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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Larry D. Brown-Bey,

No. CV-14-02038-TUC-FRZ (BGM)

10 Petitioner,

**ORDER**

11 v.

12 J.T. Shartle, Warden,

13  
14 Respondent.

15 Currently pending before the Court is Petitioner Larry D. Brown-Bey's *pro se*  
16 First Amended Petition Under 28 U.S.C. § 2241 for a Writ of Habeas Corpus by a Person  
17 in Federal Custody ("Amended Petition") (Doc. 10). Respondent has filed his Return and  
18 Answer to Petitioner's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241  
19 ("Response") (Doc. 21). Petitioner filed his Response to the Respondent's Return and  
20 Answer to Petitioner's Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241  
21 ("Reply") (Doc. 24). The Petition is ripe for adjudication.

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24 As an initial matter, Petitioner named Louis Winn, Warden of the United States  
25 Penitentiary–Tucson ("USP–Tucson") as the Respondent. *See* Amended Petition (Doc.  
26 10). The Court takes judicial notice, however, that Louis Winn is no longer warden of  
27 USP–Tucson. As such, the Court will substitute the new Warden of USP–Tucson, J. T.  
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1 Shartle, as Respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

2 Pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure,<sup>1</sup> this matter  
3 was referred to Magistrate Judge Macdonald for Report and Recommendation. The  
4 Magistrate Judge recommends that the District Court deny the Amended Petition (Doc.  
5 10).  
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8 **I. FACTUAL AND PROCEDURAL BACKGROUND**

9 Petitioner is an inmate currently incarcerated at the United States Penitentiary  
10 (“USP”) in Terre Haute, Indiana. See Fed. Bureau of Prisons (“BOP”) Inmate Locator,  
11 <https://www.bop.gov/inmateloc/> (last visited April 27, 2017). On November 8, 1999,  
12 Petitioner was sentenced by the Superior Court of the District of Columbia on six (6)  
13 counts of First Degree Child Sex Abuse and one (1) count of Escape. Answer (Doc. 21),  
14 Borrego Decl. (Exh. “1”), Superior Ct. of the Distr. of Columbia, Case No. F8202-96,  
15 Judgment and Commitment/Probation Order (Attach. “2”) at 1. On the same date, the  
16 Superior Court for the District of Columbia also sentenced Petitioner for a second Escape  
17 conviction. *Id.*, Exh. “1,” Superior Ct. of the Distr. of Columbia, Case No. F2442-98,  
18 Judgment and Commitment/Probation Order (Attach. “3”) at 1. Petitioner’s November  
19 1999 sentence included three (3) consecutive twelve (12) to thirty-six (36) year terms of  
20 imprisonment and two (2) consecutive twenty (20) month to five (5) year sentences. *Id.*,  
21 Exh. “1,” Attach. “2” at 1 & Attach. “3” at 1. On December 3, 1999, the Superior Court  
22 of the District of Columbia sentenced Petitioner to a third twenty (20) month to five (5)  
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<sup>1</sup> Rules of Practice of the United States District Court for the District of Arizona.

1 year sentence for a violation of the Bail Reform Act, and ordered the sentence “to run  
2 consecutive to any other sentence that defendant is currently serving.” *Id.*, Exh. “1,”  
3 Superior Ct. of the Distr. of Columbia, Case No. F3021-97A, Judgment and  
4 Commitment/Probation Order (Attach. “4”) at 1.

6 BOP has combined Petitioner’s minimum and maximum terms for each  
7 consecutive sentence to arrive at a single expiration full term date (“EFT”), mandatory  
8 release date (“MRD”), and parole eligibility date (“PED”). Response (Doc. 21), Borrego  
9 Decl. (Exh. “1”), United States Department of Justice (“U.S. DOJ”), Federal Bureau of  
10 Prisons (“BOP”), Program Statement P5880.33, Chapter 20 (Attach. “6”) at 4.  
11 Petitioner’s combined minimum term is thirty-six (36) years and sixty (60) months and  
12 his combined maximum term is one hundred twenty-three (123) years. *See* Response  
13 (Doc. 21), Exh. “1,” District of Columbia Dept. of Corrections Face Sheet No. 2, Case  
14 Nos. F8202-96, F2442-98 & F3021-97 (Attach. “5”). Petitioner was credited with 568  
15 days of time served. *Id.*, Exh. “1,” Attach. “5” at 3. Petitioner also earned seventy-five  
16 (75) days of extra good time DC education credit awards (“DCEGT”) by earning his  
17 Graduate Equivalency Diploma (“GED”). *Id.*, Borrego Decl. (Exh. “1”), Sentence  
18 Monitoring Good Time Data (Attach. “7”) at 1. Petitioner’s mandatory release date, his  
19 maximum consecutive sentences minus any credit time and DCEGT, is projected to be  
20 February 2, 2121. *See* Response (Doc. 21), Exh. “1,” Attach. “1” at 5. His parole  
21 eligibility date, Petitioner’s minimum consecutive sentences minus any credit time and  
22 DCEGT, is February 3, 2039. *Id.*, Exh. “1,” Attach. “1” at 5.

28 Petitioner filed his initial petition (Doc. 1) on April 21, 2014, which was

1 subsequently amended pursuant to Order of the Court. *See* Order 4/29/2014 (Doc. 6);  
2 Order 5/22/2014 (Doc. 9). Petitioner asserts that BOP has miscalculated his sentence,  
3 and that as “a D.C. prisoner from the Superior Court of the District of Columbia [] has  
4 the expectation that he will be seen by the USPC after he has completed one third of his  
5 original sentence.” Reply (Doc. 24) at 6; *see also* Amended Petition (Doc. 10) at 4.  
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## 8 **II. ANALYSIS**

### 9 **A. Jurisdiction**

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11 “Federal courts are always ‘under an independent obligation to examine their own  
12 jurisdiction,’ . . . and a federal court may not entertain an action over which it has no  
13 jurisdiction.” *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000) (quoting  
14 *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)). “Generally, motions to  
15 contest the legality of a sentence must be filed under § 2255 in the sentencing court,  
16 while petitions that challenge the manner, location, or conditions of a sentence’s  
17 execution must be brought pursuant to § 2241 in the custodial court.” *Id.* at 864.  
18 Therefore, before proceeding to any other issue a court must establish whether a habeas  
19 petition is filed pursuant to § 2241 or § 2255 to determine whether jurisdiction is proper.  
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21 *Id.* at 865.  
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24 Here, Petitioner does not claim that the sentencing court imposed an illegal  
25 sentence; rather, he seeks relief with respect to the BOP’s calculation of his parole  
26 eligibility. Thus, Petitioner is challenging the manner, location, or condition of the  
27 execution of his sentence. When a petitioner challenges the “manner in which his  
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1 sentence was executed,” the action is “maintainable only in a petition for habeas corpus  
2 filed pursuant to 28 U.S.C. § 2241.” *Tucker v. Carlson*, 925 F.2d 330, 331 (9th Cir.  
3 1991); *see also Tablada v. Thomas*, 533 F.3d 800 (9th Cir. 2008) (section 2241 petition  
4 proper to challenge BOP’s calculation of good conduct time); *Ramirez v. Galaza*, 334  
5 F.3d 850, 858 (9th Cir. 2003) (“a prisoner may seek a writ of habeas corpus under 28  
6 U.S.C. § 2241 for ‘expungement of a disciplinary finding from his record if expungement  
7 is likely to accelerate the prisoner’s eligibility for parole’”) (quoting *Bostic v. Carlson*,  
8 884 F.2d 1267, 1269 (9th Cir. 1989)); *Weinstein v. U.S. Parole Comm’n*, 902 F.2d 1451,  
9 1452 (9th Cir. 1990) (“The district court had jurisdiction pursuant to 28 U.S.C. § 2241 to  
10 review a claim by a federal prisoner challenging a decision of the United States Parole  
11 Commission”). Challenges brought pursuant to § 2241 must be brought in the custodial  
12 court. At the time of filing the Petition, Petitioner was incarcerated at USP–Tucson in  
13 Arizona. Accordingly, this Court has jurisdiction over this matter. *See Francis v. Rison*,  
14 894 F.2d 353, 354 (9th Cir. 1990).

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19 **B. Exhaustion**

20 The Ninth Circuit Court of Appeals has stated:

21 [28 U.S.C. § 2241] does not specifically require petitioners to exhaust  
22 direct appeals before filing petitions for habeas corpus. [Footnote omitted.]  
23 However, we require, as a prudential matter, that habeas petitioners exhaust  
24 available judicial and administrative remedies before seeking relief under §  
25 2241.

26 *Castro-Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001), *abrogated on other grounds*  
27 *by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006).

28 “The requirement that federal prisoners exhaust administrative remedies before filing a

1 habeas corpus petition was judicially created; it is not a statutory requirement.” *Brown v.*  
2 *Rison*, 895 F.2d 533, 535 (9th Cir. 1990), *overruled on other grounds by Reno v. Koray*,  
3 515 U.S. 50, 54–55, 115 S.Ct. 2021, 2023–24, 132 L.Ed.2d 46 (1995). “Nevertheless,  
4 ‘[p]rudential limits like jurisdictional limits and limits on venue, are ordinarily not  
5 optional.’” *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) (alterations in original)  
6 (quoting *Castro-Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001), *abrogated on other*  
7 *grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422, 165 L.Ed.2d  
8 323 (2006)).

11 “Courts may require prudential exhaustion if ‘(1) agency expertise makes agency  
12 consideration necessary to generate a proper record and reach a proper decision; (2)  
13 relaxation of the requirement would encourage the deliberate bypass of the administrative  
14 scheme; and (3) administrative review is likely to allow the agency to correct its own  
15 mistakes and to preclude the need for judicial review.’” *Id.* (quoting *Noriega-Lopez v.*  
16 *Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003)). “When a petitioner does not exhaust  
17 administrative remedies, a district court ordinarily should either dismiss the petition  
18 without prejudice or stay the proceedings until the petitioner has exhausted remedies,  
19 unless exhaustion is excused.” *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir.  
20 2011) (citations omitted). Exhaustion may be excused if pursuing an administrative  
21 remedy would be futile. *Fraley v. United States Bureau of Prisons*, 1 F.3d 924, 925 (9th  
22 Cir. 1993).

27 If a prisoner is unable to obtain an administrative remedy because of his failure to  
28 appeal in a timely manner, then the petitioner has procedurally defaulted his habeas

1 corpus claim. *See Nigro v. Sullivan*, 40 F.3d 990, 997 (9th Cir. 1994) (citing *Francis v.*  
2 *Rison*, 894 F.2d 353, 354 (9th Cir. 1990); *Martinez v. Roberts*, 804 F.2d 570, 571 (9th  
3 Cir. 1986)). If a claim is procedurally defaulted, the court may require the petitioner to  
4 demonstrate cause for the procedural default and actual prejudice from the alleged  
5 constitutional violation. *See Francis*, 894 F.2d at 355 (suggesting that the cause and  
6 prejudice test is the appropriate test); *Murray v. Carrier*, 477 U.S. 478, 492, 106 S.Ct.  
7 2639, 2647–48, 91 L.Ed.2d 397 (1986) (cause and prejudice test applied to procedural  
8 defaults on appeal); *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 906–08 (9th  
9 Cir. 1986) (cause and prejudice test applied to *pro se* litigants).

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13 The BOP has established an administrative remedy process permitting an inmate  
14 to seek review of an issue relating to “any aspect of his/her own confinement.” 28 C.F.R.  
15 § 542.10(a). Here, Respondent asserts that Petitioner has failed to exhaust his  
16 administrative remedies prior to filing his Petition. Answer (Doc. 21) at 5. Petitioner  
17 states that he “has indeed filed administrative remedies regarding the calculation of his  
18 sentences, and even if he had not, the court may exercise its discretion to waive the  
19 requirement, where it finds that exhaustion would be futile.” Reply (Doc. 24) at 4 (citing  
20 *Fraley v. U. S. Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993)). A review of  
21 Petitioner’s administrative remedy requests and appeals shows that Petitioner has not  
22 filed any grievances regarding his sentence calculation. *See* Response (Doc. 21), Borrego  
23 Decl. (Exh. “1”), Administrative Remedy Generalized Retrieval (Attach. “8”). The Court  
24 finds, however, that “[b]ecause of the existence of official BOP policy . . . exhaustion  
25 would be futile here[.]” *Ward v. Chavez*, 678 F.3d 1042, 1046 (9th Cir. 2012). As such,  
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1 this Court will reach the merits of Petitioner’s claim.

2 **C. Merits of the Petition**

3 **1. District of Columbia Prisoners—Generally**

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5 Section 24-101(b), District of Columbia Code, governs felons sentenced pursuant  
6 to the D.C. Official code and provides for their transfer “to a penal or correctional facility  
7 operated or contracted for by the Bureau of Prisons.” D.C. Code § 24-101(b). The  
8 statute further provides that “[s]uch persons shall be subject to any law or regulation  
9 applicable to persons committed for violations of laws of the United States consistent  
10 with the sentence imposed, and the Bureau of Prisons shall be responsible for the  
11 custody, care, subsistence, education, treatment and training of such persons.” *Id.*  
12 Similarly, Section 24-131, District of Columbia Code, delineates which entity oversees  
13 the parole of District of Columbia felons. The United States Parole Commission has  
14 assumed “the jurisdiction and authority of the Board of Parole of the District of Columbia  
15 to grant and deny parole, and to impose conditions upon an order of parole, in the case of  
16 any imprisoned felon who is eligible for parole or reparole under the District of Columbia  
17 Official Code.” D.C. Code § 24-131(a). Persons convicted in the District of Columbia of  
18 a felony shall be sentenced to “a maximum period not exceeding the maximum fixed by  
19 law, and for a minimum period not exceeding one-third of the maximum sentence  
20 imposed, and any person so convicted and sentenced may be released on parole as herein  
21 provided at any time after having served the minimum sentence.” D.C. Code § 24-  
22 403(a).  
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1 shall be applied to the person’s minimum term of imprisonment to determine the date of  
2 eligibility for release on parole and to the person’s maximum term of imprisonment to  
3 determine the date when release on parole becomes mandatory.” D.C. Code § 24-  
4 221.01(b).  
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### 6 3. Petitioner’s Sentence

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8 Petitioner relies on a 1987 memorandum ostensibly to the Chief Judge of the  
9 Superior Court of the District of Arizona to argue that when a sentence imposed is twelve  
10 (12) to thirty-six (36) years, a defendant is eligible for parole after eight (8) years. Reply  
11 (Doc. 24) at 8. Petitioner’s reliance is misplaced. As discussed in Section II.C., *supra*,  
12 the OCJRAA became effective in 1994 and governs Petitioner’s sentence. Furthermore,  
13 because Petitioner was sentenced to multiple, consecutive sentences, he is required to  
14 serve *all* of his minimum sentences (minus any jail time and other applicable credits)  
15 prior to being eligible for parole. *Gibson v. Stewart*, 2016 WL 1460489 (D. Maryland  
16 April 14, 2016) (holding the United States Parole Commission does not have authority to  
17 release a prisoner prior to service of the total of his minimum sentences); *Bryant v.*  
18 *Civiletti*, 663 F.2d 286 (D.D.C. 1981) (“Parole hearings are designed to evaluate  
19 prisoners who are eligible for release . . . because [Petitioner] still had other minimum  
20 sentences to serve . . . [a parole hearing is not required.]”); *see also* D.C. Code § 24-  
21 403(a) (parole eligibility occurs after service of the minimum sentence).  
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26 Accordingly, Petitioner is required to serve thirty-six (36) years and sixty (60)  
27 months minus jail time and eligible credits prior to being eligible for parole. BOP has  
28 calculated Petitioner’s parole eligibility date to be February 3, 2039. Response (Doc. 21),

1 Borrego Decl. (Exh. "1") at ¶ 12. The Court finds this calculation to be correct.  
2 Petitioner has not met his burden to show that "[h]e is in custody in violation of the  
3 Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c). As such,  
4 Petitioner is not entitled to habeas relief.  
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### 6 7 **III. RECOMMENDATION**

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9 For the reasons delineated above, the Magistrate Judge recommends that the  
10 District Judge enter an order:

11 (1) SUBSTITUTING J.T. Shartle, Warden, as Respondent for Louis Winn  
12 pursuant to Rule 25(d) of the Federal Rules of Civil Procedure and Rule 43(c)(2) of the  
13 Federal Rules of Appellate Procedure; and  
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15 (2) DENYING Petitioner's First Amended Petition Under 28 U.S.C. § 2241 for  
16 a Writ of Habeas Corpus by a Person in Federal Custody (Doc. 10).  
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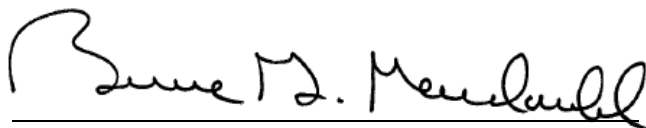
18 Pursuant to 28 U.S.C. § 636(b) and Rule 72(b)(2) of the Federal Rules of Civil  
19 Procedure, any party may serve and file written objections within fourteen (14) days after  
20 being served with a copy of this Report and Recommendation. A party may respond to  
21 another party's objections within fourteen (14) days after being served with a copy. Fed.  
22 R. Civ. P. 72(b)(2). No replies shall be filed unless leave is granted from the District  
23 Court. If objections are filed, the parties should use the following case number: **CV-14-**  
24 **02038-TUC-FRZ.**  
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27 Failure to file timely objections to any factual or legal determination of the  
28 Magistrate Judge may result in waiver of the right of review. The Clerk of the Court

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shall send a copy of this Report and Recommendation to all parties.

Dated this 1st day of May, 2017.



Honorable Bruce G. Macdonald  
United States Magistrate Judge