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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Lukner Rene,

10 Petitioner,

11 v.

12 M. Gutierrez,

13 Respondent.  
14

No. CV-23-00214-TUC-SHR (BGM)

**REPORT AND RECOMMENDATION**

15 On May 5, 2023, Petitioner Lukner Rene, who is currently incarcerated with the  
16 Federal Bureau of Prisons (“BOP”) and was housed at the United States Penitentiary in  
17 Tucson, Arizona (“USP-Tucson”), filed a Petition Under 28 U.S.C. § 2241 for a Writ of  
18 Habeas Corpus by a Person in Federal Custody. (Doc. 1.) Petitioner raises one ground for  
19 relief in his petition, alleging that he suffered due process violations when USP-Tucson  
20 officials failed to notify him of three separate disciplinary reports used to revoke fifty-four  
21 days of his good-conduct credit. (*Id.* at 4-5.) Petitioner alleges that the only contact that  
22 he had with officers during the timeframe in which it is alleged that he received notice was  
23 on two separate occasions when officers threatened him with sexual assault and battery if  
24 he refused to sign waivers related to hearings on the incidents. (*Id.*) Under LRCiv 3.7(e),  
25 72.1(c), and 72.2(a)(2), this matter was referred to Magistrate Judge Bruce G. Macdonald  
26 for a Report and Recommendation. (Doc. 4.) After reviewing the briefs, exhibits, and  
27 record in this case, Magistrate Judge Macdonald recommends that the petition be denied.  
28

1 **BACKGROUND<sup>1</sup>**

2 This action arises from disciplinary incidents in the special housing unit (“SHU”)  
3 of USP-Tucson in the early days of April 2023. (Doc. 1-2 at 2, 7, 12.) On April 7, 2023,  
4 at approximately 5:30 p.m., Petitioner told a corrections officer that “[I]f I don’t get the  
5 phone today[,] I’m willing to murder a staff member,” and that the officer should “go grab  
6 the motherf\*cking team already.” (Doc. 13-1 at 21.) As a result, Petitioner was issued an  
7 incident report for threatening bodily harm,<sup>2</sup> a copy of which was allegedly given to him at  
8 6:40 p.m. that night. (*Id.* ¶¶ 14-16.) The officer who delivered the copy and advised  
9 Petitioner of his rights stated that Petitioner yelled, “F\*ck you[,] bitch, suck my d\*ck. How  
10 about that[?] [W]rite that down[,] b\*tch.” (Doc. 13-1 at 23.) Petitioner allegedly ripped  
11 up the report and threw it back under the door. (*Id.* ¶ 24.) The next day, the Unit Discipline  
12 Committee (“UDC”) reviewed the report and referred the incident to the Disciplinary  
13 Hearing Officer (“DHO”) for a hearing. (*Id.* at 22.) Petitioner was present at the review  
14 and informed the UDC chairman that he “just [wanted to] waive the DHO.” (*Id.* ¶ 17.)

15 An hour and a half after Petitioner was issued the aforementioned report for  
16 threatening staff, he was cited for destroying property and becoming disruptive by  
17 tampering with the sprinkler system and destroying a mattress in an attempt to use the  
18 mattress as a weapon against staff.<sup>3</sup> (Doc. 13-1 at 43.) Two days later, a corrections officer  
19 allegedly delivered a copy of the incident report to Petitioner. (*Id.* ¶¶ 14-16.) A day after  
20 he allegedly received a copy of the report, Petitioner informed the UDC committee that  
21 “it’s all fabricated,” and the committee referred the charges to the DHO. (*Id.* at 44.)

22 In the early morning hours of April 8, 2023, apparently while in restraints, Petitioner  
23 again threatened a corrections officer, telling him:

24 All of y’all going in my lawsuit. Better yet, do your homework. See how I’m  
25 the guy who closed (USP) Thompson. I already got seven bodies[,] and I  
26 ain’t done yet. Y’all fixing to be eight, nine, and ten. Just wait till these chains  
27 come off[.] I’m gonna f\*ck all of y’all up.

28 <sup>1</sup> The information in this section is stated in the light most favorable to Petitioner.

<sup>2</sup> Incident Report Number: 3756325.

<sup>3</sup> Incident Report Number: 3756362.

1 (Doc. 13-1 at 32.) Petitioner was issued a disciplinary report for the comments,<sup>4</sup> a copy of  
2 which was allegedly delivered the following morning. (*Id.* ¶¶ 16-16.) At the UDC meeting  
3 on April 10, 2023, Petitioner once again informed the committee that “it’s all fabricated,”  
4 and the committee referred the matter to the DHO for a hearing. (Doc. 13-1, ¶ 17 at 33.)

5 On May 5, 2023, Petitioner filed his § 2241 Petition alleging procedural due process  
6 violations because corrections officers failed to provide him with copies of the  
7 aforementioned incident reports. (Doc. 1 at 4-5.) Petitioner requests that the Court vacate  
8 the reports, remove them from his prison record, and restore the loss of good conduct  
9 credits that resulted from the discipline. (*Id.* at 11.) On June 16, 2023, Warden Gutierrez  
10 answered Petitioner’s claims (Doc. 13); and Petitioner failed to file an optional reply. This  
11 Report and Recommendation follows.

#### 12 **LEGAL STANDARD**

13 Under 28 U.S.C. § 2241, a district court may grant habeas relief when a petitioner  
14 is in custody in “violation of the Constitution or laws or treaties of the United States.”  
15 Generally, motions to contest the legality of a sentence are filed under § 2255 in the  
16 sentencing court, while petitions that challenge the manner, location, or conditions of a  
17 sentence’s execution are brought under § 2241 in the custodial court. *Hernandez v.*  
18 *Campbell*, 204 F.3d 861, 864 (9th Cir. 2000). An inmate may obtain relief under § 2241  
19 for the loss of good conduct time credits if the prison disciplinary proceeding did not  
20 comply with due process. *Bostic v. Carlson*, 884 F.2d 1267, 1269 (9th Cir. 1989),  
21 *overruled on other grounds by Nettles v. Grounds*, 830 F.3d 922 (9th Cir. 2016). This is  
22 because the loss of good time credit may affect the duration of the prisoner’s confinement.  
23 *See Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973) (ruling that inmates’ suit seeking  
24 restoration of good time credits was “within the core of habeas corpus in attacking the very  
25 duration of their physical confinement”). A petitioner bears the burden of proving that he  
26 is being held contrary to federal law, and he must satisfy his burden by a preponderance of  
27 the evidence. *Skaftouros v. United States*, 667 F.3d 144, 158 (2d Cir. 2011).

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<sup>4</sup> Incident Report Number: 3756376.



1 unwilling to provide any relief to aggrieved inmates; (ii) an administrative scheme is so  
2 opaque that it becomes incapable of use; and (iii) prison administrators thwart inmates from  
3 taking advantage of a grievance process through machination, misrepresentation, or  
4 intimidation, *Ross v. Blake*, 578 U.S. 632, 643-44 (2016). This list is non-exhaustive and  
5 there are other limited circumstances that render administrative remedies unavailable.  
6 *Andres v. Marshall*, 867 F.3d 1076, 1078-79 (9th Cir. 2017). Because failure to exhaust is  
7 an affirmative defense, it is the defendant’s burden to show that there was an available  
8 administrative remedy that a petitioner did not exhaust. *Albino*, 747 F.3d at 1172.

9 **A. Administrative Remedy Program**

10 The administrative remedy program for prisoners at BOP facilities is promulgated  
11 under 28 C.F.R. § 542.10 *et seq.* (Doc. 13-2, ¶ 5.) The purpose of the program is to allow  
12 an inmate to seek formal review of an issue relating to any aspect of his confinement. *Id.*  
13 § 542.10(a). The Bureau has a four-step process for inmate grievances. (Doc. 13-2, ¶ 6.)  
14 The first step is informal resolution with prison staff. (*Id.*) The second step is the filing of  
15 a formal administrative remedy request. (*Id.*) The request must be filed within twenty  
16 calendar days following the date on which the basis of the request occurs. (*Id.*) The third  
17 step is an appeal of the warden’s response to the regional director. (*Id.*) The appeal must  
18 be filed within twenty calendar days of the date the warden signed the response. (*Id.*) The  
19 fourth step is an appeal to the director. (*Id.*) Under the program, an inmate has not  
20 exhausted his administrative remedies until he has properly sought review at all three  
21 *formal* levels. (*Id.* (emphasis added).)

22 **1. Respondent Fails To Demonstrate Available Remedies**

23 As it concerns administrative exhaustion, Petitioner states that his counselor, Ms.  
24 Mack, is the only one that can issue him the necessary appeal forms for the incidents in  
25 question and that when he asked her for the forms, she advised him to “file it in [c]ourt,”  
26 and that he could not have them. (Doc. 1 at 3.) Respondent argues that Petitioner fails to  
27 demonstrate exhaustion because the record demonstrates that he failed to even begin the  
28 process and that Petitioner fails to substantiate his claim that he was denied administrative

1 remedy forms with any facts that indicate administrative remedies were unavailable to him.  
2 (Doc. 13 at 8.) Respondent adds that any member of the Unit Team can provide Petitioner  
3 with administrative remedy forms at the facility. (*Id.* at 8-9.)

4 Construing the pleadings in the light most favorable to Petitioner,<sup>5</sup> the Court finds  
5 that administrative remedies were unavailable to him and denies Respondent’s motion to  
6 dismiss on the issue. While the Court recognizes that a key consideration of prudential  
7 exhaustion is whether “relaxation of the requirement would encourage the deliberate  
8 bypass of the administrative scheme,” *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir.  
9 2004), it is Respondent’s burden to demonstrate that administrative remedies are *available*,  
10 not Petitioner’s burden to demonstrate that they are unavailable, *see Albino*, 747 F.3d at  
11 1172. Respondent’s reference to Case Manager Mack’s declaration fails to demonstrate  
12 the availability of administrative remedies. (*See* Doc. 13 at 8.) Respondent declares that  
13 “any member [of the] Unit Team can provide [Petitioner] with administrative remedy  
14 forms,” (*id.*), and Mack declares that “[t]he Unit Team is comprised of the Unit Manager,  
15 Case Manager, Correctional Counselor, and Unit Secretary,” (Doc. 13-2, ¶ 12). However,  
16 the evidence in the record demonstrates that Mack *is* a case manager and that he denied  
17 Petitioner’s request for administrative remedy forms. (*Id.* ¶ 4.) In Mack’s own words, he  
18 states that he remembers that Petitioner asked him for administrative remedy forms but that  
19 he instructed Petitioner to ask his correctional counselor for the forms when the counselor  
20 was scheduled to make rounds the following day. (*Id.*)

21 The record also demonstrates that Petitioner was housed in the highly restricted  
22 SHU at the time of his request—and was sometimes placed in restraints—which causes the  
23 Court to draw the reasonable inference that Petitioner’s movements were limited and  
24 administrative remedy forms were not as readily accessible as they would have been in the  
25 general population. (*See* Doc. 13-2, ¶ 4 (“Petitioner asked me for administrative remedy  
26 forms when I conducted my rounds in the Special Housing Unit (SHU).”) Because

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27 <sup>5</sup>In ruling on a motion to dismiss a petition, the court “accept[s the] factual allegations in  
28 the [petition] as true and construe[s] the pleadings in the light most favorable to the non-  
moving party.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (cleaned up).

1 evidence in the record demonstrates that administrative remedy forms were unavailable to  
2 Petitioner for the incidents in question, the Court waives the prudential exhaustion  
3 requirement and recommends that Respondent's motion to dismiss on the issue of  
4 exhaustion be denied. *See Albino*, 747 F.3d at 1174-76 (reversing district court on issue of  
5 exhaustion and ruling that defendants failed to prove administrative remedies were  
6 available when defendants' declarations on the availability of inmate complaint forms were  
7 contradicted by the petitioner's assertions).

## 8 **II. Procedural Due Process Protections**

9 While the Court recommends that Petitioner's exhaustion requirement be waived, it  
10 concludes that Petitioner fails to demonstrate that he is entitled to habeas relief. The  
11 Supreme Court has ruled that a prisoner has a liberty interest in the loss of good conduct  
12 credit and that an inmate facing a loss of such credit as a result of disciplinary violations is  
13 entitled to certain procedural due process protections. *See Wolff v. McDonnell*, 418 U.S.  
14 539, 563-68 (1974). In *Wolff v. McDonnell*, the court held that an inmate facing the loss  
15 of good conduct credit is entitled to advance written notice of the claimed violation and a  
16 written statement as to the evidence relied upon and the reasons for the disciplinary action  
17 taken. 418 U.S. at 563. The inmate is also to be permitted to call witnesses and present  
18 documentary evidence when permitting him to do so would not be unduly hazardous to  
19 institutional safety or correctional goals. *Id.* at 566.

20 Petitioner claims that prison officials violated his procedural due process rights  
21 because he failed to receive *any* notice of incident reports #3756325, 3756362, and  
22 3756376,<sup>6</sup> and that corrections officers threatened him with sexual assault and bodily harm  
23 if he refused to waive his right to attend the disciplinary hearings related to these reports.

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24  
25 <sup>6</sup> Petitioner asserts that he failed to receive notice of any of the relevant incident reports.  
26 (See Doc. 1 at 5.) He asserts:

27 [I] never received notice in Report No. 3756325[,] [and it] was not delivered  
28 to [me] as stated ... by Lt. Alcantar ... [N]otice was not provided at all and  
the camera will show this. . . . Petitioner avows no service ever given to him  
and the SHU B-Range camera will show this fact.

1 (Doc. 1 at 5-6.) Respondent argues that Petitioner’s claims should be dismissed because  
2 the record of the disciplinary proceedings “establish that Petitioner was afforded each of  
3 [his] applicable *Wolff* rights,” and that Petitioner “offers no allegations that he was denied  
4 any of the five *Wolff* requirements for inmate disciplinary proceedings.” (Doc. 13 at 10.)  
5 Respondent adds that Petitioner “appear[s] to allege that he was not presented with proper  
6 notice of the charges against him within 24 hours from when Incident Report Nos. 3756325  
7 and 3756376 were written, an alleged violation of Bureau policy.” (*Id.*) Lastly,  
8 Respondent argues that the Court lacks jurisdiction over report #3756362 because  
9 “[Petitioner] was not subject to sanctions that could impact a protected liberty interest.”  
10 (*Id.* at 12.) Agreeing that the basis for Petitioner’s claims is flawed, the Court addresses  
11 whether Petitioner has due process protections over a temporary loss of email privileges  
12 and whether he has demonstrated the necessary prejudice to sustain his remaining claims.

13 **A. Incognizable Interest In Loss of Email Privileges**

14 Respondent argues that the Court lacks jurisdiction over Petitioner’s habeas petition  
15 as it relates to incident report #3756362 because the penalty for that incident, a 60-day loss  
16 of email privileges, fails to impact a protected liberty interest. (Doc. 13 at 12-14.) The  
17 Court agrees. “[T]he essence of habeas corpus is an attack by a person in custody upon the  
18 legality of that custody.” *Preiser*, 411 U.S. at 484. Habeas corpus relief is appropriate  
19 where it will result in *immediate release* or *shorten the duration* of the petitioner’s  
20 confinement. *Id.* at 487 (emphasis added). A habeas petition that fails to attack the legality  
21 of imprisonment is subject to dismissal. *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir.  
22 1979). The United States Circuit Court of Appeals for the Ninth Circuit has instructed that  
23 challenges concerning general conditions of confinement, *e.g.*, the loss of email privileges,  
24 are not cognizable under 28 U.S.C. § 2241. *See Wright v. Shartle*, 699 F. App’x 733 (9th  
25 Cir. 2017) (citing *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000)) (ruling that  
26 the loss of phone, visitation, and email privileges are not cognizable under § 2241 because  
27 “they do not concern the manner, location, or conditions of [a] sentence’s execution.”). A  
28 review of Petitioner’s exhibits demonstrates that punishment for incident #3756362 was a



1 60-day loss of email privileges. (Doc. 1-2, ¶ 6 at 10.) This loss of privileges is incognizable  
2 because relief would not result in Petitioner’s immediate release or shorten the duration of  
3 his confinement. *See e.g., Cobb v. Howard*, No. CV 20-00515-TUC-LCK, 2021 WL  
4 5850885, at \*2 (D. Ariz. Dec. 9, 2021), *aff’d*, No. 22-15073, 2022 WL 17176483 (9th Cir.  
5 Nov. 23, 2022) (ruling that the court lacked jurisdiction over petitioner’s claim because a  
6 successful challenge to a 6-month loss of telephone privileges would not shorten his  
7 sentence); *Strouse v. Shartle*, No. CV-16-00237-TUC-RCC (EJM), 2017 WL 2224926, at  
8 \*3 (D. Ariz. May 22, 2017), *report and recommendation adopted*, No. CV-16-00237-TUC-  
9 RCC, 2017 WL 2731059 (D. Ariz. June 26, 2017) (ruling that a 30-day loss of commissary  
10 privileges did not affect the duration of the petitioner’s custody and that the court lacked  
11 jurisdiction over that claim). Accordingly, the Court recommends that this claim be denied.

12 **B. Failure to Demonstrate Prejudice**

13 In addition to determining that Petitioner fails to state a habeas claim for the loss of  
14 email privileges, the Court concludes that even taking Petitioner’s allegations that he failed  
15 to receive notice of the remaining incident reports as true, Petitioner fails to demonstrate  
16 that the lack of notice caused him prejudice. It is uncontested that federal prisoners have a  
17 due process interest in disciplinary proceedings that may take away good conduct credits.  
18 *See* 18 U.S.C. § 3624(b); *Wolff*, 418 U.S. at 556-57. However, “[e]ven if a prison official’s  
19 actions create a potential due process violation, a habeas petitioner needs to demonstrate  
20 that he was harmed by the violation in order to obtain relief.” *Jordan v. Zych*, No. 7:10-  
21 CV-00491, 2011 WL 2447937, at \*4 (W.D. Va. June 15, 2011) (citing *Brown v. Braxton*,  
22 373 F.3d 501, 508 (4th Cir. 2004)); *see also Lee v. Kramer*, No. 1:07-CV-0432 AWI JMD  
23 HC, 2008 WL 4507584, at \*4 (E.D. Cal. Oct. 7, 2008), *report and recommendation*  
24 *adopted*, No. 107CV0432 AWI JMDHC, 2008 WL 5246383 (E.D. Cal. Dec. 16, 2008)  
25 (ruling that the petitioner’s claim failed because he had not shown prejudice resulting from  
26 the failure to call his potential witnesses, or the failure to consider his witness list); *Powell*  
27 *v. Coughlin*, 953 F.2d 744, 750 (2d Cir. 1991) (ruling that it is “inappropriate to overturn  
28 the outcome of a prison disciplinary proceeding because of a procedural error without

1 making the appellate assessment as to whether the error was harmless or prejudicial”).

2 Here, Petitioner fails to demonstrate prejudice as a result of his alleged failure to  
3 receive copies of his incident reports. The evidence in the record belies Petitioner’s  
4 contentions that he failed to receive copies of the reports. All three reports indicate when  
5 copies of the reports were delivered to Petitioner and by whom, (Doc. 13-1 at 21, 32, and  
6 43), what Petitioner said during the UDC meetings on those reports, (*id.* at 22, 33, and 44),  
7 and even that a charged violation was reduced after the DHO reviewed the report and the  
8 UDC’s recommendation, (*id.* at 41). Accordingly, the Court recommends that Petitioner’s  
9 remaining claims for habeas corpus relief be denied, and that Petitioner’s § 2241 Petition,  
10 in its entirety, be dismissed with prejudice.

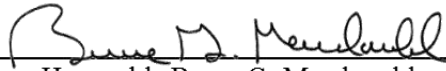
11 **RECOMMENDATION**

12 For the foregoing reasons, the Magistrate Judge RECOMMENDS that the District  
13 Court enter an Order DENYING the Petition Under 28 U.S.C. § 2241 for a Writ of Habeas  
14 Corpus by a Person in Federal Custody (Doc. 1).

15 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b)(2), any  
16 party may serve and file written objections within fourteen (14) days of being served with  
17 a copy of this Report and Recommendation. A party may respond to another party’s  
18 objections within (14) days after being served with a copy. Fed. R. Civ. P. 72(b)(2). No  
19 replies shall be filed unless leave is granted by the District Court. If objections are filed,  
20 the parties should use the following case number: **CV-23-214-TUC-SHR**.

21 Failure to file timely objections to any factual or legal determination of the  
22 Magistrate Judge may result in waiver of the right of review. The Clerk of Court shall send  
23 a copy of this Report and Recommendation to all parties.

24 Dated this 17th day of October, 2023.

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26   
27 Honorable Bruce G. Macdonald  
28 United States Magistrate Judge