the APA. See 18 U.S.C. § 3625 ("§ 3625") ("The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter [18 U.S.C. §§ 3621-3626].").

The government argues that the BOP's decision to assign the petitioner a greater security management variable was made pursuant to the BOP responsibilities set forth in § 3621(b). Therefore, pursuant to § 3625, the decision is excluded from review under the APA. See, e.g., Jones v. Bureau of Prisons, No. 1:04-cv-35, 2007 WL 965746, at *3 (E.D. Tex. Mar. 27, 2007) (holding that § 3625 precludes judicial review of BOP's assignment of management variable); Fullenwiley v. Wiley, No. 98-1698, 1999 WL 33504428, at *1 (N.D.N.Y. Oct. 5, 1999) (§ 3625 precludes review of BOP's classification decision) (report and recommendation, adopted by district court, see C.A. No. 98-1698, docket entry #20 (Feb. 20, 2000)).

**C. Privacy Act**

The Privacy Act requires that federal agencies maintain records to be used in making determinations about individuals "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual." 5 U.S.C. § 552a(e)(5). The Privacy Act permits an individual to access agency records and request amendment of records believed to be inaccurate. See 5 U.S.C. § 552a(d). The Privacy Act also provides a civil cause of action to enforce the accuracy and amendment requirements, and provides for costs, attorneys' fees, and, where the agency's actions are willful or intentional, actual damages. See 5 U.S.C. § 552a(g).

The respondent argues that Pagani-Gallego's claim under the Privacy Act is not the proper subject of a habeas petition, and was brought against the wrong person. Whereas a petition for a writ of habeas corpus challenging present physical custody must be brought against the immediate custodian, see Rumsfeld v. Padilla, 542 U.S. 426, 439 (2004), an action under the Privacy Act must be brought against the agency that has allegedly violated the statute, see 5 U.S.C. § 552a(g)(1). Further, while a litigant seeking relief under the Privacy Act seeks amendment of a record and/or damages, the "core" of habeas corpus is speedier release. See Wilkinson v. Dotson, 544 U.S. 74, 82 (2005) (citations omitted).

Even if the Court had proper jurisdiction, petitioner would not have a viable claim. The Privacy Act permits the head of any

agency to promulgate rules to exempt "any system of records" from certain provisions of the Act, including the access, amendment and civil enforcement provisions of the Act. See 5 U.S.C. § 552a(j). Exemption is permitted if the system of records is "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including . . . the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities," and the records falls within one of three categories of records, including "reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision." Id.

Pursuant to 5 U.S.C. § 552a(j), the Bureau of Prisons has exempted from the access, amendment, and civil enforcement provisions of the Act several systems of records the agency keeps, including the Inmate Central Records System. See 28 C.F.R. § 16.97(a)(4). Thus, while petitioner may have certain administrative remedies to correct the records concerning Pagani-Gallego's alleged prison escape plot, which he has not used, Pagani-Gallego would have no cause of action under that statute for money damages or injunctive relief. See Martinez v. Bureau of Prisons, 444 F.3d 620, 624 (D.C. Cir. 2006) (per curiam) (affirming dismissal of federal inmates action under the Privacy Act because, inter alia, BOP had exempted Inmate Central Record System from provisions of the Privacy Act; Scaff-Martinez v.

Federal Bureau of Prisons, 160 Fed. App'x. 955, 956-57 (11th Cir. 2005) (per curiam)(same, where inmate had claimed that the BOP had intentionally and willfully failed to maintain accurate records); Collins v. Federal Bureau of Prisons, No. 5:06cv129, 2007 WL 2433967, at *3 (S.D. Miss. Aug. 2, 2007) (same, where plaintiff challenged accuracy of information on which BOP based its decision to impose greater security management variable).

**ORDER**

For the reasons stated, the respondent's motion to dismiss is **ALLOWED.**

**S/PATTI B. SARIS**
UNITED STATES DISTRICT JUDGE