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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

COREY BURGESS,

 Petitioner,

 v.

WARDEN PAUL COPENHAVER,

 Respondent.

Case No. 1:12-cv-00777-AWI-SKO-HC

ORDER SUBSTITUTING WARDEN PAUL
COPENHAVER AS RESPONDENT

FINDINGS AND RECOMMENDATIONS TO
DISMISS IN PART AND TO DENY THE
PETITION FOR WRIT OF HABEAS CORPUS
(DOC. 1) AND TO ENTER JUDGMENT FOR
RESPONDENT

OBJECTIONS DEADLINE:
THIRTY (30) DAYS

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. The matter was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 through 304. Pending before the Court is the petition filed on May 11, 2012. Respondent filed an answer on August 30, 2012. Petitioner filed a traverse on September 24, 2012.

I. Jurisdiction and Order Substituting Respondent

Because the petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.

1 Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,
2 1499 (9th Cir. 1997).

3 Petitioner alleges his release date has been miscalculated
4 because the BOP 1) improperly computed the date of commencement of
5 his sentence as the date his sentence was imposed, rather than
6 waiting until the day he arrived at his designated institution; 2)
7 failed to award prior custody credit for time spent serving a state
8 sentence of shock incarceration; and 3) failed to deduct from his
9 sentence all prior custody credits that have been awarded, as well
10 as good conduct time (GCT). Petitioner further contends that the
11 BOP improperly designated him to a high-security penitentiary;
12 instead, he should be transferred to a residential drug abuse
13 program (RDAP), re-entry center (RRC), or a community correctional
14 center (CCC) for the duration of his sentence.

15 A claim challenging the manner, location, or conditions of a
16 sentence's execution must be brought under § 2241. Hernandez v.
17 Campbell, 204 F.3d 861, 864 (9th Cir. 2000). A challenge to the
18 manner in which a sentence is executed must be brought in a habeas
19 petition pursuant to 28 U.S.C. § 2241. Tucker v. Carlson, 925 F.2d
20 330, 331 (9th Cir. 1991) (concerning whether the parole commission
21 had improperly failed to credit the prisoner's federal sentence with
22 time served in state custody). Thus, this Court has jurisdiction
23 over Petitioner's claims, which concern the execution of his
24 sentence.

25 A petitioner filing a petition for writ of habeas corpus under
26 28 U.S.C. § 2241 must file the petition in the judicial district of
27 the petitioner's custodian. Brown v. United States, 610 F.2d 672,
28 677 (9th Cir. 1990). Petitioner named as Respondent the warden of

1 his institution of confinement, who is within this judicial
2 district. However, Respondent states that Petitioner's most recent
3 custodian is Warden Paul Copenhaver. (Ans., doc. 28 at 2.)

4 Respondent concedes that venue is proper in this district and
5 that as to his claim concerning sentence computation, Petitioner has
6 exhausted administrative remedies. (Ans., doc. 28, 4-5.) However,
7 Respondent denies that Petitioner exhausted administrative remedies
8 as to his claim concerning his prison placement, which Respondent
9 contends should be dismissed. (Id. at 4-5.)

10 The Court concludes it has subject matter jurisdiction over the
11 claim concerning sentence computation and jurisdiction over the
12 person of the Respondent. Subject matter jurisdiction over
13 Petitioner's claim concerning his prison placement will be discussed
14 below.

15 In view of the fact that the acknowledged Respondent is Warden
16 Paul Copenhaver, it is ORDERED that Warden Paul Copenhaver is
17 SUBSTITUTED as Respondent pursuant to Fed. R. Civ. P. 25.¹

18 II. Factual Background

19 On September 13, 2007, Petitioner was arrested by police
20 officers of St. Louis, Missouri, and charged with assault in the
21 first degree and unlawful use of a weapon. On the same date, he was
22 released from custody pending application of warrants, which were
23 later refused. (Carr decl., ¶ 3; doc. 28-1 at 8-9, 11, 19.)

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26 ¹ Fed. R. Civ. P. 25(d) provides that when a public officer who is a party to a
27 civil action in an official capacity dies, resigns, or otherwise ceases to hold
28 office while the action is pending, the officer's successor is automatically
substituted as a party. It further provides that the Court may order substitution
at any time, but the absence of such an order does not affect the substitution.

1 On December 12, 2007, Petitioner was arrested by St. Louis
2 County police for a state probation violation. (Carr decl., ¶4;
3 doc. 28-1, 19.) This arrest placed Petitioner under the primary
4 jurisdiction of state authorities in Missouri.

5 On January 10, 2008, after a probation violation hearing,
6 Petitioner's probation was continued, and a term of one hundred and
7 twenty days of shock incarceration was imposed as a condition of
8 probation with credit for time served. (Carr decl., ¶ 4; doc. 28-1
9 at 11, 17, 19.) "Time served" was interpreted by the BOP to include
10 all days from December 12, 2007, through January 9, 2008. (Carr
11 decl., ¶4.)

12 On April 4, 2008, after serving 114 days of his 120 days,
13 Petitioner was released from the custody of the state of Missouri
14 into the custody of the U.S. Marshals Service on federal charges of
15 felon in possession of a firearm, in violation of 18 U.S.C.
16 § 922(g)(1). (Carr decl., ¶ 5; doc. 28-1, 21.) The conduct
17 underlying this charge was the same conduct for which Petitioner was
18 originally arrested by state authorities on September 13, 2007.
19 (Id. at ¶ 3; doc. 28-1 at 33.)

20 On September 30, 2008, Petitioner was sentenced in the United
21 States District Court, Eastern District of Missouri, to a seventy-
22 seven-month term of imprisonment on the federal firearm possession
23 charge. (Carr decl., ¶ 6; doc. 28-1 at 21.)

24 The BOP prepared a sentence computation for Petitioner, based
25 on a term of seventy-seven months commencing September 30, 2008 -
26 the date his sentence was imposed. A tentative full term (TFT) date
27 was calculated by projecting seventy-seven months (6 years, 5
28 months) out from September 30, 2008. The TFT is the date Petitioner

1 would finish his sentence if he received no credit for prior
2 custody, and if he received no GCT credits. Petitioner's TFT is
3 February 28, 2015. (Carr decl., ¶ 7; doc. 28-1 at 34.)

4 The BOP then awarded Petitioner prior custody credit in the
5 amount of 179 days, consisting of one day for the day spent in state
6 custody on September 13, 2007, and 178 days for time spent in
7 federal custody from April 5, 2008, the day after he was released
8 from state custody, through September 29, 2008, the day prior to the
9 imposition of sentence. The 179 days of prior custody credit were
10 deducted from the TFT of February 28, 2015, resulting in an
11 expiration full term (EFT) date of September 2, 2014. (Carr decl.,
12 ¶ 8.)

13 The BOP took into account Petitioner's earned and projected
14 GCT. As of the time the answer was filed, Petitioner was projected
15 to receive 160 days of GCT. An additional 176 days of GCT were
16 disallowed due to disciplinary infractions. Deducting 160 days of
17 projected GCT from an EFT of September 2, 2014, results in a
18 projected GCT release date of March 26, 2014. (Carr decl., ¶ 10.)²

19 III. Mootness

20 Federal courts lack jurisdiction to decide cases that are moot
21 because the courts' constitutional authority extends to only actual
22 cases or controversies. Iron Arrow Honor Society v. Heckler, 464
23 U.S. 67, 70-71 (1983). Article III requires a case or controversy
24 in which a litigant has a personal stake in the outcome of the suit
25 throughout all stages of federal judicial proceedings and has

26 _____
27 ² On August 26, 2014, and March 27, 2015, Petitioner filed notices of change of
28 address that appear to reflect a private address as opposed to an institution.
Because Petitioner's sentence included a two-year period of supervised release,
the Court will not presume that the release computation is moot.

1 suffered some actual injury that can be redressed by a favorable
2 judicial decision. Id. A petition for writ of habeas corpus
3 becomes moot when it no longer presents a case or controversy under
4 Article III, § 2 of the Constitution. Wilson v. Terhune, 319 F.3d
5 477, 479 (9th Cir. 2003). A petition for writ of habeas corpus is
6 moot where a petitioner's claim for relief cannot be redressed by a
7 favorable decision of the court issuing a writ of habeas corpus.
8 Burnett v. Lampert, 432 F.3d 996, 1000-01 (9th Cir. 2005) (quoting
9 Spencer v. Kemna, 523 U.S. 1, 7 (1998)). Mootness is
10 jurisdictional. See, Cole v. Oroville Union High School District,
11 228 F.3d 1092, 1098-99 (9th Cir. 2000). A moot petition must be
12 dismissed because nothing remains before the Court to be remedied.
13 Spencer v. Kemna, 523 U.S. 1, 18. A federal court has a duty to
14 consider mootness on its own motion. Demery v. Arpaio, 378 F.3d
15 1020, 1025 (9th Cir. 2004).

16 It could be argued that Petitioner's claim concerning
17 computation of his release date is moot because the docket reflects
18 that he has been released from custody. (Docs. 57, 62-63, notices
19 of change of address filed August 26, 2014, and March 27, 2015.)
20 However, the passage of a release date does not render a claim
21 regarding the release date moot when the sentence includes a term of
22 supervised release. The possibility that the sentencing court might
23 use its discretion to reduce the term of supervised release under 18
24 U.S.C. § 3583(e) is sufficient to prevent the petition from being
25 moot. Tablada v. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008),
26 cert. den. 560 U.S. 964 (2010) (citing Mujahid v. Daniels, 413 F.3d
27 991, 994-995 (2005)).

1 Here, because Petitioner's sentence includes a two-year period
2 of supervised release (doc. 28-1, 21), the claim is not moot.

3 IV. Sentence Computation

4 Petitioner is entitled to relief pursuant to 28 U.S.C. § 2241
5 if Petitioner is "in custody in violation of the Constitution or
6 laws or treaties of the United States." 28 U.S.C. § 2241(c)(3);
7 Rose v. Hodges, 423 U.S. 19, 21 (1975) (citing 28 U.S.C. § 2241).

8 A. Prior Custody Credit

9 It is the responsibility of the BOP to compute the time credit
10 and release date of the Petitioner. With respect to credit for time
11 served and the commencement of terms, 18 U.S.C. § 3585 provides as
12 follows:

13 (a) Commencement of sentence.--A sentence to a term of
14 imprisonment commences on the date the defendant is
15 received in custody awaiting transportation to, or arrives
16 voluntarily to commence service of sentence at, the
official detention facility at which the sentence
is to be served.

17 (b) Credit for prior custody.--A defendant shall be given
18 credit toward the service of a term of imprisonment for
19 any time he has spent in official detention prior to the
date the sentence commences--

20 (1) as a result of the offense for which the
21 sentence was imposed; or

22 (2) as a result of any other charge for which
23 the defendant was arrested after the
24 commission of the offense for which the
sentence was imposed;

25 that has not been credited against another sentence.

26 18 U.S.C. § 3585. Section 3585 does not authorize a district court
27 to compute pre-sentence credit at the time of sentencing. The
28 Attorney General, acting through the BOP, has the duty to compute

1 the credit allowed by § 3585(b). United States v. Wilson, 503 U.S.
2 329, 337 (1992).

3 A federal sentence may commence on the date it is imposed.
4 Schleining v. Thomas, 642 F.3d 1242, 1249 (9th Cir. 2011), cert.
5 den. 132 S.Ct. 2415 (2012). Here, Petitioner was in primary federal
6 custody when sentence was pronounced; there is no reason for the
7 sentence not to have commenced when it was imposed. As Respondent
8 also notes, if the sentence were instead considered not to have
9 begun until November 5, 2008, the post-sentencing time Petitioner
10 spent in custody before that date would be credited against the
11 sentence as presentence time. Thus, there would be no difference in
12 the time ultimately credited to service of the sentence.

13 There is no merit to Petitioner's claim of entitlement to
14 credit for time spent in shock incarceration from December 12, 2007
15 through April 4, 2008 because Petitioner was given credit for that
16 time in his state case. To give Petitioner credit for this time
17 against his federal sentence would be to award double credit - a
18 result which is foreclosed by the clearly expressed intention of
19 Congress in § 3585(b). United States v. Wilson, 503 U.S. at 337.

20 B. Good Conduct Time Credits

21 With respect to GCT credits, 18 U.S.C. § 3624(b) provides in
22 pertinent part:

23 (b) Credit toward service of sentence for satisfactory
24 behavior.—

25 (1) Subject to paragraph (2), a prisoner who is serving
26 a term of imprisonment of more than 1 year other than a
27 term of imprisonment for the duration of the prisoner's
28 life, may receive credit toward the service of the
prisoner's sentence, beyond the time served, of up to
54 days at the end of each year of the prisoner's term
of imprisonment, beginning at the end of the first year

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

20 (2) Notwithstanding any other law, credit awarded under
21 this subsection after the date of enactment of the
22 Prison Litigation Reform Act shall vest on the date the
23 prisoner is released from custody.

24 18 U.S.C. § 3624(b).

25 Petitioner was thus eligible to earn up to 54 days of GCT for
26 each year served. 18 U.S.C. § 3624(b). The BOP awards the credit
27 at the end of each year of imprisonment except during the last year
28 of the sentence in which, pursuant to the statute's directions
concerning proration and credit, the calculation occurs during the
last six weeks of the sentence. Records reflect that a total of 176
days of GCT have been forfeited as penalties for disciplinary
infractions. Deducting an additional 160 days (the total that could
potentially be earned) from Petitioner's EFT of September 2, 2014,
resulted in a projected GCT release date March 26, 2014. Petitioner
was released no later than August 2014, when he first notified the
Court that his address had changed. The Court has no data before it

1 with which to evaluate the ultimate release date. Petitioner has
2 not shown that with respect to the BOP's computations that are
3 before the Court, he was entitled to some percentage of time off his
4 sentence that exceeds the allowable total of good conduct time
5 credits permitted under § 3624(b).

6 A federal offender must serve one hundred percent of the
7 sentence imposed with the sole statutory exception of good time
8 credits. Barber v. Thomas, 560 U.S. 474, 482 (2010). The Supreme
9 Court has specifically approved the BOP's method of calculating GCT
10 credit in light of the disciplinary history of the offender and
11 based on the length of time the prisoner has actually served, rather
12 than the length of the sentence imposed. Id. at 480-483. It will,
13 therefore, be recommended that Petitioner's claims concerning his
14 sentence computation be denied.

15 V. Classification Score and Custodial Placement

16 To the extent Petitioner contends his rights under the Eighth
17 and Fourteenth Amendments have been violated by the BOP's failure to
18 place Petitioner in a RDAP, RRC, or CCC, his petition is moot.
19 Because Petitioner has been released from physical custody and is
20 serving only the supervised release portion of his sentence, there
21 is no relief this Court can give with respect to Petitioner's
22 placement. Thus, the petition is moot as to this claim.

23 This Court also lacks jurisdiction to review the discretionary
24 decision of the BOP regarding the custodial placement of a federal
25 prisoner. There is no subject matter jurisdiction in this Court to
26 review individualized, discretionary determinations made by the BOP
27 pursuant to 18 U.S.C. § 3621; however, judicial review remains
28 available for allegations that BOP action is contrary to established

1 federal law, violates the Constitution, or exceeds statutory
2 authority. Reeb v. Thomas, 636 F.3d 1224, 1228-29 (9th Cir. 2011).

3 Accordingly, it will be recommended that Petitioner's claim
4 concerning his placement be dismissed.

5 VI. Recommendations

6 Based on the foregoing, it is RECOMMENDED that:

7 1) The petition for writ of habeas corpus be DISMISSED in part
8 for lack of subject matter jurisdiction, and otherwise be DENIED;
9 and

10 2) Judgment be ENTERED for Respondent.

11 These findings and recommendations are submitted to the United
12 States District Court Judge assigned to the case, pursuant to the
13 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local
14 Rules of Practice for the United States District Court, Eastern
15 District of California. Within thirty (30) days after being served
16 with a copy, any party may file written objections with the Court
17 and serve a copy on all parties. Such a document should be
18 captioned "Objections to Magistrate Judge's Findings and
19 Recommendations." Replies to the objections shall be served and
20 filed within fourteen (14) days (plus three (3) days if served by
21 mail) after service of the objections. The Court will then review
22 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).
23 The parties are advised that failure to file objections within the
24 specified time may result in the waiver of rights on appeal.

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1 Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing
2 Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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5 IT IS SO ORDERED.

6 Dated: May 26, 2015

/s/ Sheila K. Oberto
7 UNITED STATES MAGISTRATE JUDGE
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