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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ABRAHAM HEREDIA-OLIVA,) 1:09-cv-1646-SKO-HC
)
Petitioner,) ORDER DIRECTING THE CLERK TO
) SUBSTITUTE NEIL ADLER, WARDEN, AS
) RESPONDENT PURSUANT TO
v.) FED. R. CIV. P. 25(d)
)
NEIL ADLER, Warden,) ORDER DENYING PETITION FOR WRIT
) OF HABEAS CORPUS (DOC. 1)
Respondent.)
) ORDER DIRECTING THE CLERK TO
) ENTER JUDGMENT IN FAVOR OF
) RESPONDENT

Petitioner is a federal prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to the parties' consent,¹ the matter has been referred to the Magistrate Judge for all proceedings, including the entry of final judgment, pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73(b), and Local Rule 301.

Pending before the Court is the petition, which was filed on July 21, 2009, in the District of Arizona, and transferred to this Court on September 18, 2009. Respondent filed an answer

¹ Petitioner filed a signed, written consent form on September 28, 2009; Respondent John Sugrue filed a written consent form signed by an authorized representative on December 15, 2009 and March 4, 2010.

1 entitled as a response, on March 9, 2010. Petitioner filed a
2 traverse, entitled "BRIEF ON REPLY TO RESPONDENT'S RESPONSE," on
3 March 29, 2010.

4 I. Background

5 When the petition was initially filed, Petitioner was
6 incarcerated at the Correctional Institution in California City,
7 California (CICC). (Pet. 1.) In 2010, Petitioner was
8 transferred to the Correctional Institution in Taft, California
9 (TCI), where he is presently incarcerated. (Not., doc. 15.)

10 Petitioner is serving a sentence of fifty-one (51) months
11 for having illegally reentered the United States after
12 deportation in violation of 8 U.S.C. § 1326(a). (Resp. Att. 1,
13 2.) Petitioner was sentenced to thirty-six (36) months of
14 supervised release after serving his term. (Id.) The judgment
15 was pronounced on May 30, 2008. (Id. at 4.)

16 Petitioner's sole contention is that the Bureau of Prisons
17 (BOP) erroneously calculated his good conduct time (GCT) pursuant
18 to 18 U.S.C. § 3624(b). Petitioner argues that the statute
19 requires the BOP to award fifty-four (54) days of GCT for each
20 year of imprisonment to which Petitioner was sentenced instead of
21 for each year actually served by Petitioner. Petitioner contends
22 that if the statute were applied as he urges, then Petitioner's
23 release date would change from November 15, 2010, to October 15,
24 2010. (Pet. 6.)

25 II. Subject Matter Jurisdiction

26 Respondent correctly concedes that this action, which
27 concerns alleged violations of federal law making conditions,
28 place, or duration of confinement illegal, was properly brought

1 pursuant to 28 U.S.C. § 2241. (Resp. 3.) Relief by way of a
2 writ of habeas corpus extends to a prisoner in custody under the
3 authority of the United States who shows that the custody
4 violates the Constitution, laws, or treaties of the United
5 States. 28 U.S.C. § 2241(c)(3). Although a federal prisoner who
6 challenges the validity or constitutionality of his conviction
7 must file a petition for writ of habeas corpus pursuant to 28
8 U.S.C. § 2255, a federal prisoner challenging the manner,
9 location, or conditions of the execution of a sentence must bring
10 a petition for writ of habeas corpus under 28 U.S.C. § 2241.
11 Hernandez v. Campbell, 204 F.3d 861, 864-65 (9th Cir. 2000). A
12 district court has subject matter jurisdiction pursuant to § 2241
13 over a claim concerning the BOP's failure to consider whether a
14 prisoner was entitled to time credit because such a challenge is
15 to the manner in which the sentence is being executed. Tucker v.
16 Carlson, 925 F.2d 330, 331 (9th Cir. 1991).

17 III. Jurisdiction over Respondent and Substitution of
18 Neil Adler, Warden, as Respondent

19 Title 28 U.S.C. § 2241(a) provides that writs of habeas
20 corpus may be granted by the district courts "within their
21 respective jurisdictions." A writ of habeas corpus operates not
22 upon the prisoner, but upon the prisoner's custodian. Braden v.
23 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 494-495
24 (1973). A petitioner filing a petition for writ of habeas corpus
25 under 28 U.S.C. § 2241 must file the petition in the judicial
26 district of the petitioner's custodian. Brown v. United States,
27 610 F.2d 672, 677 (9th Cir. 1990). The warden of the
28 penitentiary where a prisoner is confined constitutes the

1 custodian who must be named in the petition, and the petition
2 must be filed in the district of confinement. Id.; Rumsfeld v.
3 Padilla, 542 U.S. 426, 446-47 (2004). It is sufficient if the
4 custodian is within the territorial jurisdiction of the Court at
5 the time the petition is filed; transfer of the petitioner
6 thereafter does not defeat personal jurisdiction that has once
7 been properly established. Ahrens v. Clark, 335 U.S. 188, 193
8 (1948), overruled on other grounds in Braden v. 30th Judicial
9 Circuit Court of Kentucky, 410 U.S. at 193, citing Ex parte
10 Mitsuye Endo, 323 U.S. 283, 305 (1944); Francis v. Rison, 894
11 F.2d 353, 354 (9th Cir. 1990). A failure to name and serve the
12 custodian deprives the Court of personal jurisdiction. Johnson
13 v. Reilly, 349 F.3d 1149, 1153 (9th Cir. 2003).

14 Here, Petitioner was incarcerated within the district at the
15 time the petition was filed, and he is presently incarcerated in
16 the district.

17 The petition names John Sugrue, Warden of CICC, as
18 Respondent. Respondent notes that since Petitioner's transfer to
19 TCI, Petitioner's immediate custodian has been Neil Adler.
20 (Resp. 2.) Respondent then waives any objection "on this basis,"
21 (Resp. 2), which the Court finds is reasonably interpreted as a
22 waiver of any objection to jurisdiction over the person.

23 Although 28 U.S.C. § 2242 requires that the petition name
24 the person who has custody over the petitioner and the authority
25 or claim by virtue of which custody is maintained, it is
26 established that this requirement is akin to personal
27 jurisdiction and is subject to the general rule that objections
28 to personal jurisdiction may be waived. Mujahid v. Daniels, 413

1 F.3d 991, 993-94, 994 n. 2 (9th Cir. 2005) (citing Rumsfeld v.
2 Padilla, 542 U.S. 426, 433-34, 434 n. 7, 452-53 (2004) and Smith
3 v. Idaho, 392 F.3d 350, 354-56 (9th Cir. 2004)) (petition brought
4 pursuant to § 2241)).

5 The Court concludes that Petitioner's immediate custodian,
6 Warden Neil Adler, is an appropriate respondent in this action,
7 and that pursuant to Fed. R. Civ. P. 25(d), he should be
8 substituted in place of John Sugrue, Warden.

9 Respondent further waives any defect if personal service on
10 the custodian of the Petitioner has not been effected.

11 The Court notes Respondent's waivers and concludes that the
12 Court has jurisdiction over the person of Petitioner's custodian
13 and is acting within its jurisdiction within the meaning of 28
14 U.S.C. § 2241(a).

15 IV. Exhaustion of Administrative Remedies

16 As a "prudential matter," federal prisoners are generally
17 required to exhaust available administrative remedies before
18 bringing a habeas petition pursuant to 28 U.S.C. § 2241. Huang
19 v. Ashcroft, 390 F.3d 1118, 1123 (9th Cir. 2004) (quoting Castro-
20 Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001)); Martinez v.
21 Roberts, 804 F.2d 570, 571 (9th Cir. 1986). Respondent concedes
22 that Petitioner has exhausted his administrative remedies.
23 (Resp. 3.)

24 V. Calculation of Good Credit Time pursuant to
25 18 U.S.C. § 3624(b)

26 Title 18 U.S.C. § 3624(b) provides in pertinent part:

27 (b) Credit toward service of sentence for satisfactory
28 behavior.--

(1) Subject to paragraph (2), a prisoner who is serving

1 a term of imprisonment of more than 1 year other than a
2 term of imprisonment for the duration of the prisoner's
3 life, may receive credit toward the service of the
4 prisoner's sentence, beyond the time served, of up to
5 54 days at the end of each year of the prisoner's term
6 of imprisonment, beginning at the end of the first year
7 of the term, subject to determination by the Bureau of
8 Prisons that, during that year, the prisoner has
9 displayed exemplary compliance with institutional
10 disciplinary regulations. Subject to paragraph (2), if
11 the Bureau determines that, during that year, the
12 prisoner has not satisfactorily complied with such
13 institutional regulations, the prisoner shall receive
14 no such credit toward service of the prisoner's
15 sentence or shall receive such lesser credit as the
16 Bureau determines to be appropriate. In awarding credit
17 under this section, the Bureau shall consider whether
18 the prisoner, during the relevant period, has earned,
19 or is making satisfactory progress toward earning, a
20 high school diploma or an equivalent degree. Credit
21 that has not been earned may not later be granted.
22 Subject to paragraph (2), credit for the last year or
23 portion of a year of the term of imprisonment shall be
24 prorated and credited within the last six weeks of the
25 sentence.

14 (2) Notwithstanding any other law, credit awarded under
15 this subsection after the date of enactment of the
16 Prison Litigation Reform Act shall vest on the date the
17 prisoner is released from custody.

18 U.S.C. § 3624(b).

18 Petitioner argues that the phrase "term of imprisonment"
19 consistently refers to the sentence imposed, rather than to the
20 time actually served. Further, he contends that the statute
21 requires the credit to be applied during the last part of the
22 year, and not after the year is over. (Pet. 4, 7.) Petitioner
23 thus argues that he is presently entitled to credit calculated by
24 multiplying fifty-four (54) days by the number of years of
25 imprisonment to which Petitioner was sentenced. Petitioner
26 argues that his interpretation is required by the plain meaning
27 of the words in the statute, linguistics, legislative history and
28 Congressional intent, the need to construe consistently a term

1 that appears repeatedly in a statute, and the rule of lenity
2 requiring construction of a penal statute in favor of the
3 defendant. (Pet. 7-11.)

4 The BOP argues that a prisoner is entitled to a maximum
5 annual credit of fifty-four (54) days of GCT for each full year
6 of imprisonment that the prisoner serves, and a proportionally
7 adjusted amount of credit for any additional time served that is
8 less than a full year. The BOP awards the credit at the end of
9 each year of imprisonment except during the last year of the
10 sentence in which, pursuant to the statute's directions
11 concerning proration and credit, the calculation occurs during
12 the last six weeks of the sentence.

13 In Barber v. Thomas, - S.Ct., No. 09-5201, 2010 WL 2243706,
14 *2 (U.S. June 7, 2010), the Court held that the BOP's method of
15 calculating GCT was consistent with the most natural reading of
16 the statute, and the Court rejected the very arguments that
17 Petitioner has raised in this proceeding. The Court noted the
18 express language in § 3624(b) concerning receipt of credit "at
19 the end of each year" and the inconsistency of a contrary
20 position with the express terms of the statute. Id. *5. The
21 Court reviewed the legislative history and concluded that
22 Congress had intended to change the previous system, in which a
23 prisoner was entitled to a deduction for credit on the day on
24 which the sentence commenced to run, subject to forfeiture for
25 misbehavior. The Court noted that in contrast, the present
26 statute provides for the earning of credit at the end of the year
27 based on the prisoner's behavior. Id. *5. The Court reasoned
28 that the BOP's method tied an award of GCT directly to good

1 behavior and better furthered the statute's basic purpose, which
2 was to achieve uniform, essentially determinate terms absent a
3 reduction for good conduct. Id. *5-*6. The Court found
4 inapposite the rule of lenity that requires that criminal
5 statutes be construed in favor of the defendant. Id. *9. The
6 Court concluded that even if § 3624(b) could be construed as
7 imposing a criminal penalty, the rule of lenity did not apply
8 because after considering the text, structure, history, and
9 purpose of the statute, the Court discerned no grievous ambiguity
10 or uncertainty in the statute. Id. at *9. When urged by the
11 petitioners not to defer to the BOP's interpretation and
12 implementation of § 3624(b), the Court stated:

13 In our view, the BOP's calculation system applies
14 that statute as its language is most naturally read,
15 and in accordance with what that language makes clear
16 is its basic purpose. No one doubts that the BOP
17 has the legal power to implement the statute in
18 accordance with its language and purposes; hence
19 we need not determine the extent to which Congress
20 has granted the BOP authority to interpret the statute
21 more broadly, or differently than it has one here.
22 Cf. Chevron, supra, at 944-845.

23 Barber v. Thomas, 2010 WL 2243706, *9-*11.

24 The controversy in the present case is governed by Barber v.
25 Thomas. The BOP's interpretation and application of the statute
26 are consistent with the most natural reading of the language of
27 the statute when viewed in the context of the basic, statutory
28 purpose. The BOP's method of calculating Petitioner's GCT
pursuant to 18 U.S.C. § 3624(b) with reference to years actually
served by Petitioner, as distinct from years to which Petitioner
was sentenced, was not erroneous or unfair. Petitioner has not
shown that he has failed to receive GCT to which he is entitled.

1 VI. Disposition

2 In summary, the Court concludes that Petitioner's petition
3 for writ of habeas corpus should be denied.

4 Accordingly, it is ORDERED that:

5 1) The Clerk of the Court SUBSTITUTE Neil Adler, Warden, as
6 Respondent in this action;

7 2) The petition for writ of habeas corpus is DENIED with
8 prejudice; and

9 3) The Clerk is DIRECTED to enter judgment for Respondent.

10
11 IT IS SO ORDERED.

12 Dated: June 20, 2010

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE