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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael Strausbaugh,
10 Petitioner,
11 v.
12 J.T. Shartle,
13 Respondent.

No. CV-17-00333-TUC-JAS (BPV)

REPORT
AND
RECOMMENDATION

14
15 Petitioner Michael Strausbaugh, who is currently incarcerated at the United States
16 Penitentiary–Tucson, filed a Petition Under 28 U.S.C. § 2241 for a Writ of Habeas
17 Corpus by a Person in Federal Custody. (Doc. 1.) Respondent filed a Return and Answer
18 to the § 2241 Petition (Doc. 11), and Petitioner a Reply (Doc. 25). Both parties briefed
19 the standard for evaluating regulatory restrictions on outgoing mail. (Docs. 29, 37.) This
20 case has been referred to Magistrate Judge Bernardo P. Velasco for a Report and
21 Recommendation pursuant to Local Rules of Civil Procedure 72.1 and 72.2. (Doc. 6 at 3.)
22 The Court recommends the District Judge: (1) find that Petitioner does not have standing
23 to raise a First Amendment claim; (2) find that the greater weight of the evidence
24 supported the Bureau of Prisons’ (“BOP”) disciplinary decision; and (3) deny Petitioner’s
25 § 2241 Petition in its entirety.

26 **I. SUMMARY AND PARTIES’ POSTURE**

27 The basis for Petitioner’s claims arise from the disciplinary measures taken by the
28 BOP subsequent to Petitioner’s attempted mailing of another inmate’s (“J.M.”)

1 Administrative Remedy Appeal (“Appeal”) to the inmate’s wife (“P.M.”). J.M. was
2 prohibited from mailing the Appeal to his wife directly, and the Disciplinary Hearing
3 Officer (“DHO”) found that Petitioner’s actions constituted an attempt to circumvent the
4 BOP’s mail monitoring regulations. (Doc. 1 at 1.) The DHO sanctioned Petitioner with
5 the loss of twenty-seven (27) days Good Conduct Time, and the loss of email and
6 visitation privileges for one hundred eighty (180) days. (Ex. A, Att. 4, Doc. 11-3 at 18-
7 19.)¹

8 In Ground One, Petitioner claimed that his First Amendment rights were violated
9 when the BOP reduced his Good Conduct Time because the regulations governing
10 violations of mail monitoring procedures cannot meet the appropriate level of scrutiny for
11 outgoing mail. (Doc. 1 at 10.) In Ground Two, Petitioner asserted that the DHO did not
12 apply the “greater weight of the evidence” standard when it came to its decision, and the
13 failure to do so violated 28 C.F.R. § 541.8(f). *Id.* at 15.

14 Respondent countered that Petitioner admitted he sent the mail, and he was
15 afforded a proper investigation as mandated by due process. (Doc. 11 at 9-10.)
16 Furthermore, the mail monitoring procedures meet the level of scrutiny required for
17 prison mail; they serve an important security function. *Id.* at 12-13. Therefore,
18 Petitioner’s constitutional rights were not violated when he was disciplined for breaking
19 these rules. *Id.* Furthermore, “some evidence” existed to support the DHO’s
20 determination, and because Petitioner’s evidence was not contradictory to the evidence
21 against him, only “some evidence” was necessary to support the decision, not the “greater
22 weight of the evidence” that Petitioner suggests. *Id.* at 10-11.

23 The Court ordered that Respondent address whether Respondent’s restriction on
24 Petitioner’s outgoing mail must meet a higher standard set forth in *Procunier v. Martinez*,
25 416 U.S. 396, 413 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S.
26 401, 404 (1989), which states that restrictions on the content of outgoing mail must: (1)
27 “further an important or substantial governmental interest unrelated to the suppression of

28 ¹ Docket citations refer to the page numbers generated by the Court’s Electronic Case
Filing System (ECF).

1 expression,” and (2) “the limitation of First Amendment freedoms [is] no greater than is
2 necessary or essential to the protection of the particular governmental interest involved.”
3 (Doc. 28.)

4 Respondent answered that Petitioner’s actions were not protected under the First
5 Amendment because the mailed document constituted J.M.’s third-party speech, not
6 Petitioner’s. (Doc. 29 at 1-2.) Regardless of Petitioner’s lack of standing, Respondent
7 argued that the violation meets the standard set forth in *Procunier. Id.* at 3-5. First,
8 disciplining for violations of the mail monitoring procedures furthers the government’s
9 substantial interest in maintaining order and safety in prisons by prohibiting
10 circumvention the procedures instituted for mail monitoring. *Id.* Second, because the
11 Code for which Petitioner was found to have violated is not content-based, the Code
12 serves an interest “unrelated to the suppression of expression.” *Id.* at 4 (quoting
13 *Procunier*, 416 U.S. at 413). Finally, the limitation is no greater than necessary because
14 the reduction of Good Conduct Time was not based on censorship of speech, but rather
15 was due to a subversion of the mail monitoring policies that limited J.M. from mailing
16 the Appeal to P.M. *Id.* at 4-5.

17 Petitioner responded that because he authored J.M.’s Appeal, it was his speech and
18 therefore afforded First Amendment protection. (Doc. 37 at 3.) Furthermore, Petitioner
19 had an interest in exposing BOP misconduct, and this information was publicly available.
20 *Id.* at 4.

21 **II. DISCIPLINARY HISTORY**

22 While conducting a review of outgoing mail, on February 24, 2016, Special
23 Investigative Services Technician D. Madrid found mail sent by Petitioner, which
24 consisted of the Appeal of inmate J.M. addressed to J.M.’s wife, P.M. (Doc. 1 at 10; Ex.
25 A, Att. 4, Doc. 11-3 at 12.) Madrid created an incident report on February 24, 2016,
26 noting that J.M. was on mail restriction, and was unable to mail the documents himself.
27 (Ex. A, Att. 4, Doc. 11-3 at 28.)

28 Petitioner alleges that Madrid’s statements in the report were false, including that:
(1) Petitioner claimed J.M. asked Petitioner to send the Appeal to P.M.; (2) that Petitioner

1 was aware that he was prohibited from mailing such information; and (3) J.M. made P.M.
2 contact Petitioner's mother. (Doc. 1 at 10-12.) Instead, Petitioner claims he told Madrid
3 that J.M. did *not* ask him to mail the Appeal, instead Petitioner's mother told Petitioner
4 that P.M. had requested the mailing. *Id.* at 10. Furthermore, he did not admit he was
5 aware his actions were a violation, but asserts he asked Madrid, "how can that be a
6 violation of policy?" *Id.*

7 The incident report was then investigated by Lieutenant S. Hellman, who provided
8 a copy of the report to Petitioner on the same day of the incident. (Ex. A, Att. 4, Doc. 11-
9 3 at 17, 28.) Petitioner claims he made a statement to Lt. Hellman consistent with that
10 given to Madrid. (Doc. 1 at 12.) Lt. Hellman reported that Petitioner claimed his mother
11 had been contacted by J.M.'s wife, P.M., who asked that Petitioner mail her the Appeal.
12 (Ex. A, Att. 4, Doc. 11-3 at 28-29.) Lt. Hellman also reported that Petitioner stated J.M.
13 asked him to send the mailing to P.M., and Petitioner knew this was in violation of the
14 BOP's policies. *Id.* The incident report noted that Petitioner later claimed he did not
15 know that his actions were in violation of BOP rules. *Id.* at 28. Lt. Hellman found the
16 claim had sufficient factual basis to forward for further review. *Id.* at 29.

17 Two days later, Petitioner had a hearing in front of the Unit Discipline Committee
18 ("UDC"). (Doc. 1 at 11.) Petitioner claims he gave the same explanation for the mailing,
19 but believes the counselor only made a note indicating Petitioner was unaware that his
20 actions were in violation of the rules of conduct. *Id.* The UDC found the claim serious
21 enough to warrant review by the DHO and forwarded the matter to the DHO for a
22 disciplinary hearing. (Ex. A, Att. 4, Doc. 11-3 at 28.) Petitioner was given notice of the
23 disciplinary hearing on February 26, 2016. *Id.* at 25-26.

24 A hearing occurred on March 3, 2016, led by DHO Phillips-Sluder. *Id.* at 17-19.
25 Petitioner waived his right to assistance from a staff representative and presented
26 evidence including: his oral statement, his written statement, a statement from his mother,
27 and an email from his mother. (Doc. 1 at 11; Ex. A, Att. 4, Doc. 11-3 at 20-24.) The
28 DHO relied on D. Madrid's report, Petitioner's statements, and his written evidence when
coming to a decision. (Ex. A, Att. 4, Doc. 11-3 at 18.) The DHO concluded that

1 Petitioner violated Code 296A, by attempting to circumvent the mail monitoring
2 procedures. *Id.* The DHO explained that Petitioner’s action “poses a serious threat to the
3 ability of the staff to control the use of the mail. [Petitioner’s] actions interfered with the
4 ability of staff to monitor whether inmates are using mail for prohibited or illegal
5 purposes.” *Id.* at 19. As discipline, the DHO subtracted twenty-seven (27) days Good
6 Conduct Time. *Id.* at 18-19.

7 **III. STANDARD OF REVIEW**

8 *a. 28 U.S.C. § 2241*

9 A federal prisoner who seeks to challenge the legality of a sentence must generally
10 do so by motion raised in the sentencing court pursuant to 28 U.S.C. § 2255. *See*
11 *Harrison v. Ollison*, 519 F.3d 952, 954 (9th Cir. 2008). In contrast, a prisoner who seeks
12 to challenge the manner, location, or conditions relating to execution of his sentence must
13 bring a petition pursuant to 28 U.S.C. § 2241 in the custodial court. *Hernandez v.*
14 *Campbell*, 204 F.3d 861, 864 (9th Cir. 2000). In this instance, Petitioner challenges the
15 DHO’s reduction in Good Conduct Time in violation of his First Amendment Rights and
16 the Code of Federal Regulations. Therefore, he challenges the manner in which his
17 sentence is being executed and a petition under § 2241 is proper. *See e.g., McQuown v.*
18 *Ives*, 3:16-CV-01927-KI, 2017 WL 359181, at *3 (D. Or. Jan. 24, 2017) (District Court
19 has jurisdiction over § 2241 Petitioner alleging the application of BOP policies violate
20 the Constitution or federal law); *Close v. Thomas*, 653 F.3d 970, 973-74 (9th Cir. 2011)
21 (“[J]udicial review remains available for allegations that BOP action is contrary to
22 established federal law, violates the United States Constitution, or exceeds its statutory
23 authority.”).

24 Furthermore, prior to filing a petition under 28 U.S.C. § 2241, a petitioner must
25 exhaust his administrative remedies. *Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004).
26 Exhaustion is not disputed by Respondent. (Doc. 11 at 2.)

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1 **b. Prison Disciplinary Rights**

2 “Prison disciplinary proceedings are not part of a criminal prosecution, and the full
3 panoply of rights due a defendant in such proceedings does not apply.” *Wolff v.*
4 *McDonnell*, 418 U.S. 539, 556 (1974). To discipline an inmate and reduce his Good
5 Conduct Time, due process requires the inmate is afforded: (1) notice of the violation; (2)
6 a written explanation of the disciplinary action taken and reasons such action; (3) a
7 chance to present evidence; (4) assistance preparing a defense if requested; and (5) an
8 impartial fact finder. *Id.* at 563-72.

9 Petitioner acknowledges that his due process rights were not violated, and instead
10 argues it is his First Amendment rights that were impinged. (Doc. 25 at 2.) Therefore, the
11 Court will not review the due process argument illustrated in Respondent’s Response.
12 (See Doc. 11 at 9-12 (explaining legal standard and how Petitioner’s proceedings met due
13 process requirements).)

14 Petitioner asserts that in Ground One, his First Amendment rights were violated
15 because the mail restriction regulations as they apply to his case do not meet the higher
16 standard set out in *Procunier*, 416 U.S. at 413, which requires that a restriction furthers
17 an important governmental interest and is no greater than necessary. (Doc. 25 at 2-3;
18 Doc. 37 at 1.) Petitioner also believes that for Ground Two, the amount of evidence
19 necessary to reduce the amount of Earned Time Credits is more than the “some evidence”
20 necessary under due process; it requires using the “greater weight” standard because he
21 presented contradictory evidence in the disciplinary hearing. *Id.* at 2.

22 **IV. GROUND ONE: FIRST AMENDMENT VIOLATION**

23 Prisoners are afforded a First Amendment right to both send and receive mail.
24 *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam). But, the test for whether
25 a regulatory restriction on outgoing mail violates a prisoner’s First Amendment rights is
26 more stringent than the test for incoming mail. See *Lane v. Feather*, 610 F. App’x 628,
27 628 (9th Cir. 2015); *Lane v. Tews*, CV 14-1324-GW (PLA), 2016 WL 8738265, at *4
28 (C.D. Cal. Dec. 7, 2016), *report and recommendation adopted*, CV-14-1324-GW (PLA),
2017 WL 1423700 (C.D. Cal. Apr. 14, 2017); *Harrison v. Institutional Gang of*

1 *Investigations*, C 07-3824 SI (PR), 2010 WL 653137, at *4 (N.D. Cal. Feb. 22, 2010); *cf.*
2 *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989) (restrictions on *incoming* mail need only
3 be “reasonably related to legitimate penological interests”). When regulatory restrictions
4 are placed on a prisoner’s right to send outgoing mail, it must meet the test laid out in
5 *Procunier. Barrett v. Belleque*, 544 F.3d 1060, 1062 (9th Cir. 2008). Under *Procunier*,
6 limitations on inmates’ correspondence may be enforced when the regulations “further an
7 important or substantial governmental interest unrelated to the suppression of expression”
8 and “the limitation of First Amendment freedoms [is] no greater than is necessary or
9 essential to the protection of the particular governmental interest involved.” *Procunier*,
10 416 U.S. at 413. Prison administrators do not have to show that failing to censor
11 correspondence would certainly led to adverse consequences; administrators are granted
12 “[s]ome latitude in anticipating the probable consequences” of permitting certain
13 correspondence in a prison setting. *Id.* at 414.

14 However, a restriction placed on outgoing mail is in violation of the First
15 Amendment rights of the person exercising his rights only. A person asserting a First
16 Amendment right “does not speak . . . by handling another person’s speech.” *Knox v.*
17 *Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018) (internal quotation marks omitted)
18 (finding claimant had no First Amendment protection by delivering another person’s
19 ballot); *see also Voting for America, Inc. v. Steen*, 732 F.3d 382, 390 (5th Cir. 2013)
20 (third-party collection and delivery of voter registration application not speech).

21 Mailing a fellow inmate’s Administrative Remedy Appeal did not restrict
22 Petitioner’s speech, was not an expressive activity, and affords him no protection as a
23 third-party conveyor of speech. That Petitioner helped prepare the Appeal does not
24 change this analysis, as the Appeal could only be submitted by J.M., *see* 28 C.F.R. §
25 542.16(a), and therefore can only be construed as J.M.’s speech, not Petitioner’s.
26 Furthermore, the mailing was not a written communication by Petitioner to P.M. about
27 the Appeal, but was simply a copy of J.M.’s Appeal, and constituted an unauthorized
28 relaying of J.M.’s speech to P.M., not Petitioner’s exercise of expression. Despite his

1 claims to the contrary, Petitioner was not in any way acting in the role of Émile Zola:
2 *J'Accuse . . .!*

3 The Court finds that Petitioner does not have standing to raise a First Amendment
4 argument because the Appeal is not Petitioner's speech and is therefore not protected
5 speech. Because of this, the Court need not address the constitutional issue of whether the
6 regulation is narrowly tailored to further an important governmental interest.

7 **V. GROUND TWO: CODE OF FEDERAL REGULATIONS VIOLATION**

8 “[T]he requirements of due process are satisfied if some evidence supports the
9 decision by the prison disciplinary board to revoke good time credits.” *Superintendent v.*
10 *Hill*, 472 U.S. 445, 455 (1985). In this instance, the Court need not re-examine and re-
11 weigh all of the evidence, but looks for “any evidence” supporting the DHO's decision.
12 *Id.* at 455-56; *Cato v. Rushen*, 824 F.2d 703, 704-05 (9th Cir. 1987). However, the Code
13 of Federal Regulations concludes that when there is conflicting evidence in the
14 disciplinary hearing record, the decision of the BOP must be supported by a “greater
15 weight of the evidence.” 28 C.F.R. § 541.17(f).

16 Petitioner violated the regulatory restriction prohibiting circumventing mail
17 monitoring procedures. The Code of Federal Regulations describes the offense:

18 Use of the mail for abuses other than criminal activity which circumvent
19 monitoring procedures (e.g, use of the mail to commit or further a High
20 category prohibited act, special mail abuse; writing letters in code; directing
21 others to send, *sending*, or receiving *a letter through unauthorized means*;
22 *sending mail for other inmates without authorization*; *sending*
23 *correspondence to a specific address with directions or intent to have the*
24 *correspondence sent to an unauthorized person*; and using a fictitious
25 return address in an attempt to send or receive unauthorized
26 correspondence).

27 28 C.F.R. §541.3 Table 1, Code 296 (emphasis added). Committing a mail abuse act is a
28 high severity level act that may result in withholding of Good Conduct Time. 28 C.F.R. §
541.3(b); 28 C.F.R. § 541.3 Table 2. In addition, the “Aiding, attempting, abetting, or
making plans to commit any of the prohibited acts is treated the same as committing the
act itself.” 28 C.F.R. § 541.3(a). “This regulation puts a reasonable prisoner on

1 reasonable notice that sending a letter to someone with a direction to have the letter sent
2 to an unauthorized third individual was a violation of BOP regulations.” *Johnson v.*
3 *Zuniga*, 1:15-CV-00493-SKO HC, 2017 WL 6513229, at *4 (E.D. Cal. Dec. 20, 2017).

4 Petitioner admitted that he mailed J.M.’s Appeal to J.M.’s wife, P.M. (Doc. 25 at
5 3.) He further admitted that P.M. contacted Petitioner’s mother to ask if Petitioner would
6 mail the Appeal to P.M. (Doc. 1 at 12.) In essence, Petitioner was attempting to send
7 J.M.’s mail to a person J.M. was unauthorized to communicate with in this fashion. At
8 the request of P.M., Petitioner attempted to provide J.M.’s unauthorized communication
9 to her. This undermined the safety and order of the BOP’s system for correspondence.
10 Petitioner circumvented J.M.’s mailing limitations by mailing J.M.’s communications in
11 his stead.

12 Petitioner’s argument that his contradictory evidence mandates that the BOP’s
13 decision be supported by the “greater weight of the evidence” fails for two reasons: (1)
14 his evidence did not contradict a finding that Petitioner circumvented mail monitoring
15 procedures, and (2) even if it had, the decision is adequately supported by a greater
16 weight of evidence.

17 Petitioner claims that his statements and his evidence from his mother conflicted
18 with D. Madrid’s, that the greater weight of the evidence leaned in his favor, and
19 therefore the DHO should not have found him guilty of subverting mail monitoring
20 procedures. However, this is not the case. It is a fact that J.M. was on mail restriction. In
21 addition, Petitioner admitted he attempted to mail J.M.’s document to P.M. He also
22 admitted that it was not a personal correspondence to P.M., but relayed the Appeal to
23 P.M., which J.M. was prohibited from doing on his own. Finally, the DHO confirmed
24 that Petitioner was aware of the mailing procedures because “it is made clear in policy,
25 and in the Inmate Handbook that [Petitioner] received upon [his] arrival.” (Ex. A, Att. 4,
26 Doc. 11-3 at 18.) Petitioner signed and acknowledged these rules. *Id.*

27 Furthermore, Petitioner’s contention that mailing J.M.’s Appeal at the request of P.M. is
28 not a violation of mailing procedures because it was requested by P.M. is unpersuasive.
While Petitioner was permitted to mail P.M. personally, his mailing was not personal, but

1 was a surreptitious means of relaying prohibited information. Who requested the Appeal
2 is insignificant, what matters is that Petitioner attempted to circumvent the limitations on
3 J.M.'s communications with his wife by providing J.M.'s documents to his wife.

4 Given all the evidence presented, a greater weight of the evidence supports the
5 DHO's decision that Petitioner's actions constituted "sending mail for other inmates
6 without authorization" in violation of 28 C.F.R. §541.3 Table 1, Code 296. Accordingly,
7 the DHO's withholding of Good Conduct Time was appropriate.

8 **I. RECOMMENDATION**

9 For the reasons stated herein, the Magistrate Judge recommends that the District
10 Judge enter an order:

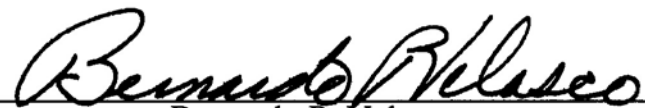
- 11 1. **FINDING** that Petitioner does not have standing to raise a First Amendment
12 claim;
- 13 2. **FINDING** the greater weight of the evidence supported the BOP's disciplinary
14 determination;
- 15 3. **FINDING** that Petitioner is not entitled to relief under 28 U.S.C. § 2241; and
- 16 4. **DENYING** Petitioner's Petition Under 28 U.S.C. § 2241 for a Writ of Habeas
17 Corpus by a Person in Federal Custody. (Doc. 1.)

18 Pursuant to 28 U.S.C. § 636(b) and the Federal Rules of Civil Procedure 72(b)(2),
19 any party may serve and file written objections within fourteen (14) days after being
20 served with a copy of this Report and Recommendation. A party may respond to another
21 party's objections within fourteen (14) days after being served with a copy of the
22 objection. Filed objections should use the following case number:

23 **No. CV-17-00333-TUC-JAS**

24 Failure to timely object to the factual and legal determination of the Magistrate
25 judge may waive Petitioner's right to *de novo* review. The Clerk of Court shall send a
26 copy of this Report and Recommendation to all parties.

27 Dated this 28th day of December, 2018.

28 

Bernardo P. Velasco
United States Magistrate Judge