

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES L. GARY,	1:09-cv-02161-DLB (HC)	
Petitioner,		ORDER DENYING PETITION FOR WRIT OF
v.		HABEAS CORPUS, DIRECTING CLERK OF
		COURT TO ENTER JUDGMENT IN FAVOR
		OF RESPONDENT, AND CERTIFICATE OF
FEDERAL BUREAU OF PRISONS,		APPEALABILITY IS NOT NECESSARY
Respondent.	[Doc. 1]	

Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge. (Court Docs. 4, 6.)

BACKGROUND

Petitioner is a federal prisoner serving a 141 month aggregate sentence. Petitioner’s sentence is comprised of several smaller sentences, including a 12 month sentence imposed on November 19, 2002, by the Western District of Missouri, for violation of supervised release (the original sentence, for Escape from Federal Custody, in violation of 18 U.S.C. § 751(a), was imposed on February 22, 1999); a 105 months sentence, also imposed on November 19, 2002, by the Western District of Missouri, for Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) (date of offense November 15, 2001); and a 24 month sentence imposed by the Eastern District of Kentucky on August 22, 2005, for Possession of Methamphetamine by a Federal Inmate, in violation of 18 U.S.C. § 1791(a)(2) (date of offense January 24, 2004). See

1 Answer, Attachment 1, Judgment & Commitment Orders; see also, Attachment 2, Public
2 Information Inmate Data. At the time of the challenged incident report, Petitioner was housed at
3 the United States Penitentiary in Lee County (USP Lee), Virginia. Petitioner is currently housed
4 at the United States Penitentiary in Atwater (USP Atwater), California. Petitioner’s projected
5 release date is November 14, 2010-via good conduct time release.

6 In the instant petition, Petitioner challenges the sanctions he received for three different
7 prison rule violations. He claims he was denied due process and the hearing officer was not
8 authorized to forfeit Non-Vested Good Conduct Time as a sanction.

9 DISCUSSION

10 I. Subject Matter Jurisdiction and Venue

11 Writ of habeas corpus relief extends to a person in custody under the authority of the
12 United States. See 28 U.S.C. § 2241. Writ of habeas corpus relief is available if a federal
13 prisoner can show he is “in custody in violation of the Constitution or laws or treaties of the
14 United States.” 28 U.S.C. § 2241(c)(3). Whether the Court has subject matter to hear
15 Petitioner’s claims pursuant to 28 U.S.C. § 2241 will be discussed below. In addition, pursuant to
16 § 2241, venue is proper in this case because Petitioner was confined at the United States
17 Penitentiary in Atwater, California, at the time he filed the instant petition. Hernandez v.
18 Campbell, 204 F.3d 861, 864 (9th Cir.2000).

19 II. Exhaustion of Administrative Remedies

20 Before filing a petition for writ of habeas corpus, a federal prisoner challenging any
21 circumstance of imprisonment must first exhaust all administrative remedies. Martinez v.
22 Roberts, 804 F.2d 570, 571 (9th Cir. 1986); Chua Han Mow v. United States, 730 F.2d 1308,
23 1313 (9th Cir. 1984); Ruviwat v. Smith, 701 F.2d 844, 845 (9th Cir. 1983). The requirement that
24 federal prisoners exhaust administrative remedies before filing a habeas corpus petition was
25 judicially created; it is not a statutory requirement. Brown v. Rison, 895 F.2d 533, 535 (9th Cir.
26 1990). Thus, “because exhaustion is not required by statute, it is not jurisdictional.” Id. If
27 Petitioner has not properly exhausted his claims, the district court, in its discretion, may either
28 “excuse the faulty

1 exhaustion and reach the merits or require the petitioner to exhaust his administrative remedies
2 before proceeding in court.”

3 If the petitioner did not properly exhaust his administrative remedies, and such remedies
4 are no longer available, he may have procedurally defaulted on his claims. See Francis v. Rison,
5 894 F.2d 353, 354-55 (9th Cir.1990) (applying procedural default rules to administrative
6 appeals); see generally Murray v. Carrier, 477 U.S. 478, 485 (1986); Wainwright v. Sykes, 433
7 U.S. 72, 86-87 (1977); Tacho v. Martinez, 862 F.2d 1376, 1378 (9th Cir.1988). If a claim is
8 procedurally defaulted, the court may require the petitioner to demonstrate cause for the
9 procedural default and actual prejudice from the alleged constitutional violation. See Francis,
10 894 F.2d at 355 (suggesting that the cause and prejudice test is the appropriate test); Murray, 477
11 U.S. at 492 (cause and prejudice test applied to procedural defaults on appeal); Hughes v. Idaho
12 State Bd. of Corr., 800 F.2d 905, 906-08 (9th Cir.1986) (cause and prejudice test applied to pro
13 se litigants).

14 The Bureau of Prisons has established an administrative remedy procedure governing
15 prisoner complaints. The procedure is set forth at 28 C.F.R. § 542.10 et. seq. First, an inmate
16 must attempt to resolve the issue informally by presenting it to staff before submitting a Request
17 for Administrative Remedy. 28 C.F.R. § 542.13 (1999). If dissatisfied with the response, the
18 prisoner may proceed with the formal filing of an Administrative Remedy Request. 28 C.F.R.
19 § 542.14 (1999). Upon denial by the institution, the prisoner may appeal the decision by filing a
20 complaint with the Regional Director of the Bureau of Prisons. 28 C.F.R. § 542.15 (1999). The
21 Regional Director’s decision may be appealed to the General Counsel in Washington, D.C. Id.
22 Appeal to the General Counsel is the final step in the administrative remedy process. Id.

23 With regard to incident report 1619034, Petitioner submitted an appeal to the Regional
24 Director on August 9, 2007. However, it was rejected because Petitioner did not submit three
25 copies of his continuation page. He was advised he must resubmit his appeal within ten days.
26 Petitioner failed to do so. However, Petitioner did submit an administrative appeal to the
27 Warden at USP Atwater challenging both incident reports 1619034 and 1647130, which was
28 denied on January 25, 2010. See Amendment to Original Petition, at 3-5. Petitioner did not

1 appeal this decision. See Answer, Attachment 3, Declaration of Jennifer Vickers. Therefore,
2 Petitioner has not exhausted his administrative remedies with respect to these incident reports.

3 With regard to incident report 1793099, Petitioner filed a Regional Administrative
4 Remedy Appeal with the Mid-Atlantic Regional Office, on February 18, 2009. Id., see also
5 Attachment 4, Administrative Remedy Appeal 531143-R1; Petition at 11. The Regional Director
6 responded to Petitioner's appeal on May 6, 2009. Id., see also Petition at 10. On June 2, 2009,
7 the BOP's central officer received a Central Officer Administrative Appeal. Id., see also Petition
8 at 5-9. On June 18, 2009, the appeal was rejected because Petitioner exceeded the allowable
9 continuation page limit. Id., see also, Petition at 4. Petitioner was instructed that he could re-file
10 the appeal within fifteen days, but he failed to do so. Accordingly, Petitioner has not exhausted
11 the administrative remedies with respect to this claim as well. Notwithstanding Petitioner's
12 failure to exhaust, for the reasons explained below, his claims fail on the merits.

13 IV. Applicable Law

14 Prisoners cannot be entirely deprived of their constitutional rights, but their rights may be
15 diminished by the needs and objectives of the institutional environment. Wolff v. McDonnell,
16 418 U.S. 539, 555 (1974). Prison disciplinary proceedings are not part of a criminal prosecution,
17 so a prisoner is not afforded the full panoply of rights in such proceedings. Id. at 556. Thus, a
18 prisoner's due process rights are moderated by the "legitimate institutional needs" of a prison.
19 Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989), *citing Superintendent, etc. v. Hill*, 472
20 U.S. 445, 454-455 (1984).

21 However, when a prison disciplinary proceeding may result in the loss of good time
22 credits, due process requires that the prisoner receive: (1) advance written notice of at least 24
23 hours of the disciplinary charges; (2) an opportunity, when consistent with institutional safety
24 and correctional goals, to call witnesses and present documentary evidence in his defense; and
25 (3) a written statement by the factfinder of the evidence relied on and the reasons for the
26 disciplinary action. Hill, 472 U.S. at 454; Wolff, 418 U.S. at 563-567. In addition, due process
27 requires that the decision be supported by "some evidence." Hill, 472 U.S. at 455, *citing United*
28 States ex rel. Vatauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927). The "some

1 evidence” standard is “minimally stringent,” and a decision must be upheld if there is any reliable
2 evidence in the record that could support the conclusion reached by the fact finder. Hill, 472
3 U.S. at 455-456; see also Barnsworth v. Gunderson, 179 F.3d 771, 779 (9th Cir. 1990);
4 Zimmerlee v. Keeney, 831 F.2d 183, 186 (9th Cir. 1987). Determining whether this standard is
5 satisfied does not require examination of the entire record, independent assessment of the
6 credibility of witnesses, or the weighing of evidence. Hill, 472 U.S. at 455; Toussaint v.
7 McCarthy, 801 F.2d 1080, 1105 (9th Cir. 1986).

8 V. Analysis of Petition

9 A. Incident Report 161903

10 On July 11, 2007, Officer D. Compton, Special Investigative Tech., wrote an incident
11 report charging Petitioner with a violation of Code 197, Use of the Telephone to Further
12 Criminal Activity, and Code 203, Threatening Another With Bodily Harm or Any Other Offense.
13 See Attachment 5, DHO File 1619034 at 5.

14 On July 12, 2007, the Unit Disciplinary Committee (UDC) conducted a hearing and
15 referred the incident report to be heard by the Discipline Hearing Officer (DHO). Id. at 10.
16 Petitioner signed the form indicating that he had been advised of his rights, and he did not
17 request a Staff Representative or to call witnesses. Id. at 11.

18 The DHO held a hearing on July 19, 2007. Petitioner did not submit any documentary
19 evidence, but he made the following statement: “I said what I said. I’m not denying it. I was
20 mad. I called her three times since. I made the threat.” Id. After considering all of the evidence,
21 including Petitioner’s statements and the information set forth in the incident report, Petitioner
22 was expunged of the Code 197 charge, but was found guilty of violating Code 203. Id. at 3.

23 As a consequence, Petitioner lost five years of telephone privileges, visiting privileges for
24 one year, and his property was impounded for 30 days. Id. Petitioner was also placed in
25 disciplinary segregation for 30 days. Petitioner also lost 27 days of Good Conduct Time (GCT),
26 and forfeited 60 days of Non-vested Good Conduct Time (NVGCT). Id. As of November 14,
27 2006, Petitioner had 203 days of NVGCT available to forfeit. See Answer, Attachment 6,
28 Sentence Monitoring Good Time Data.

1 As to this incident report, Petitioner was afforded each of the procedural due process
2 requirements set forth in Wolff. Petitioner was given written notice on July 11, 2007-well over
3 24 hours prior to his appearance before the DHO on July 19, 2007. See Answer, Attachment 5,
4 DHO File 1619034 at 1. The hearing was conducted by DHO, Marc Renda, an impartial hearing
5 officer. Id. at 3. Petitioner waived his right to call witnesses and to a staff representative. Id. at
6 1, 11. Petitioner appeared at the hearing and was provided the opportunity to submit evidence
7 and make statements. Id. at 1. Lastly, Petitioner was provided a written statement of the
8 evidence used against him and the reasons for the sanctions imposed. Id. at 3. Accordingly,
9 Petitioner was provided with all of the procedural safeguards required by Wolff.

10 In addition, there is clearly some evidence to support the DHO's findings. In the incident
11 report, Officer Compton stated:

12 On July 11, 2007, at 1:55 p.m., I monitored a completed inmate telephone
13 call made on the telephone account of inmate James Gary, #09112-045, on July
14 09, 2007, at 10:45 a.m., to telephone number [redacted], from inmate telephone
15 station 7208 in Unit D-1. During this telephone call to a female identified as
16 [redacted], inmate Gary's [redacted], they become engaged in a heated
17 conversation concerning her desire for inmate Gary to stop calling her. Inmate
18 Gary became very agitated, and at approximately the nine minute mark he states,
19 "There's no law. I'm doing it myself. I'm coming home. When I come home I'll
20 take him (her boyfriend) out of the picture. He'll be gone off the face of the earth.
21 That's it, and if your mom and dad get in the way they will be gone too. End of
22 question. If I go to jail for life, then I go to jail for life. Period. No if, ands or
23 buts. If you get in the way you will be gone too. There's no questions about what
24 I'm going to do." Inmate Gary utilized the inmate telephone system to make
25 threats to the safety of other individuals.

26 Id. at 5.

27 Petitioner was asked whether the report was true, and he responded, "Yes, what can I
28 say." When asked why he threatened his [the individual], Petitioner said because they "were in a
heated argument." When asked why he threatened the mother and father, he said "because they
have [her boyfriend] working for them." Petitioner further stated, "It was just a [sic] argument,
there was no real threat to any one here. I am not threatening the security of the institution. I
don't understand what the big deal is." Id. at 6. Thus, it is clear that Petitioner violated Code
197 by threatening another person with bodily harm, and his due process rights were not violated.

1 Indeed, Petitioner did not contest his guilt before the DHO, nor does he do so now. Accordingly,
2 Petitioner's claim is without merit.

3 B. Incident Report 1647130

4 On September 21, 2007, Officer J. Suchecki, Correctional Officer, completed an incident
5 report charging Petitioner with a violation of Code 297-Use of a Telephone for Abuses Other
6 Than Criminal, and Code 328-Giving/Receiving Money or Anything of Value to/from Another
7 Inmate. See Answer, Attachment 7, DHO File 1647130 at 6.

8 Petitioner's was again afforded each of the procedural due process requirements set forth
9 in Wolff. Petitioner received the copy of the incident report on September 21, 2007 from
10 Lieutenant L. Maines. The hearing was conducted by the UDC on September 25, 2007. Id. at 6.
11 The UDC referred the incident report to be heard by the DHO. Id. at 8. Petitioner signed a form
12 indicating that he had been advised of his rights, and did not request a Staff Representative or
13 wish to call any witnesses. Id. at 11-12.

14 The DHO held a hearing on September 27, 2007, and Petitioner was given the
15 opportunity to submit evidence and make a statement. Id. at 1. After considering all of the
16 evidence, including the reporter officer's statement, Petitioner's statement, and printouts
17 reflecting that the telephone number Petitioner called had been added to inmate Hall's account on
18 August 21, 2007-just two days prior to the telephone call at issue, the DHO concluded that
19 Petitioner committed the violations of Codes 297-Use of the telephone for abuses other than
20 criminal activity, and 328-Giving money or anything of value to, or accepting money or anything
21 of value from another person. Id. at 3. Petitioner was provided a written copy of the evidence
22 used against him, and the reasons for the sanctions imposed. Id. at 4.

23 For the Code 297 violation, Petitioner lost telephone privileges for five years and 30 days
24 of disciplinary segregation-suspended for 180 days clear conduct. Petitioner was also disallowed
25 27 days of GCT pursuant to 28 C.F.R. § 541.13, Table 3, High Category, Sanction B.1. Id. He
26 also forfeited 25 days of NVGCT pursuant to 28 C.F.R. § 541.13, Table 3, High Category,
27 Sanction B (DHO may forfeit up to 50%, or up to 60 days NVGCT). As of November 14, 2006,
28 Petitioner had 203 days of NVGCT available to forfeit. See Attachment 6, Sentence Monitoring

1 Good Time Data. After 60 days were forfeited on July 19, 2007, for incident report 1619034-143
2 days of NVGCT remained to forfeit. Because 50% of 143 is more than 60, the DHO was not
3 allowed to forfeit more than 60 days, and his decision to forfeit 25 days was proper.

4 With respect to the Code 328 violation, Petitioner lost commissary privileges for six
5 months, and received 15 days disciplinary segregation-suspended for 180 days clear conduct.

6 See Attachment 7, DHO File 1647130 at 3.

7 There is some evidence to support the DHO's findings. The report was based on Officer
8 Suchecki's statement:

9 On September 21, 2007, at 9:35 a.m., I monitored a completed telephone
10 call made on the account of inmate Hall, [Robert], #15506-045, on August 23,
11 2007, at 5:08 p.m., to telephone 1. During this telephone call to a female the
12 inmate asks if his mother is there. The female tells him no she is not home. The
13 inmate tells the female to write this name down (Hall, Robert), and this number
14 (15506-045), and to put \$20-\$25 into that account. I also recognized the content
of the conversation to match that of a telephone call made by inmate Gary on July
9, 2007, at 9:18 p.m., to the same telephone number. The telephone number
[redacted] was placed on inmate Hall's account on August 21, 2007. Inmate Gary
was placed on a 5 year phone restriction on July 19, 2007, which expires July 19,
2012.

15 Id. at 6.

16 Petitioner told Lieutenant Maines, "Yes, I used his phone, and I had him put the numbers on his
17 list. He dials the phone then gives it to me." Id. at 7. At the hearing, Petitioner did not submit
18 any documentary evidence, but he made the following statement:

19 "The whole time he ... Mr. Compton knew." When further questioned by
20 the DHO Gary admitted being on telephone restriction and utilizing the other
21 inmates [sic] telephone account (ITS). Gary admitted sending money to Hall's
22 telephone account and stated "he has no money." He stated "we know the same
people on the outside," "he did me a favor by letting me talk and I did him a favor
by sending him money."

23 Id. at 1-2. In addition, telephone records indicated that the telephone number Petitioner called
24 had been added to inmate Hall's account on August 21, 2007-just two days before Petitioner
25 made this call. Id. at 2. In light of these circumstances, there is some evidence that Petitioner
26 both circumvented the telephone monitoring procedures by using another inmate's account-in
27 violation of Code 297, and gave money to another inmate without authorization-in violation of
28

1 Code 328. Petitioner fails to present any evidence in support of his innocence, and his due
2 process rights were not violated.

3 C. Incident Report 1793099

4 On October 26, 2008 (approximately 14 months after the previous violation), Officer B.
5 Kilgore, wrote an incident report charging Petitioner with a violation of Code 297-Use of the
6 Telephone for Abuses Other Than Criminal. See Attachment 8, DHO File 1793099 at 9.

7 Petitioner was provided all of the process due under Wolff. Petitioner received a copy of
8 the incident report on October 26, 2008 from Lieutenant J. Baker-who was assigned to
9 investigate the incident. Id. at 9-10. Petitioner refused to make a statement. Id. at 10. The UDC
10 convened on October 30, 2008. Id. at 9. BOP policy indicates that the UDC hearing will
11 “ordinarily” be conducted within three days, not including “the day staff become aware of the
12 inmate’s involvement, weekends, and holidays.” Program Statement (P.S.) 5270.07, Inmate
13 Discipline and Special Housing Units, Chapter 2, Page 3.¹ Extensions of time are authorized.
14 See Id. at Chapter 6, Page 5; see also 28 C.F.R. § 541.15(K). In this instance, staff advised
15 Petitioner there was a one-day delay due to insufficient staff to complete his UDC hearing
16 sooner. Attachment 8, DHO File 1793099 at 5. On November 7, 2008, the DHO held a hearing
17 regarding incident report 1793099. Id. at 1. Petitioner appeared before the DHO, and had the
18 opportunity to make a statement and present documentary evidence. Id. Petitioner was advised
19 of his rights but refused to sign the form. Id. at 7-8. Although Petitioner did not request a staff
20 representative or wish to present witnesses, he again refused to sign the form. Id. at 6. Lastly,
21 Petitioner was provided a written statement of the evidence used against him, and the reason for
22 the sanctions imposed. Id. at 4. Accordingly, Petitioner was provided all the process required
23 under Wolff.

24 Moreover, some evidence supports the DHO’s finding that Petitioner committed a
25 violation of Code 297-Phone Abuse. Code 297 specifically prohibits:

26
27
28 ¹ The Court takes judicial notice of the copy of P.S. 5270.07 available at www.bop.gov, pursuant to Rule
201 of the Federal Rules of Evidence.

1 Use of Telephone for abuses other than criminal activity (e.g. circumventing
2 telephone monitoring procedures, possession and/or use of another inmate's PIN
3 number; third-party calling; third party billing; using credit card numbers to place
4 telephone calls, conference calling; talking in code)

5 28 C.F.R. § 541.13, Table 5.

6 In this instance, Officer Kilgore provided the following factual basis for the violation:

7 On October 25, 2008, at approximately 9:19 p.m., I monitored a telephone
8 call placed from the F Unit phone station 6044-LEE-F-A, beginning at 9:19 p.m.,
9 and using the Phone Access Code (PAC) provided exclusively to inmate CAIN,
10 Ralph, W., Reg. No. 10672-032. This call was placed to [redacted], and lasted
11 about four minutes. During their conversation the inmate placing the call told the
12 called party, "I have to pay to use it, when I get on the phone, so, half the money
you sent me I didn't get, you know what I mean, 'cause it don't belong to me." I
13 contacted the F Unit Officer who positively identified inmate Gary, James L, Reg.
14 No. 09112-045, as making this call while he was still using the phone. Gary's
15 phone privileges are currently suspended. Inmates are prohibited from using
16 another inmate's PAC to place phone calls, and are prohibited from using the
17 phone while their own privileges are suspended.

18 Id. at 7, 9.

19 At the UDC hearing, Petitioner stated "I'm guilty. I took his number without his
20 knowing. He had nothing to do with it." Id. at 9. Petitioner did not submit any documentary
21 evidence, but stated the incident report was true. Id. The DHO considered Petitioner's statement,
22 the reporting officer's statements, and a memorandum by Correctional Officer J. Seagraves,
23 which stated:

24 On [October 25, 2008] at 9:25 pm, I was contacted by SIS that an inmate was
25 using the phone under a different pin number. I approached the inmate who
26 identified himself as Inmate Gary #09112-045. I reported back to SIS which
27 inmate was using the phone.

28 Id. at 11. The DHO concluded that Petitioner committed a violation of Code 297. Id. at 3.

Petitioner was sanctioned with a loss of telephone privileges for 18 months, loss of
commissary privileges for 180 days, and 45 days in disciplinary segregation-suspended for 180
days clear conduct. Id. Petitioner also lost 27 days of GCT pursuant to 28 C.F.R. § 541.13,
Table 3, High Category, Sanction B.1. Id. He also forfeited 88 days of NVGCT. Id. Although
this exceeds the standard sanction authorized by section 541.13, it was properly based on the
repetitive violation of the same code within a 18 month period under 28 C.F.R. § 541.13, Table

1 5-authorizing forfeiture of 75%, up to 90 days, of NVGCT. As of November 14, 2007, Petitioner
2 had 118 days of NVGCT available to forfeit, and 75% of 118 is 88 days. Accordingly, this
3 sanction was properly imposed by the DHO. Based upon this evidence, there is clearly some
4 evidence to support the DHO’s findings that Petitioner was “circumventing telephone monitoring
5 procedures by using another inmate’s [Phone Access Code (PAC) to place calls. . . .” *Id.* at 3.

6 VI. The DHO Properly Forfeited Petitioner’s Non-vested Good Conduct Time

7 On April 26, 1996, section 18 U.S.C. § 3624(b) was amended to its current form by the
8 Prison Litigation Reform Act (PLRA).² Petitioner’s sentences took place after April 26, 1996,
9 and federal regulations therefore allow the DHO to forfeit his NVGCT as a sanction for a high
10 level offense. The PLRA statute requires “exemplary compliance” with prison rules for GCT.
11 18 U.S.C. § 3624(b)(1); see also Amendment to Original Petition at 12(BOP training aid setting
12 forth timeline of sentencing laws). In addition, unlike SRA inmates, section 3624 was amended
13 so that GCT awarded to PLRA inmates does not vest until “the date the prisoner is released from
14 custody.” 18 U.S.C. § 3624(b)(2). Therefore, since GCT for PLRA inmates does not vest at the
15 end of the year it is awarded, it is now subject to be taken by BOP as a sanction for a prison
16 disciplinary action.

18 ² Section 3624(b) was initially enacted by the Sentence Reform Act (SRA). The SRA is part of the
19 Comprehensive Crime Control Act of 1984 (CCCA) which was enacted into law on October 12, 1984, and became
20 effective on November 1, 1987. The CCCA repealed previous good time statutes (18 U.S.C. § 4161, allowing the
21 award of Statutory Good Time (SGT), and § 4162, allowing the award of Extra Good Time (EGT)), and enacted 18
22 U.S.C. § 3624(b). If an inmate was convicted of a crime committed between November 1, 1987, and September 12,
23 1994 (SRA inmate), “unless the Bureau of Prisons determines, that, during that year, he has not satisfactorily
24 complied with such institutional disciplinary regulations. . . .” 18 U.S.C. § 3624(b) (1987); see also 28 C.F.R.
25 523.20(a) (“For inmates serving a sentence for offenses committed on or after November 1, 1987, but before
26 September 13, 1994, the Bureau will award 54 days credit toward service of sentence (good conduct time credit) for
27 each year served”). Pursuant to the SRA, GCT earned each year was vested at the end of that year and could not be
28 disallowed in following years. See 18 U.S.C. § 3624(b) (1987).

24 Thereafter, on September 13, 1994, 18 U.S.C. § 3624(b) was amended as a result of the enactment of the
25 Violent Crime Control and Law Enforcement Act of 1994 (“VCCLEA”). The GCT of federal inmates convicted of
26 crimes committed on or after September 13, 1994, but before April 26, 1996, is governed by this version of the
27 statute, which required “exemplary compliance” with prison rules by all inmates convicted of a “crime of violence.”
28 18 U.S.C. § 3624(b)(1). In addition, under the VCCLEA, an inmate’s GCT does not vest “unless the prisoner has
earned or is making satisfactory progress toward a high school diploma.” 18 U.S.C. § 3624(b)(2) (1995); see also 28
C.F.R. § 423.20(b)(2009) (For inmates serving a sentence for offenses committed on or after September 13, 1994,
but before April 26, 1996, all yearly awards of good conduct time will vest for inmates who have earned, or are
making satisfactory progress . . . toward earning a General Educational Development (GED) credential”).

1
2 On September 26, 1997, 28 C.F.R. § 541.13-Prohibited Acts and Disciplinary Severity
3 Scale, was modified by 62 FR 50787-01 (1997). This rule modified the way federal inmates lose
4 good time credits, taking into account the changes in the law reflected by the VCCLEA-
5 exemplary compliance and the PLRA-changes to NVGCT. Id. at 50787-88.

6 Section 542.12(a)(2) provides that if an inmate found guilty of a high category offense,
7 the DHO “shall impose and execute one or more of sanctions A through M [in Table 3].” Thus,
8 Sanction B is obviously included within this section and allows the forfeiture of NVGCT for
9 VCCLEA and PLRA inmates. See 28 C.F.R. § 541.13, Table 3, High Category, Sanction B
10 (2007). The DHO may “Forfeit . . . non-vested good conduct time up to 50% or up to 60 days,
11 whichever is less. . . .” Id. Moreover, Sanction B.1 is mandatory and requires disallowance of
12 GCT to be imposed on PLRA inmates. 28 C.F.R. § 541.13(a)(2). Therefore, because Petitioner
13 was convicted of a crime on or after April 26, 1996, the DHO may take GCT either mandatorily
14 (disallowance of GCT, pursuant to sanction B.1) or discretionary (forfeiture of NVGCT, pursuant
15 to sanction B).

16 Petitioner contends that because his crime was committed after November 1, 1987, the
17 DHO may not forfeit NVGCT. In support of his argument Petitioner cites the following:

18 Sanctions B and F of the Prohibited Acts and Disciplinary Severity Scale, pertain
19 to statutory good time [SGT] and do not apply to inmates committed under the
20 Sentencing Reform Act [SRA] provisions of the Comprehensive Crime Control
21 Act [CCCA]. This means that inmates who committed their crimes on or after
22 November 1, 1987 and who are sentenced under the [SRA] provisions of the
[CCCA] are only eligible to receive 54 days per year of good conduct [GCT] (18
U.S.C. § 3624(b)). This credit is given at the end of each year of time served and,
once given, is vested.

23 P.S. 5270.07, Chapter 4, Appendix, Page 1.

24 Contrary to Petitioner’s claim, at the time the SRA took effect on November 1, 1987,
25 BOP regulations did not account for the disallowance of GCT under section 3624(b), only SGT
26 and EGT could be forfeited. This was later amended such that Sanction B did not apply to
27 inmate convicted under the SRA, because they did not earn SGT or EGT. P.S. 5270.07, Chapter
28 4, Appendix. The DHO could only take good time credits from these SRA inmates by

1 disallowing GCT from the current year that had not yet been awarded. Id.

2 As previously stated, in 1997, Chapter 4 of the P.S. was revised to reflect the changes
3 imposed by the VCCLEA and the PLRA. See P.S. 5370.07, Change Notice 08. The amendment
4 clearly reflected that under Sanction B “non-vested good conduct time,” may be forfeited by the
5 DHO. Id. The entire portion of the text cited by Petitioner sets forth the limitations of Sanction
6 B stating:

7 This Sanction B does not apply to inmate committed under the provisions of the
8 [CCCA] for crimes committed on or after November 1, 1987 and prior to passage
9 of the Violent Crime Control and Law Enforcement Act of 1994 (September 23,
1994). For those inmates, the applicable sanction is B.1.

10 P.S. 5270.07 at Chapter 4, Pgs. 16-17. Therefore, Sanction B does not apply to inmates who
11 were sentenced for crimes committed after November 1, 1987, and prior to September 23, 1994.

12 In sum, because each of Petitioner’s convictions of which he is currently serving an aggregate
13 term of imprisonment were for offenses committed after April 26, 1996. Answer, Attachment 1,
14 Judgment and Commitment Orders. His GCT is therefore governed by the current, PLRA
15 version of section 3624(c), and current version of 28 C.F.R. §541.13. Accordingly, there is no
16 merit to Petitioner’s claim and it must be denied.

17 VII. Imposition of Enhanced Sanctions for Incident Report 1793099

18 Petitioner contends that the amount of NVGCT forfeited for incident report 1793099
19 exceeded the amount authorized by the applicable regulations. More specifically, Petitioner
20 claims that his previous violation of Code 297, from incident report 1647130, occurred more
21 than 12 months prior to this violation, and the sanctions under section 541.13 are not applicable.
22 Petitioner is mistaken.

23 If a PLRA inmate committed the same offense within a short period of time, the DHO
24 may increase the sanctions imposed on the inmate. Under Sanction B.1, an increase of
25 disallowance of GCT is only authorized for “a greatly aggravated offense or where there is a
26 repetitive violation of the same prohibited act that occurs within a relatively short time frame
27 (e.g., . . . within 12 months for the same high severity prohibited act. . . .)” 28 C.F.R. § 541.13,
28 Table 4(1)(b.1) (I).

1 The amount of NVGCT forfeited may also be increased under Sanction B. 28 C.F.R. §
2 541.13(e); see also 28 C.F.R. § 541.13, Table 5. Under Table 5, if the inmate has a prior offense
3 for the same high category code violation within the past 18 months, the amount of NVGCT
4 forfeited may be increased up to 75% or up to 90 days, whichever is less. . . .”

5 Therefore, if the inmate suffers a repetitive high category offense within a 12 months
6 period, the DHO may increase both the amount of GCT disallowed and NVGCT forfeited. If the
7 repetitive offense is committed within a 18 month period, the DHO may increase the amount of
8 NVGCT which is forfeited, but not the amount of GCT disallowed under Sanction B.1.

9 In this instance Petitioner first committed a violation of Code 297-Phone Abuse, on
10 August 23, 2007, and then again on October 25, 2008. Answer, Attachment 7, DHO File
11 1647130 and 1793099. Because the violations did not place within a 12 month period, the DHO
12 could not increase the amount of GCT disallowed, however, it was within a 18 month period, and
13 the DHO was allowed to increase the forfeiture of NVGCT from 50% up to 60 days, to 75% or
14 up to 90 days. 28 C.F.R. § 541.13, Table 5. Therefore, the DHO’s sanction of 75% of the
15 available NVGCT was proper, and Petitioner’s claim to the contrary is without merit.

16 ORDER

17 Based on the foregoing, it is HEREBY ORDERED that:

- 18 1. The instant petition for writ of habeas corpus is DENIED; and
19 2. The Clerk of Court is directed to enter judgment in favor of Respondent.

20 IT IS SO ORDERED.

21 **Dated: April 20, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE