

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Andrew James Johnston v. Mark Gutierrez

Johnston · No. CV-24-00005-TUC-SHR · Decided March 16, 2026

OPINION

1 WO 2 3 4 5 6 IN THE UNITED STATES DISTRICT COURT 7 FOR THE DISTRICT OF
ARIZONA 8 9 Andrew James Johnston, No. CV-24-00005-TUC-SHR 10 Petitioner, ORDER 11
v. 12 Mark Gutierrez, 13 Respondent. 14 15 16 Before the Court is the Petition Under 28 U.S.C. §
2241 for a Writ of Habeus Corpus 17 by a Person in Federal Custody (“Petition”) (Doc. 1) filed by
pro se Petitioner Andrew 18 James Johnston (“Petitioner”) and the Report and Recommendation
(R&R) by United 19 States Magistrate Judge Eric J. Markovich (Doc.

31). Judge Markovich recommends the 20 Petition be denied and dismissed. (Id. at 18.)
Additionally, before the Court is a Renewed 21 Motion for Preliminary Injunctive Relief and/or
TRO (Doc. 29) filed by Petitioner, which 22 the R&R recommends the Court deny as moot or
resolve as a motion for reconsideration 23 (Doc. 31 at 18–19). Petitioner filed an Objection to the
R&R (Doc.

32) and Respondents 24 responded to those objections (Doc. 40). Petitioner then filed a Motion to
Strike R&R 25 (Doc. 42). That Motion is fully briefed (Docs. 46, 47). For the following reasons,
the 26 Court will adopt the R&R, dismiss Petitioner’s Petition (Doc. 1), deny Petitioner’s 27
Renewed Motion for Preliminary Injunctive Relief (Doc. 29) as moot, and deny 28 Petitioner’s
Motion to Strike R&R (Doc.

42). 1 I. Procedural History 2 The R&R provides a succinct account of the procedural history in
this case. (Doc. 3 31 at 1–3.) Neither party objected to this portion of the R&R, and the Court will
adopt it 4 in its entirety.

As an overview, the procedural history is as follows: Petitioner is serving 5 a 151-month term of
imprisonment for attempted bank robbery in violation of 18 U.S.C 6 § 2113(a). (Id. at 2.) At
sentencing, Petitioner was designated as a career offender based 7 upon two prior convictions for
bank robbery. (Id.) Petitioner appealed, arguing, in part, 8 “his conviction is not a ‘crime of
violence.’” United States v. Johnston, 814 Fed.

App’x 9 142, 147 (7th Cir. 2020). The Seventh Circuit affirmed his conviction and sentence and
10 reiterated “federal bank robbery by ‘intimidation’ is a categorical crime of violence.” Id. 11
Petitioner’s projected release date is April 15, 2028. (Doc. 31 at 2.) 12 The First Step Act (“FSA”)
allows prisoners to earn credits toward an earlier release. 13 See 18 U.S.C. § 3632(d).

Eligibility criteria and rules for earning and applying time credits 14 are governed by statute and implemented through the Federal Bureau of Prisons (BOP) 15 program statements and policies. (See Doc. 31 at 7–9.) The BOP has developed a Prisoner 16 assessment tool, PATTERN, to predict the likelihood of recidivism for all BOP inmates 17 over a three-year follow-up period.

(Id. at 10.) PATTERN utilizes a diverse set of factors 18 to predict recidivism, including the prisoner’s “instant violent offense.” (Id.) There are 19 four requirements for eligibility to apply FSA time credits, and all must be met prior to a 20 prisoner being found eligible. (Id. at 18); See 18 U.S.C. § 3624(g). One requirement for 21 eligibility, as relevant here, is for a prisoner to have “shown through the periodic risk 22 reassessments a demonstrated recidivism risk reduction or ha[ve] maintained a minimum 23 or low recidivism risk, during the prisoner’s term of imprisonment.” § 3624(g)(1)(B).

24 Petitioner has been classified as medium risk for recidivism. (See Doc. 31 at 3.) Due to 25 his medium-risk classification, the BOP determined Petitioner is not eligible to have earned 26 time credits applied toward prerelease custody or supervised release. Id. 27 II. Habeas Petition 28 On January 2, 2024, Petitioner filed this Petition for a Writ of Habeas Corpus.

(Doc. 1 1.) Petitioner alleges the implementation of PATTERN “without an accurate metric and/or 2 definition of ‘violence’” has resulted in improper categorization of his convictions, 3 “incorrectly keeping petitioner’s recidivism risk score at a medium instead of a low— 4 thereby depriving petitioner of the eligibility to apply his earned FSA time credits—which 5 effects a liberty interest under *Preiser v. Rodriguez*, 411 U.S. 474, 498 (1973).” (Doc.

1 at 6 1, 4–5.) Petitioner seeks “a writ of habeas corpus that invalidates PATTERN’s metric for 7 ‘violence’ and/or compels that PATTERN’s metric for ‘violence’ be clarified/adjusted to 8 identically match” *United States v. Taylor*, 596 U.S. 845 (2022) and “P.S. 5162.05, § 4e’s 9 federal definition of a ‘crime of violence.’” (Id. at 7.) Petitioner additionally seeks an 10 order directing the BOP to remove ‘violence’ points from Petitioner’s PATTERN score.

11 (Id.) 12 Respondents issued a general denial of Petitioner’s allegations. (Doc. 10.) 13 Respondents further request the Court deny the Petition on the grounds: (1) Petitioner did 14 not exhaust available administrative remedies before filing suit; (2) the Court lacks subject 15 matter jurisdiction to review the BOP’s determination of FSA time credits; (3) the Court 16 lacks authority to compel discretionary BOP action; (4) Petitioner has no liberty interest in 17 his recidivism risk classification or in having his time credits applied for early release; and 18 (5) the BOP correctly calculated Petitioner’s sentence.

(Id.) 19 On June 27, 2024, Petitioner filed a reply, alleging the futility exception to 20 exhaustion of administrative remedies applies (Doc. 11 at 2), and asserting the APA does 21 not bar jurisdiction, “a liberty interest is attached to FSA time credits,” and “PATTERN’s 22 definition of

violence is inconsistent with [Taylor].” (Id. at 3). He further alleges the 23 “shall” language of 18 U.S.C. § 3632(d)(4)(C) makes application of FSA time credits 24 mandatory regardless of recidivism risk score, and prisoners with medium or high 25 recidivism scores should be processed under § 3624(g) as directed by § 3632(d)(4)(C).

26 (Doc. 11 at 7–8.) 27 On October 15, 2025, Magistrate Judge Eric J. Markovich issued an R&R 28 recommending the Court deny Petitioner’s Petition. (Doc. 31.) After concluding Petitioner 1 had properly filed a § 2241 petition and further exhaustion of administrative remedies 2 would not aid judicial review, the R&R concluded Petitioner’s conviction is properly 3 categorized as a crime of violence, Petitioner is not entitled to judicial review of his 4 PATTERN score, and he lacks a liberty interest in FSA time credits.

(Id.) Petitioner timely 5 objected and Respondent responded. (Docs. 32, 40.) On January 2, 2026, Petitioner filed 6 a Motion to Strike the R&R (Doc. 42). 7 III. R&R Standard of Review 8 This Court “may accept, reject, or modify, in whole or in part, the findings or 9 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).

The Court is not 10 required to conduct “any review at all...of any issue that is not the subject of an objection.” 11 *Thomas v. Arn*, 474 U.S. 140, 149 (1985). The Court “must review the magistrate judge’s 12 findings and recommendations de novo if objection is made, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

However, objections 14 to R&Rs “are not to be construed as a second opportunity to present the arguments already 15 considered by the Magistrate Judge.” *Betancourt v. Ace Ins. Co. of P.R.*, 313 F. Supp. 2d 16 32, 34 (D.P.R. 2004); see also *Camardo v. Gen. Motors Hourly-Rate Emps. Pension Plan*, 17 806 F. Supp. 380, 382 (W.D.N.Y. 1992) (“The purpose of the Federal Magistrates Act is 18 to relieve courts of unnecessary work,” and “[t]here is no increase in efficiency, and much 19 extra work, when a party attempts to relitigate every argument which it presented to the 20 Magistrate Judge.”).

Objections that merely repeat or rehash arguments already addressed 21 in the R&R are insufficient to trigger de novo review and are instead reviewed for clear 22 error. See *Tinlin v. Hudson*, No. CV-24-00425-TUC-JCH, 2025 WL 2468802, *1 (D. Ariz. 23 Aug. 7, 2025) (citing *Curtis v. Shinn*, No. CV-19-04374-PHX-DGC-JZB, 2021 WL 24 4596465, at *5 (D. Ariz. Oct. 6, 2021)).

District courts conduct proper de novo review 25 where they state they have done so, even if the order fails to specifically address a party’s 26 objections.” *United States v. Ramos*, 65 F.4th 427, 433–34 (9th Cir. 2023) (“[T]he district 27 court ha[s] no obligation to provide individualized analysis of each objection.”). 28 Additionally, the party seeking de novo review must provide

“specific written 1 objections to the proposed findings and recommendations” of the magistrate judge.

Fed. 2 R. Civ. P. 72(b)(2). The clear purpose of this requirement is judicial economy—to permit 3 magistrate judges to resolve matters not objectionable to the parties. See *Thomas*, 474 U.S. 4 at 149. Because de novo review of the entire R&R would defeat the efficiencies intended 5 by Congress and Rule 72, a general objection has the same effect as a failure to object.

See 6 *Warling v. Ryan*, No. CV 12-01396-PHX-DGC, 2013 WL 5276367, at *2 (D. Ariz. Sept. 7 19, 2013); *Eagleman v. Shinn*, No. CV-18-2708-PHX-RM (DTF), 2019 WL 7019414, at 8 *5 (D. Ariz. Dec. 20, 2019). 9 IV. Objections 10 Many of Petitioner’s objections regard the analysis Judge Markovich undertook to 11 conclude Petitioner’s claims are meritless. He states “the R&R, wrongly refers to pre- 12 Taylor and pre-Stokeling decisions entered by the district court in the northern district of 13 Illinois, and the Seventh Circuit to justify its circumvention of legal analysis required by 14 *Loper Bright* [*Enterprises v. Raimondo*, 603 U.S. 369, (2024)] and *Neal* [v.

United States, 15 516 U.S. 284 (1996)].” (Doc. 32 at 2.) He asserts Magistrate Judge Markovich erred by 16 relying on “pre-*Loper Bright*... decisions” such as *Reeb v. Thomas*, 636 F.3d 1224 (9th 17 Cir. 2011), “to conclude [the APA] precludes review under 18 U.S.C. § 3625,” and states 18 under *Loper Bright* and *Neal*, “the R&R was required to compare PATTERN’s Violent 19 Offense Code Sheet against Taylor and Stokeling.” (Id. at 1.)

He further contends the 20 Seventh Circuit’s upholding of his conviction and sentence “has absolutely nothing to do 21 with the current post-*Loper Bright* legal landscape in 2025, and the application of Taylor 22 and Stokeling to an official BOP policy (PATTERN) that does not reflect the interpretation 23 of attempted robbery/robbery set forth by Taylor and Stokeling.” (Id. at 2.)

24 Petitioner’s argument regarding the application of Taylor and Stokeling to 25 PATTERN is the same argument he raised in the Petition (Doc. 1 at 5), which the R&R 26 addressed on the merits (see Doc. 31 at 13–14).

Accordingly, the Court reviews that 27 portion of the R&R for clear error. The Court finds none. The R&R is thorough and well- 28 reasoned on this issue. Regardless, even upon de novo review, the Court finds no merit to 1 Petitioner’s contention Judge Markovich was required under *Loper Bright* or *Neal* to 2 conduct a certain legal analysis in this case.

The holding in *Loper Bright* involves judicial 3 deference to an agency’s interpretation of a statute when the statute is ambiguous. It does 4 not overturn the holding in *Reeb* that judicial review of the BOP’s discretionary decisions 5 regarding recidivism risk scores is unavailable. Compare *Loper Bright*, 603 U.S. at 413 6 with *Reeb*, 636 F.3d at 1227. Nor does it invalidate the R&R’s

conclusion Petitioner's 7 crime is a crime of violence, and therefore PATTERN's inclusion of his crime as an 'Instant 8 Violent Offense' is not a violation of federal law.

The Court finds the R&R properly relied 9 on pre-Loper Bright caselaw in concluding judicial review of Petitioner's PATTERN score 10 is unavailable and Petitioner has failed to show a violation of federal law. The Court adopts 11 these conclusions. 12 Petitioner additionally states the R&R erroneously relied on *Tennigkeit v. Taylor*, 13 No. 24-6322, 2025 WL 618740, *1 (9th Cir.

Feb. 26, 2025) to conclude the APA precludes 14 review of BOP's assessment of a prisoner's recidivism risk level. (Doc. 32 at 1.) He states 15 this reliance "fails to account for the difference between Petitioner's claim and the claim 16 in *Tennigkeit*" because the petitioner in *Tennigkeit* "challenged his own individual 17 PATTERN scoring" and "did not argue that the national policy implemented by way of 18 PATTERN's statutory interpretation violated Supreme Court precedent and/or sta're 19 deci'sis like [Taylor] and [Stokeling.]" (Id.)

The R&R acknowledges the Court retains 20 judicial review to decide whether the BOP acted contrary to established federal law, 21 violated the Constitution, or exceeded its statutory authority pursuant to 18 U.S.C. § 3621 22 (Doc. 31 at 11–12), and its reliance on *Tennigkeit* for the assertion the APA precludes 23 review of an individual's PATTERN score is not erroneous.

24 Next, Petitioner criticizes the R&R's conclusion "whether or not attempted robbery 25 under [18 U.S.C. § 1951] is defined as a crime of violence is irrelevant to Petitioner's 26 conviction" pursuant to 18 U.S.C. § 2113. (Id. at 14; Doc. 32 at 2.) He asserts "the R&R 27 should not be treating attempted robbery under 18 U.S.C. [§] 1951(b) as though it is not 28 identically worded to 18 U.S.C. [§] 2113(a), and should have instead compared the 1 elements of attempted robbery categorically." (Doc.

32 at 2.) This objection does not alter 2 the conclusion Petitioner's crime is a crime of violence. As stated in the R&R, as "the 3 Seventh Circuit recognized on his direct appeal, Petitioner's convictions for bank robbery 4 by intimidation are appropriately categorized as crimes of violence." (Doc. 31 at 15.)¹ 5 Finally, Petitioner argues "the R&R wrongly concludes that the statutory terms 6 'shall earn,' 'shall be applied,' and 'shall transfer' do not create a liberty interest, and 7 mischaracterizes mandatory FSA incentives as 'discretionary actions.'" (Doc.

32 at 4.) 8 This is the same argument Petitioner raised in the Reply, which the R&R already addressed 9 on the merits. (See Doc. 11 at 7; Doc. 31 at 15–16.) Accordingly, the Court reviews this 10 portion of the R&R for clear error and finds none.

To the extent Petitioner makes a new 11 argument regarding this issue, the Court has reviewed the objection de novo and finds no 12 merit to Petitioner's claim. The R&R thoroughly analyzed whether a liberty interest exists 13 for Petitioner to seek relief and concluded discretionary

authority cannot give rise to a 14 liberty interest, and Petitioner has no right to dictate his earned FSA time credits be applied 15 in a specific way.

(Doc. 31 at 15–16.) The Court adopts this conclusion. 16 V. Motion to Strike R&R 17 In Petitioner’s Motion to Strike the R&R, he argues the R&R was entered without 18 jurisdiction over the Petition and Magistrate Judge Markovich was not permitted to 19 adjudicate Petitioner’s Renewed Motion for Injunctive Relief. (Doc. 42). 20 Magistrate judges have jurisdiction to hear and determine any pretrial matter and 21 1Petitioner cites to multiple authorities in his Objection, including *United States v. Baldon*, 22 956 F.3d 1115, 1121 (9th Cir.

2020); “*Whitlow v. United States*, 2016 U.S. App, LEXIS 24192, Id. at n.19 (9th Cir. 2016)”; *Davis v. Crabtree*, 109 F.3d 566, 568–570 (9th Cir. 1997); and “*Pelullo 23 v. Warden, FCC Coleman*, 2024 U.S. Dist. LEXIS 143499, Id. at *8–9 (Midd. D. Fl. 2024).” 24 However, Petitioner fails to meaningfully show how these authorities negate the R&R’s reasoning.

The Court concludes Petitioner’s use of these authorities is not specific enough to warrant de novo 25 review. See Fed. R. Civ. P. 72(b)(2); *Warling*, 2013 WL 5276367, at *2; *Eagleman*, 2019 WL 7019414, at *5. Regardless, even upon de novo review of these authorities, the Court finds they 26 do not impact the analysis.

For example, in *Davis*, the Ninth Circuit held firearm possession is 27 nonviolent for purposes of § 3621(e)(2)(B). 109 F.3d at 569. This holding has no impact on Petitioner’s crime, which has been upheld by the Seventh Circuit as a crime of violence. *Johnston*, 28 814 Fed. App’x at 147. Nor do the other cases Petitioner cites. 1 || submit proposed findings and recommendations for the district court’s de novo review.

2|| *Reynaga v. Cammisa*, 971 F.2d 414, 417 (9th Cir. 1992); 28 U.S.C. § 636(b)(1)(A)-(B) 3|| (establishing magistrate judge can submit recommendations for a district court judge to review). Here, Magistrate Judge Markovich acted within his jurisdiction under § 636 in 5 || providing a recommendation to the Court on the issues presented in the Petition and Motion || for Injunctive Relief.

Accordingly, the Court will deny Petitioner’s Motion to Strike the R&R. (Doc. 42.) 8 VI. CONCLUSION 9 Having conducted a de novo review, the Court concludes Magistrate Judge || Markovich thoroughly and correctly analyzed the issues involved in the instant Petition. 11 || Because the Court will adopt the recommendations set forth in the R&R, as well as the || reasoning behind those recommendations, it will not further restate the issues and their 13} resolution.

Accordingly, 14 IT IS ORDERED the R&R (Doc. 31) is ADOPTED. 15 IT IS FURTHER ORDERED the Petition (Doc. 1) is DISMISSED WITH PREJUDICE. 17 IT IS FURTHER ORDERED the Renewed Motion for Preliminary Injunctive 18 || Relief (Doc. 29) is DENIED AS

MOOT. 19 IT IS FURTHER ORDERED Petitioner's Motion to Strike R&R (Doc. 42) is ||
DENIED WITH PREJUDICE. 21 IT IS FURTHER ORDERED the Clerk of Court shall close this
case.

22 Dated this 16th day of March, 2026. 23 24 "tt Taal 27 28 -R-