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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

COREY BURGESS,  
  
                    Petitioner,  
                    v.  
  
WARDEN HECTOR ALFONZO RIOS,  
  
                    Respondent.

Case No. 1:12-cv-00544-AWI-SKO-HC  
  
FINDINGS AND RECOMMENDATIONS TO  
DENY THE FIRST AMENDED PETITION FOR  
WRIT OF HABEAS CORPUS (DOC. 7) 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 has been 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 first amended petition (FAP), which was filed on May 3, 2012. After some claims in the FAP were dismissed without leave to amend, Respondent filed an answer to the FAP on November 19, 2012. Petitioner filed a traverse on December 17, 2012.

I. Jurisdiction over the Subject Matter and the Person of the Respondent

Because the petition was filed after April 24, 1996, the

1 effective date of the Antiterrorism and Effective Death Penalty Act  
2 of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.  
3 Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,  
4 1499 (9th Cir. 1997).

5  
6 Petitioner's claims relate to alleged violations of rights  
7 suffered in connection with a prison disciplinary hearing that  
8 resulted in the loss of credits for good conduct time (GCT). A  
9 claim challenging the manner, location, or conditions of a  
10 sentence's execution must be brought under § 2241. Hernandez v.  
11 Campbell, 204 F.3d 861, 864 (9th Cir. 2000). A challenge to the  
12 manner in which a sentence is executed must be brought in a  
13 habeas petition pursuant to 28 U.S.C. § 2241. Tucker v. Carlson,  
14 925 F.2d 330, 331 (9th Cir. 1991) (concerning whether the parole  
15 commission had improperly failed to credit the prisoner's federal  
16 sentence with time served in state custody). Thus, this Court  
17 has jurisdiction over Petitioner's claims, which concern the  
18 execution of his sentence.

19 A petitioner filing a petition for writ of habeas corpus under  
20 28 U.S.C. § 2241 must file the petition in the judicial district of  
21 the petitioner's custodian. Brown v. United States, 610 F.2d 672,  
22 677 (9th Cir. 1990). Petitioner has named as Respondent the warden  
23 of his institution of confinement at the time of the filing of his  
24 petition, an officer who is within this judicial district. Thus,  
25 the Court has subject matter jurisdiction over the petition as well  
26 as jurisdiction over the person of the Respondent.

27 It could be argued that the petition is moot because it appears  
28 from notices of address changes filed in this action that Petitioner

1 has been released from custody. (Docs. 65 & 66, filed August 26,  
2 2014, and March 27, 2015.) Federal courts lack jurisdiction to  
3 decide cases that are moot because the courts' constitutional  
4 authority extends to only actual cases or controversies. Iron Arrow  
5 Honor Society v. Heckler, 464 U.S. 67, 70-71 (1983). Article III  
6 requires a case or controversy in which a litigant has a personal  
7 stake in the outcome of the suit throughout all stages of federal  
8 judicial proceedings and has suffered some actual injury that can be  
9 redressed by a favorable judicial decision. Id.

10 A petition for writ of habeas corpus becomes moot when it no  
11 longer presents a case or controversy under Article III, § 2 of the  
12 Constitution. Wilson v. Terhune, 319 F.3d 477, 479 (9th Cir. 2003).  
13 A petition for writ of habeas corpus is moot where a petitioner's  
14 claim for relief cannot be redressed by a favorable decision of the  
15 court issuing a writ of habeas corpus. Burnett v. Lampert, 432 F.3d  
16 996, 1000-01 (9th Cir. 2005) (quoting Spencer v. Kemna, 523 U.S. 1,  
17 7 (1998)). Mootness is jurisdictional. See, Cole v. Oroville Union  
18 High School District, 228 F.3d 1092, 1098-99 (9th Cir. 2000). Thus,  
19 a moot petition must be dismissed because nothing remains before the  
20 Court to be remedied. Spencer v. Kemna, 523 U.S. 1, 18. A federal  
21 court has a duty to consider mootness on its own motion. Demery v.  
22 Arpaio, 378 F.3d 1020, 1025 (9th Cir. 2004).

23 The passage of a release date does not render a claim regarding  
24 the release date moot when the sentence includes a term of  
25 supervised release. The possibility that the sentencing court might  
26 use its discretion to reduce the term of supervised release under 18  
27 U.S.C. § 3583(e) is sufficient to prevent the petition from being  
28 moot. Tablada v. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008),

1 cert. den. 560 U.S. 964 (2010) (citing Mujahid v. Daniels, 413 F.3d  
2 991, 994-995 (2005)). Here, because Petitioner's sentence includes  
3 a two-year period of supervised release (doc. 36-1, 3), Petitioner's  
4 claims are not moot.

5 II. Procedural Background

6 In the FAP filed on May 3, 2012, Petitioner alleges he is an  
7 inmate of the United States Penitentiary at Atwater, California  
8 (USPA), serving a sentence of seventy-seven months imposed in  
9 September 2008 in the United States District Court for the Eastern  
10 District of Missouri for being a felon in possession of a firearm.  
11 (FAP, 1-2.) Petitioner complains of a finding, made by a  
12 disciplinary hearing officer (DHO) at the Federal Correctional  
13 Institution at Memphis (FCIM), that Petitioner had committed an  
14 assault upon a fellow inmate on September 7, 2009. The finding  
15 resulted in a loss of forty days of GCT credit, placement in the  
16 secured housing unit for five months, and limitations of various  
17 privileges.

18 Petitioner raised the following claims in the FAP: 1) his  
19 rights under the Due Process Clause, Equal Protection Clause, Sixth  
20 Amendment, Eighth Amendment, and various program statements of the  
21 Federal Bureau of Prisons (BOP) were violated by the delay in his  
22 receipt of the report of the DHO, which resulted in obstruction or  
23 extinction of Petitioner's right to appeal the finding; 2) his  
24 rights to due process of law under the Fifth and Fourteenth  
25 Amendments, and his rights under the Sixth Amendment, the Eighth  
26 Amendment's prohibition of cruel and unusual punishment, the Ninth  
27 Amendment, the Thirteenth Amendment, the Fourteenth Amendment, as  
28 well as "CONSPIRACY, DOUBLE PUNISHMENT, SLANDER, MALFEASANCE, FALSE

1 DECLARATION, DELIBERATE INDIFFERENCE, GROSS NEGLIGENCE, AND  
2 DISCRIMINATION" (FAP 6) were violated by the hearing officer's  
3 finding that Petitioner committed the assault because a) there was  
4 evidence contrary to the findings, and the DHO should base a  
5 decision on the greater weight of the evidence, b) the findings were  
6 "prejudice, bias, and impartial" (id. at 6), which appears to  
7 constitute a claim of a biased DHO or disciplinary tribunal, c)  
8 Petitioner was not permitted to present any evidence, d) Petitioner  
9 was not permitted to amend his notice to request staff  
10 representation when it was made clear to him that his full statement  
11 was not submitted with a "515" or "SIS" report (id. at 7), e) his  
12 request for "camera review" was not admissible, and f) his statement  
13 to Lieutenant J. Phillips, an investigator, that Petitioner had been  
14 in a struggle with inmate Young, was coerced; 3) Petitioner's rights  
15 to due process under the Fifth and Fourteenth Amendments, protection  
16 from cruel and unusual punishment under the Eighth Amendment, and  
17 protection from involuntary servitude under the Thirteenth Amendment  
18 were violated by the failure to follow various program statements of  
19 the BOP which require full review of the findings, keeping of  
20 records of the hearing and supporting documents in central files,  
21 and hearing by three staff members instead of two; 4) Petitioner's  
22 rights under the Fifth, Sixth, Eight, Ninth, Thirteenth, and  
23 Fourteenth Amendments as well as "CONSPIRACY" (id. at 9) were  
24 violated by a conspiracy among the investigating officer, Lieutenant  
25 J. Phillips, and the warden, associate warden, Captain Phil Roberts,  
26 and Lieutenant J. Elam at FCIM, when a) Petitioner was deceived by  
27 Lt. Phillips' statement that Petitioner was not being referred for  
28 prosecution or being charged with an assault, b) Petitioner's

1 statement was not included in a report, nor was there any mention of  
2 how Young's injuries were inflicted, how Petitioner incurred a  
3 scratch on his face, or of the use of any weapon, c) various program  
4 statements concerning the qualifications and certifications of  
5 the investigating officer and the duty of an investigating  
6 officer to provide a report, read charges, and state the reason  
7 for any delay were disregarded, and d) Lieutenant S. Plunkett  
8 undertook a second investigation but refused to record  
9 Petitioner's statement, and unspecified evidence was overlooked.

10       Petitioner seeks monetary relief for settlement of his claim on  
11 each level of appeal; an injunction or declaration that detention in  
12 the United States Prison system is arbitrary, unlawful, and  
13 unconstitutional; injunctive relief against transfer, detention,  
14 destruction of files, and staff interference and retaliation; and  
15 surrender of all evidence related to the incident report, including  
16 the full names of all staff involved; expungement of the incident  
17 report and all subsequent incident reports; restoration of  
18 Petitioner's good conduct credits, all points, and his former  
19 custody classification; dismissal of close supervision; and transfer  
20 or release to a residential drug abuse program. (FAP at 11.)

21       On September 17, 2012, the Court dismissed many of Petitioner's  
22 claims without leave to amend, including 1) Petitioner's claims  
23 concerning conditions of confinement, including Petitioner's  
24 complaints concerning conspiracy, retaliation, slander, deliberate  
25 indifference, gross negligence, discrimination, deceptive statements  
26 concerning the authorities' intentions concerning prosecution or  
27 charges, and limitations on various privileges in prison; 2)  
28 Petitioner's requests for relief related to the conditions of

1 confinement, including monetary and injunctive relief concerning  
2 staff interference and retaliation, orders concerning the possession  
3 of evidence relating to the incident report, changes in Petitioner's  
4 classification points and custody classification, termination of  
5 close supervision, and transfer or release to a residential drug  
6 abuse program; 3) Petitioner's claims based on violations of program  
7 statements of the BOP (e.g., the failure to include Petitioner's  
8 statement in a report, a delay in Petitioner's  
9 receipt of the DHO's report, the extent of the BOP's review of  
10 the findings, the manner in which records of the disciplinary  
11 hearing were stored in the central files, the identity and  
12 qualifications of the staff members who heard the violation, the  
13 reading of charges, and a statement of the reasons for delay); and  
14 4) Petitioner's claims that the delay in his receipt of the report  
15 of the disciplinary hearing officer (DHO) violated his rights under  
16 the Equal Protection Clause and the Sixth, Eighth, Ninth, and  
17 Thirteenth Amendments. (Doc. 22.) Thus, this Court addresses only  
18 the remaining claims in the FAP.

19 The Court notes that Petitioner may be attempting to raise new  
20 claims in the traverse, such as Petitioner's entitlement to money  
21 damages, as well as the BOP's response in administrative appellate  
22 proceedings, its replies to Petitioner's requests pursuant to the  
23 Freedom of Information Act for his central file, and its placement  
24 decisions concerning Petitioner. (Doc. 41, 2-4, 15, 22.) It is  
25 improper to raise substantively new issues or claims in a traverse,  
26 and a court may decline to consider such matters. To raise new  
27 issues, a petitioner must obtain leave to file an amended petition  
28 or additional statement of grounds. Cacoperdo v. Demosthenes, 37

1 F.3d 504, 507 (9th Cir. 1994), cert. den., 514 U.S. 1026 (1995).

2 The Court here has previously limited the scope of the  
3 pleadings and has further declined to permit Petitioner to amend the  
4 FAP. (Docs. 22, 62.) Because the new matters are beyond the scope  
5 of the pleadings and are not properly before the Court, the Court  
6 declines to consider any new matters set forth in the traverse.

7 III. Factual Background

8 On November 16, 2009, Officer Phillips reported that on  
9 September 7, 2009, immediately after Officer Jones had heard noise  
10 in a cell, Jones observed Petitioner coming from the direction of  
11 the cell with a small scratch on his nose. Jones reported that the  
12 inmate of the cell was found on the floor of the cell, bleeding from  
13 his face. (Doc. 36-1, 7, 17.) The inmate sustained serious  
14 injuries, including a large open wound above the left brow,  
15 lacerations of the upper lip, and swelling of the left cheek; the  
16 left eye was swollen shut, and one tooth was knocked out. The  
17 inmate was transported to a hospital, where he underwent surgery for  
18 an orbital floor fracture. (Id. at 7, 21-22.) Petitioner also  
19 sustained abrasions to the knuckles of his hand that were  
20 inconsistent with his claim of a weight having fallen on his hand  
21 but consistent with a physical altercation. (Id.) At the hearing  
22 held before the DHO on November 24, 2009, Petitioner maintained that  
23 the injuries were sustained in a fair fight in which Petitioner was  
24 fighting for his life. (Id. at 6-7.)

25 The DHO considered memoranda from Officers Elam, Jones, and  
26 Garrett, who observed the pertinent events, alerted the institution,  
27 and helped secure the area and perform body searches of the inmates.  
28 (Doc. 36-1 at 12, 16.) The DHO considered medical reports of



1 injuries sustained by Petitioner and the victim, and the victim's  
2 identification of Petitioner as the person who assaulted him without  
3 any provocation. (Doc. 36-1, 7-8, 12, 16.) The DHO considered  
4 Petitioner's statement and concluded it was unlikely the victim had  
5 sought to fight Petitioner when the victim was unclothed in  
6 preparation for a shower and unprotected, and the DHO determined  
7 that the account of a fair fight was inconsistent with the physical  
8 injuries. (Id. at 8.) The DHO found that the preponderance of the  
9 evidence sustained the charge. The DHO's report was rewritten on  
10 February 25, 2011, to take the place of a previous report that  
11 apparently was lost in handling. The rewritten report was delivered  
12 to the inmate on March 2, 2011. (Id. at 9.)

13 IV. Violation of Due Process Resulting from Late Delivery  
14 of the DHO's Report

15 Petitioner alleges he suffered a violation of his right to due  
16 process of law from the delayed delivery of the DHO's report, which  
17 resulted in his loss of the right of appeal.

18 A. Legal Standards

19 For relief to be granted under 28 U.S.C. § 2241, Petitioner  
20 must demonstrate he is "in custody in violation of the  
21 Constitution or laws or treaties of the United States." 28 U.S.C.  
22 § 2241(c) (3). "A necessary predicate for the granting of federal  
23 habeas relief [to a petitioner] is a determination by the federal  
24 court that [his or her] custody violates the Constitution, laws, or  
25 treaties of the United States." Rose v. Hodges, 423 U.S. 19, 21  
26 (1975) (citing 28 U.S.C. § 2241).

27 Procedural due process requires that where the government has  
28 made good time subject to forfeiture only for serious misbehavior,

1 prisoners subject to a loss of good-time credits must be given  
2 advance written notice of the claimed violation, a right to call  
3 witnesses and present documentary evidence where it would not be  
4 unduly hazardous to institutional safety or correctional goals, and  
5 a written statement of the finder of fact as to the evidence relied  
6 upon and the reasons for disciplinary action taken. Wolff v.  
7 McDonnell, 418 U.S. 539, 563-64 (1974). If the inmate is  
8 illiterate, or the issue is so complex that it is unlikely that the  
9 inmate will be able to collect and present the evidence necessary  
10 for an adequate comprehension of the case, the inmate should also  
11 have access to help from staff or a sufficiently competent inmate  
12 designated by the staff. However, confrontation, cross-examination,  
13 and counsel are not required. Wolff, 418 U.S. at 568-70.

14 In addition to the minimal standards of procedural due process  
15 set forth above, where good time credits are a protected liberty  
16 interest, the decision to revoke credits must be supported by some  
17 evidence in the record. Superintendent v. Hill, 472 U.S. 445, 454  
18 (1985). The Court in Hill stated:

19 We hold that the requirements of due process are satisfied  
20 if some evidence supports the decision by the prison  
21 disciplinary board to revoke good time credits. This  
22 standard is met if "there was some evidence from which the  
23 conclusion of the administrative tribunal could be  
24 deduced..." United States ex rel. Vajtauer v. Commissioner  
25 of Immigration, 273 U.S., at 106, 47 S.Ct., at 304.  
26 Ascertaining whether this standard is satisfied does not  
27 require examination of the entire record, independent  
28 assessment of the credibility of witnesses, or weighing of  
the evidence. Instead, the relevant question is whether  
there is any evidence in the record that could support the  
conclusion reached by the disciplinary board. See ibid.;  
United States ex rel. Tisi v. Tod, 264 U.S. 131, 133-134,  
44 S.Ct. 260, 260-261, 68 L.Ed. 590 (1924); Willis v.  
Cicccone, 506 F.2d 1011, 1018 (CA8 1974).

1 Superintendent v. Hill, 472 U.S. at 455-56. The Constitution does  
2 not require that the evidence logically preclude any conclusion  
3 other than the conclusion reached by the disciplinary board; there  
4 need only be some evidence to ensure there was some basis in fact  
5 for the decision. Superintendent v. Hill, 472 U.S. at 457.

6 A failure to meet a prison guideline regarding a disciplinary  
7 hearing does not alone constitute a denial of due process. See  
8 Bostic v. Carlson, 884 F.2d 1267, 1270 (9th Cir. 1989). To  
9 establish a denial of due process of law, prejudice is generally  
10 required. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)  
11 (proceeding pursuant to 28 U.S.C. § 2254); see also Tien v. Sisto,  
12 Civ. No. 2:07 cv-02436-VAP (HC), 2010 WL 1236308, at \*4 (E.D.Cal.  
13 Mar. 26, 2010) (while neither the United States Supreme Court nor  
14 the Ninth Circuit Court of Appeals has spoken on the issue, numerous  
15 federal Courts of Appeals, as well as courts in this district, have  
16 held that a prisoner must show prejudice to state a habeas claim  
17 based on an alleged due process violation in a disciplinary  
18 proceeding, and citing Pilgrim v. Luther, 571 F.3d 201, 206 (2d Cir.  
19 2009); Howard v. United States Bureau of Prisons, 487 F.3d 808, 813  
20 (10th Cir. 2007); Piggie v. Cotton, 342 F.3d 660, 666 (7th Cir.  
21 2003); Elkin v. Fauver, 969 F.2d 48, 53 (3d Cir. 1992); Poon v.  
22 Carey, no. Civ. S 05 0801 JAM EFB P, 2008 WL 5381964, \*5 (E.D.Cal.  
23 Dec. 22, 2008); and Gonzalez v. Clark, no. 1:07 CV 0220 AWI JMD HC,  
24 2008 WL 4601495, at \*4 (E.D.Cal. Oct. 15, 2008)); see also Smith v.  
25 United States Parole Commission, 875 F.2d 1361, 1368-69 (9th Cir.  
26 1989) (requiring a petitioner in a § 2241 proceeding who challenged  
27 the government's delayed compliance with a procedural regulation  
28 concerning the appointment of counsel before a record review in

1 parole revocation proceedings to demonstrate prejudice to be  
2 entitled to habeas relief); Standlee v. Rhay, 557 F.2d 1303, 1307-08  
3 (9th Cir. 1977) (the burden is on a parolee to demonstrate that  
4 failure to permit a witness's live testimony at a revocation hearing  
5 was so prejudicial as to violate due process).

6 B. Analysis

7 The procedural protections provided for by Wolff did not  
8 include a mandatory appeal of prison disciplinary findings. Thus,  
9 Petitioner has not shown that the delay in his receipt of the DHO's  
10 report violated his constitutional rights. Further, Petitioner  
11 himself alleges his problem with the progress of his administrative  
12 appeal was based on the failure to obtain an extension of time to  
13 appeal, which was due to Petitioner's being in transit between  
14 institutions and being physically separated from his legal property.  
15 (FAP, doc. 7, 4-5.) There is no showing that the timing of  
16 Petitioner's receipt of the DHO's decision resulted in any prejudice  
17 to Petitioner.

18 Accordingly, it will be recommended that Petitioner's due  
19 process claim concerning delayed receipt of a DHO decision be  
20 denied.

21 V. Due Process Violation Based on the DHO's Finding

22 Petitioner alleges he suffered a due process violation when the  
23 DHO found he had committed the assault because there was some  
24 evidence that supported a contrary finding, and the weight of the  
25 evidence actually supported Petitioner's innocence.

26 In determining whether some evidence of the violation supported  
27 the finding, the Court does not make its own assessment of the  
28 credibility of witnesses or reweigh the evidence; however, the Court

1 must ascertain that the evidence has some indicia of reliability  
2 and, even if meager, "not so devoid of evidence that the findings of  
3 the disciplinary board were without support or otherwise arbitrary."  
4 Cato v. Rushen, 824 F.2d 703, 704-05 (9th Cir. 1987) (quoting  
5 Superintendent v. Hill, 472 U.S. 445, 457 (1985)). Evidence that  
6 has been evaluated and found to constitute "some evidence" supportive  
7 of various findings includes the report of a prison guard who saw  
8 several inmates fleeing an area after an assault on another inmate  
9 when no other inmates were in the area, Superintendent v. Hill, 472  
10 U.S. 456-57; and the statement of a guard that the inmate had  
11 admitted a theft to supplement his income, coupled with  
12 corroborating evidence, Bostic v. Carlson, 884 F.2d 1267, 1270 (9th  
13 Cir. 1989).

14 Here, the reports of the officers' observations at the time of  
15 the assault, the documented injuries, and the victim's statement to  
16 the investigating officer constituted some evidence to support the  
17 finding that Petitioner assaulted another inmate. Accordingly, it  
18 will be recommended that the Court deny Petitioner's due process  
19 claim based on the weight of the evidence.

#### 20 VI. Biased Tribunal

21 Petitioner alleges the hearing officer was biased against him.

22 A fair trial in a fair tribunal is a basic requirement of due  
23 process that applies in prison disciplinary proceedings. In re  
24 Murchison, 349 U.S. 133, 136 (1955); Wolff v. McDonnell, 418 U.S. at  
25 570-71. Fairness requires an absence of actual bias and of the  
26 probability of unfairness. In re Murchison, 349 U.S. at 136. Bias  
27 may be actual, or it may consist of the appearance of partiality in  
28 the absence of actual bias. Stivers v. Pierce, 71 F.3d 732, 741

1 (9th Cir. 1995). A showing that the adjudicator has prejudged, or  
2 reasonably appears to have prejudged, an issue is sufficient.  
3 Kenneally v. Lungren, 967 F.2d 329, 333 (9th Cir. 1992). There is a  
4 presumption of honesty and integrity on the part of decision makers  
5 which may be overcome by evidence of a risk of actual bias or  
6 prejudgment based on special facts and circumstances. Withrow v.  
7 Larkin, 421 U.S. 35, 46-47, 58 (1975).

8 The mere fact that a decision maker denies relief in a given  
9 case or has denied relief in the vast majority of cases does not  
10 demonstrate bias. Stivers v. Pierce, 71 F.3d at 742. Unfavorable  
11 judicial rulings alone are generally insufficient to demonstrate  
12 bias unless they reflect such extreme favoritism or antagonism that  
13 the exercise of fair judgment is precluded. Liteky v. United  
14 States, 510 U.S. 540, 555 (1994). A committee of correctional  
15 officers and staff, acting with the purpose of taking necessary  
16 disciplinary measures to control inmate behavior within acceptable  
17 limits, was sufficiently impartial to conduct disciplinary hearings  
18 and impose penalties, including revocation of good time credits.  
19 Wolff v. McDonnell, 418 U.S. at 570-71.

20 Here, there is no basis to conclude that the DHO had, or even  
21 appeared to have, any prior involvement or improper connection with  
22 Petitioner' case. There is no evidence of any predisposition or  
23 prejudgment. See 28 C.F.R. § 541.8; Clutchette v. Procunier, 497  
24 F.2d 809, 820 (9th Cir. 1974), mod. 510 F.2d 613, rev'd. on other  
25 grounds, Baxter v. Palmigiano, 425 U.S. 308 (1976); see also Wolff,  
26 418 U.S. at 592-93 (Marshall, J., concurring). Petitioner has not  
27 shown any basis for rebuttal of the presumption of fairness.

28

1           Accordingly, it will be recommended that the Court deny  
2 Petitioner's claim that he suffered a due process violation from a  
3 biased tribunal.

4           VII. Inability to Present Evidence

5           Petitioner alleges that he was not permitted to present any  
6 evidence.

7           A. Witnesses

8           The right to call witnesses and to present evidence at a  
9 disciplinary hearing is limited by the prison authority's discretion  
10 concerning undue hazards to institutional safety or correctional  
11 goals. Wolff v. McDonnell, 418 U.S. at 563-64. The right to call  
12 witnesses is circumscribed by the necessary mutual accommodation  
13 between institutional needs and objectives and the provisions of the  
14 Constitution that are of general application. The Supreme Court has  
15 noted that a disciplinary authority may decline to allow an inmate  
16 to call a witness for irrelevance, lack of necessity, or hazards  
17 presented in individual cases. Baxter v. Palmigiano, 425 U.S. 308,  
18 321 (1976). A prison disciplinary hearing officer's decision that  
19 an inmate's request to call witnesses may properly be denied as  
20 irrelevant, unnecessary, unduly prolonging the hearing, or  
21 jeopardizing prison safety, is entitled to deference from the Court.  
22 See, Wolff v. McDonnell, 418 U.S. at 563-64; Ponte v. Real, 471 U.S.  
23 491, 497-98 (1985); Neal v. Shimoda, 131 F.3d 818, 831 (9th Cir.  
24 1997); Zimmerlee v. Keeney, 831 F.2d 183, 187 (9th Cir. 1987).

25           Here, there is no showing of any denial of the qualified right  
26 to present witnesses. Petitioner's own statement was considered by  
27 the DHO. Petitioner did not request witnesses. (Doc. 36-1, 12.)  
28 Although Petitioner refused to sign any acknowledgments,

1 correctional officers signed documents indicating that Petitioner  
2 was advised of his right to present witnesses on November 18, 2009,  
3 six days before the DHO hearing; he not only failed to request  
4 witnesses, but also affirmatively waived his right to present  
5 witnesses. (Id. at 6, 13-15.)

6 Accordingly, Petitioner has not shown that any denial of due  
7 process resulted from an absence of witnesses. It will thus be  
8 recommended that Petitioner's due process claim based on inability  
9 to present witnesses be denied.

10 B. Documentary Evidence

11 Petitioner alleges that his right to present documentary  
12 evidence was denied when the DHO declined Petitioner's request for  
13 copies of videographic security records.

14 On November 19, 2009, the DHO communicated with the  
15 investigating officers to determine if any video evidence had been  
16 reviewed. The response indicated that due to the amount of time  
17 that could be spent reviewing the tape in a particular recording  
18 system, no video evidence was available, and none had been  
19 considered in connection with the charges. (Doc. 36-1 at 30-31.)

20 As set forth above, there is only a qualified right or interest  
21 in presenting a defense in a disciplinary proceeding. See Wolff,  
22 418 U.S. at 556, 563-72. Petitioner has set forth no basis to  
23 render additional protections necessary in this case. Because there  
24 was no video evidence available for the DHO to consider, Petitioner  
25 cannot demonstrate a denial of due process based on the DHO's  
26 alleged failure to consider such video evidence.

27 Accordingly, it will be recommended that the Court deny  
28 Petitioner's due process claim based on the inability to present



1 documentary evidence.

2 VIII. Statement Made to Officer Phillips

3 Petitioner contends his statement to investigating officer  
4 Phillips was coerced as the product of deception because before  
5 Petitioner made his statement, Phillips allegedly informed  
6 Petitioner that he was not being referred for prosecution or being  
7 charged with a 101 assault. (Doc. 7, 7-9.) Respondent does not  
8 address this contention.

9 There is no showing of any action on the part of the officer or  
10 any circumstance attending the investigation that would cause  
11 Petitioner's will to be overborne in making the statement.  
12 Considering all the circumstances attending Petitioner's statement  
13 to Officer Phillips, Petitioner has not shown that his statement was  
14 involuntary and thus a denial of due process. See Dickerson v.  
15 United States, 530 U.S. 428, 434 (2000). Accordingly, it will be  
16 recommended that Petitioner's due process claim concerning an  
17 involuntary statement be denied.

18 IX. Incomplete Investigation

19 Petitioner contends the investigation of the matter was  
20 incomplete because Petitioner's statement was not included, and  
21 unspecified evidence was overlooked. (Doc. 7, 10.) The DHO's  
22 report of the hearing, however, clearly reflects that Petitioner's  
23 statement was considered. Petitioner's vague and unsupported  
24 assertions concerning the failure to include unspecified evidence  
25 are not sufficient to warrant relief.

26 Allegations in a petition that are vague, conclusory, patently  
27 frivolous or false, or palpably incredible are subject to summary  
28 dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

1 Accordingly, it will be recommended that that Court deny  
2 Petitioner's claim concerning an incomplete investigation.

3 X. Recommendations

4 Based on the foregoing, it is RECOMMENDED that:

- 5 1) The petition for writ of habeas corpus be DENIED; and  
6 2) Judgment be ENTERED for Respondent.

7 These findings and recommendations are submitted to the United  
8 States District Court Judge assigned to the case, pursuant to the  
9 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local  
10 Rules of Practice for the United States District Court, Eastern  
11 District of California. Within thirty (30) days after being served  
12 with a copy, any party may file written objections with the Court  
13 and serve a copy on all parties. Such a document should be  
14 captioned "Objections to Magistrate Judge's Findings and  
15 Recommendations." Replies to the objections shall be served and  
16 filed within fourteen (14) days (plus three (3) days if served by  
17 mail) after service of the objections. The Court will then review  
18 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).  
19 The parties are advised that failure to file objections within the  
20 specified time may result in the waiver of rights on appeal.  
21 Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing  
22 Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

23  
24 IT IS SO ORDERED.

25 Dated: May 26, 2015

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