

1 officer was involuntary; the hearing officer failed to provide an accurate written statement of the
2 evidence upon which he relied; and, the hearing officer was biased.

3 **II. Factual Background**

4 On July 17, 2014, a guard at USP Atwater, Officer Ramos, ordered Petitioner to submit to a pat
5 down search after the guard observed him to be “out of bounds.” (Doc. 15-1 at 14) Ramos reported
6 that during the search, that Petitioner “assaulted [him] by grabbing and pushing my hand away.” Id.
7 As a result, the officer prepared an incident report that resulted in Petitioner being charged with
8 “[a]ssaulting any person without serious injury.” Id. at 21.

9 Prison officials gave Petitioner written notice of the charge on the same date. (Doc. 15-1 at 11)
10 On July 17, 2014 at 6:40 a.m., a prison official, Lieutenant Bolter, advised Petitioner orally of his right
11 to remain silent as well as the consequences of doing so. Id. at 15. Bolter also served a copy of the
12 incident report at the same time. Id. The next day, C. Wohld served Petitioner with a “Notice of
13 Hearing Before the (DHO)” on July 18, 2014 and he acknowledged receipt of it. (Doc. 15-1 at 17)
14 On the signed acknowledgement, Petitioner indicated he wished to have a witness, John Waller, testify
15 at the hearing. Id. He asserted that inmate-Waller would testify that Petitioner “inadvertently slapped
16 [the guard’s] hands.” Id. In addition, Petitioner requested that Lt. Putnam act as his staff
17 representative. Id.

18 Along with the hearing notice, C. Wohld served Petitioner a document entitled, “Inmate Rights
19 at Discipline Hearing.” (Doc. 15-1 at 17) This document detailed his rights including, the right to
20 receive a written copy of the charges 24 hours before the hearing to have a staff representative, to call
21 witnesses, to present a statement or to remain silent, to appear at the hearing, to be advised of the
22 DHO’s decision and the facts supporting it, and t to appeal the DHO’s decision within 20 days. Id.
23 He acknowledged these rights. Id.

24 At the hearing, held on July 22, 2014, Petitioner’s staff representative, Lt. Putnam, appeared
25 via telephone and presented his findings. (Doc. 15-1 at 2, 21) At Petitioner’s request, Putnam
26 reviewed the video of the incident and remarked, “The video appeared to me that inmate Terry slapped
27 staffs [sic] hand away [and] he never reached for his belt.” Id. at 21. Petitioner stated, “I did not slap
28 his hands. I may have inadvertently touched the staff; he put his hands in my pants.” Id. Waller did

1 not appear at the hearing. Id. However, Petitioner agreed, “Inmate Waller would say the same thing
2 [Petitioner] did that [Petitioner] did not slap the staff. Terry may have inadvertently touched the staff.”
3 Id.

4 The DHO considered also the memos from Officer Ramos that “Khalil assaulted him by
5 slapping his hand away,” and Officer Helling who “state[d] inmate Khalil became verbally assaultive
6 and shoved the officers [sic] right hand away.” (Doc. 15-1 at 22) As a result, the DHO found
7 Petitioner guilty of the offense. Id.

8 Petitioner appealed the determination and the Regional Director directed that the discipline
9 hearing be re-heard. (Doc. 15-1 at 26) The Regional Director found that the staff representative,
10 Putnam, was not physically present at the hearing and the witness, Inmate Waller, was not called to
11 testify. Id. The Regional Director determined these errors required the matter to be re-heard. Id.

12 The re-hearing occurred on October 9, 2014. (Doc. 15-1 at 32) In advance of the hearing,
13 prison officials again served Petitioner notice of the hearing and notice of his rights. Id. at 28, 30.
14 Once again, Petitioner acknowledged receipt of these documents in writing.¹ Id. Also again,
15 Petitioner asserted that he wanted inmate Waller to testify and, though he requested a staff
16 representative, this time he requested Lt. Hayes act in that role. Id. at 28.

17 At the new hearing, Petitioner appeared with Hayes. (Doc. 15-1 at 32) Petitioner denied the
18 assault and stated, “I did not assault staff. I may have inadvertently touched the staff.” Id. Likewise,
19 Waller testified, “Me and Terry were talking and the staff called him for a pat search. Inmate Terry
20 cooperated with staff in the search. Inmate Terry loosened his belt to assist the staff in the search. I
21 did not see the assault on the staff.”² Id. at 23. At Petitioner’s request, Hayes viewed the video of the
22 incident and reported. “It appeared on the video that inmate Terry pushed the officers [sic] hand away
23 during the pat search.” Id. Hayes also spoke with Officer Ramos who reported, “The incident should
24 be dismissed as inmate Terry has suffered enough from the incident and I may have overreacted.” Id.
25 Though Ramos did not testify at the hearing, the DHO found this was not necessary because his
26 testimony was adequately set forth in his written report. Id.

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28 ¹ He was not served with the incident report a second time. (Doc. 15-1 at 32)

² It appears that Waller also stated that, “inmate Terry never assaulted the staff.” (Doc. 15-1 at 32)

1 In considering the evidence, the DHO found that the weight of the evidence established that
2 Petitioner assaulted Ramos. (Doc. 15-1 at 23) The DHO considered the fact that Ramos now felt that
3 Petitioner had “suffered enough” but determined this opinion was entitled to little weight and that the
4 written account provided by Ramos at the time of the incident was entitled to great weigh. Id.
5 Coupled with the corroborating statement of the witness-officer, Helling, and the video of the incident
6 showing Petitioner push Ramos’ hand away during the search, the DHO found Petitioner guilty of the
7 offense and assessed a loss of 27 days credit and other sanctions. Id. at 35.

8 Petitioner appealed the determination. (Doc. 1 at 33-34) In the appeal, Petitioner raised
9 several claims. One claim was that Hayes did not testify at the hearing that he saw on the video
10 Petitioner push Ramos’ hand away during the pat down search. Id. at 34. He asserted that the DHO
11 made up this testimony. Id. Petitioner also claimed that he was not served with the incident report nor
12 made aware that it could be used as evidence. Id. He also claimed that the DHO ignored the statement
13 from Ramos that the disciplinary proceeding should be dismissed. Id. Finally, he asserted that the
14 rehearing should not have been conducted by the same DHO who held the initial hearing because the
15 DHO was biased. Id.

16 The Regional Director, Juan Castillo, denied the appeal. (Doc. 1 at 36) Castillo noted that the
17 DHO considered the new statement from Ramos but that the DHO was entitled to afford this statement
18 little weight. Id. Likewise, Castillo rejected the claim that Hayes did not testify as described by the
19 DHO noting, “we found no evidence to support your claim.” Id. Rather, Castillo noted, “your staff
20 representative stated during the DHO hearing that video evidence shows you pushing staff’s hand
21 away, during a pat search. Such behavior is consistent with an assault.” Id. Finally, Castillo reported
22 that Petitioner’s other claims “had been investigated and determined to be without merit.”³ Id.

23 **III. Discussion**

24 **A. Jurisdiction**

25 A federal prisoner may challenge his confinement under via a petition for writ of habeas
26 corpus, if he contends it violates the Constitution or federal law or treaty. 28 U.S.C. § 2241(c)(3);

27 ³ Petitioner filed a further appeal to the General Counsel of the BOP. (Doc. 1 at 37-40) It was denied by operation of law.
28 (Doc. 15 at 3)

1 Williams v. Taylor, 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his due
2 process rights while held as a federal prisoner in Atwater, California and that he suffered a loss of
3 credits which impacts the duration of his sentence. Thus, the Court has subject matter jurisdiction and
4 venue is proper. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 494–95 (1973);
5 Brown v. United States, 610 F.2d 672, 677 (9th Cir.1980).

6 **B. Claims**

7 In this action, Petitioner raises two basic claims. First, he claims that his due process rights
8 were violated because the BOP failed to give inmates notice that their waistbands could be search
9 during a pat down search. (Doc. 1 at 6-7, 13-14) Second, he claims he was deprived of due process
10 because, in essence, the DHO failed to come to the correct decision, the DHO misrepresented the
11 content of Hayes’s testimony and because the DHO was biased. (Doc. 1 at 7-8, 15-17)

12 **1. The Court lacks habeas jurisdiction related to whether the BOP provided**
13 **notice about how officers would conduct pat down searches.**

14 Petitioner cites to no authority that supports his claim that the BOP must provide him advance
15 notice of how searches will occur. He fails to provide any legal authority that, even if advance notice
16 was required, that this issue would invoke the Court’s habeas jurisdiction.

17 As recited above, a habeas petitioner may invoke this Court’s jurisdiction as to claims that his
18 custody violates the United States Constitution or federal law or treaty. 28 U.S.C. § 2241 (c)(1), (3).
19 The petitioner may not challenge a condition of his confinement—namely, the manner in which
20 officers conduct pat down searches or whether the BOP must give advance notice of the manner in
21 which officers will conduct searches—in a section 2241 petition. The proper mechanism for a
22 prisoner seeking to challenge the conditions of his confinement is an action under Bivens v. Six
23 Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). *See also*, e.g.,
24 Nostratis v. Surgue, 2009 WL 462732 at *1 (E.D.Cal. Feb.23, 2009) (claim inmate is entitled to
25 transfer to a different facility may not be raised in a § 2241 proceeding); Evans v. U.S. Penitentiary,
26 2007 WL 4212339 at *1 (E.D.Cal. Nov. 27, 2007) (no habeas relief under § 2241 related to claims
27 regarding a transfer and inadequate medical care).

28 Moreover, as pointed out by Respondent, the Ninth Circuit has long held that pat down

1 searches—even those including an inmate’s groin—do not violate the Constitution. Grummett v.
2 Rushen, 779 F.2d 491, 495 (9th Cir. 1985). Here, of course, the search of Petitioner attempted by
3 Ramos was much less intrusive than that in Grummett. Moreover, notably, Petitioner’s witness—
4 inmate Waller—specifically testified that when the guard told Petitioner he would be searched,
5 “Petitioner Inmate Terry cooperated with staff in the search. **Inmate Terry loosened his belt to**
6 **assist the staff in the search.**” (Doc. 15-1 at 23, emphasis added) Thus, there is no evidence
7 Petitioner was unaware that his waistband could be searched. In any event, the fact that the BOP did
8 not specifically tell Petitioner that guards may search his waistband does not give rise to habeas
9 jurisdiction. Thus, the Court recommends the claim be **DISMISSED**.

10 **2. The DHO did not violate Petitioner’s due process rights**

11 **a. Due Process requirements**

12 Prisoners are not entitled to full constitutional rights given the needs and objectives of the
13 prison. Wolff v. McDonnell, 418 U.S. 539, 555 (1974). Prison disciplinary proceedings likewise
14 reduce the rights to which the inmate is entitled. Id. at 556. Indeed, a prisoner’s due process rights
15 must accommodate the “legitimate institutional needs” of a prison. Bostic v. Carlson, 884 F.2d 1267,
16 1269 (9th Cir.1989), citing Superintendent, etc. v. Hill, 472 U.S. 445, 454–455 (1984).

17 As a result, a prisoner is entitled to receive: advance written notice of the disciplinary charges
18 at least 24 hours before the hearing; an opportunity—when it does not conflict with institutional safety
19 and correctional goals—to call witnesses and present documentary evidence; and a written statement
20 the evidence the hearing officer relied upon and the reasons supporting the result. Hill, 472 U.S. at
21 454; Wolff, 418 U.S. at 563–567. Finally, due process requires that the decision be supported by
22 “some evidence.” Hill, 472 U.S. at 455.

23 **b. The DHO’s description of Hayes’ testimony is not substantively**
24 **different from Petitioner’s description**

25 Petitioner claims that the DHO misrepresented Sgt. Hayes’ testimony. The DHO reported that
26 Hayes said, “It appeared on the video that inmate Terry pushed the officers [sic] hand away during the
27 pat search.” (Doc. 15-1 at 23) Petitioner claims that Hayes later agreed with Petitioner that the video
28 showed “inmate Terry grab officers [sic] Ramos hand as a result of him placing his hands within his

1 pants.” (Doc. 1 at 16) He claimed also that Hayes said that, “some of these older convicts are not used
2 to these ‘new’ pat frisk.” *Id.* Even if there were admissible evidence that Hayes said this, this
3 statement is not substantively different from that reported by the DHO. Both statements agree that
4 Petitioner stopped the officer from using his hands while he was conducting the pat down search. The
5 Court suspects Petitioner believes that his subjective reason for preventing Ramos’ search, was a
6 viable defense to the discipline, it was not.

7 An assault is a general intent offense⁴, meaning the actor’s state of mind at the time of the act
8 is not relevant. For example, if an inmate lunged at a guard as a joke, the reason the inmate lunged
9 would not be significant; the only significance would be whether when he lunged it reasonably
10 appeared to be aggressive. In short, here, the reason Petitioner grabbed Ramos does not excuse that
11 he, in fact, grabbed Ramos and Ramos understood the act to be aggressive. The Court understands
12 that Petitioner felt surprised⁵ by the manner of the search. However, there is no evidence that
13 Petitioner lacked the ability to control his hands⁶ when he grabbed Ramos in response. Hence, his act
14 was taken voluntarily and intentionally.

15 Based upon the foregoing, it does not appear to the Court that the DHO misstated Hayes
16 statement, though he did not quote Hayes’ statement related to Petitioner’s reasoning for grabbing
17 Ramos’ hand. Again, Petitioner’s reasoning for grabbing Ramos’ hand was irrelevant to the DHO’s
18 determination. Moreover, because even Plaintiff’s version of Hayes’ testimony admits that Petitioner
19 grabbed Ramos, there was no due process violation.

20 **c. The DHO’s decision was supported by some evidence**

21 Petitioner claims that the DHO deprived him of due process, in essence, because Petitioner
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23 ⁴ For example, the Model Jury Instruction reads, “There is a forcible assault when one person intentionally strikes another,
24 or willfully attempts to inflict injury on another, or makes a threat coupled with an apparent ability to inflict injury on
25 another which causes a reasonable apprehension of immediate bodily.” Model Crim. Jury Instr. 9th Cir. 8.3 (2010), Model
26 Crim. Jury Instr. 9th Cir. 8.3 (2010).

27 ⁵ Moreover, seemingly, inmates probably *should* be surprised by search methods otherwise, they could thwart the
28 effectiveness of the searches. Nevertheless, the Court agrees with Petitioner that for the safety of everyone involved,
ideally, officers would instruct and inform the inmate being searched as to what is happening and what will happen next.

⁶ Petitioner repeatedly notes that his action was “involuntary.” However, an involuntary action is one that occurs without
conscious thought such as breathing, suffering a seizure or a reflexive action—such as when a knee kicks up when struck
under the kneecap. An involuntary act is not one that a person learns such as when he strikes out at someone who touches
him in a way he doesn’t like.

1 contends the DHO came to the wrong conclusion. The Court construes this argument as a claim that
2 the DHO’s decision was not supported by some evidence.

3 First, Petitioner admitted that he “touched” Ramos though he minimized his actions by saying
4 the touching was inadvertent. (Doc. 15-1 at 32) However, this was not a situation where Petitioner
5 did not intend to “touch” Ramos. He fully intended to prevent Ramos from searching his waistband
6 because he felt Ramos’ search of his waistband was inappropriate. However, as discussed above,
7 Petitioner’s intent when actively preventing Ramos from completing the search does not control.

8 Second, Hayes’ testimony—even considering only Petitioner’s version of it—supports that
9 Petitioner purposefully took action to prevent Ramos from searching Petitioner’s waistband by
10 “grab[bing] officers [sic] Ramos hand as a result of him placing his hands within his pants.” (Doc. 1 at
11 16) Even if it mattered whether Petitioner was aware the pat down search required officers to search
12 his waistband, Waller’s testimony supports that Petitioner was aware of the requirement given he
13 “loosened his pants” to allow easier access. Id.

14 Finally, Ramos reported, Petitioner “assaulted me by grabbing and pushing my hand away.”
15 (Doc. 15-1 at 14) The fact that Ramos later felt that Petitioner “had suffered enough” over the
16 incident and felt that the assault charge should be dropped, does not undermine the DHO’s
17 determination. Though the DHO considered Ramos’ new statement, he rejected it as inconsistent with
18 Ramos’ prior written report. In addition, Helling documented that “inmate Khalil became verbally
19 assaultive and shoved the officers [sic] right hand away.” Id. at 22. There is no evidence that
20 Helling’s report was impeached in any way.

21 Considering all of this evidence, the DHO determined Petitioner was guilty of the assault and,
22 in the Court’s evaluation, this determination was supported by “some evidence.” Though the DHO
23 could have made a different decision, that does not mean the DHO erred. Thus, the Court rejects
24 Petitioner’s claim that he suffered a due process violation.

25 **d. There is no evidence the DHO was biased**

26 Petitioner claims that the DHO deprived him of due process because he was biased against
27 him. He claims that the DHO “consistently resisted the encouragement to be fair and impartial.”
28 (Doc. 1 at 17) It appears the primary reason Petitioner believes this is that the DHO found him guilty

1 of the offense and because Petitioner claims the DHO misstated Hayes' testimony. Thus, for the same
2 reasons set forth above, the Court rejects this claim and finds there was no due process violation.

3 **IV. Findings and Recommendation**

4 The Court finds it lacks habeas jurisdiction over the first claim and the other claims fail to
5 demonstrate a due process violation. Therefore, the Court recommends the petition be **DENIED**.⁷

6 This Findings and Recommendation is submitted to the United States District Court Judge
7 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
8 Local Rules of Practice for the United States District Court, Eastern District of California. **Within 21**
9 **days** after being served with a copy, any party may file written objections with the court and serve a
10 copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings
11 and Recommendation." Replies to the objections shall be served and **filed within 10 days** (plus three
12 days if served by mail) after service of the objections. The Court will then review the Magistrate
13 Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file
14 objections within the specified time may waive the right to appeal the District Court's order. Martinez
15 v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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17 IT IS SO ORDERED.

18 Dated: March 29, 2016

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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28 ⁷ In light of these findings and recommendations, the motion to expedite a decision on the merits of the petition (Doc. 18)
is **DISREGARDED** as **MOOT**.