

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK JORDAN.

Petitioner,

V.

ANDRE MATEVOUSIAN,

Respondent.

No. 1:15-cv-01895-LJO-SKO HC

FINDINGS AND RECOMMENDATION THAT COURT DISMISS PETITION AS MOOT

(Doc. 19)

Petitioner Mark Jordan is a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. On May 20, 2016, Respondent Andre Matevousian, Warden of the U.S. Penitentiary, Atwater, California, moved to dismiss the petition as moot. Having carefully reviewed the record as a whole and applicable law, the undersigned recommends that the Court dismiss the petition as moot.

I. Procedural and Factual Background

While watching a softball game at the U.S. Penitentiary-Lee, Pennington Gap, Virginia, on July 10, 2010, Petitioner saw two fellow inmates, Paul Weakley and Kenneth Mills, grappling on the ground. Weakley held a shank (homemade knife); Mills was unarmed. Petitioner concluded that Mills could not break free without exposing himself to being stabbed. Petitioner walked up to Mills and Weakley, placed his foot on the wrist of the hand in which Weakley held

1 the shank, and told the other prisoners to break it up. Mills and Weakley disengaged, and
2 Petitioner retreated.

3 Staff was unaware of the incident until a staff member encountered Weakley as he was
4 walking from the softball field to the gym and observed that Weakley had sustained injuries
5 consistent with his having been involved in an altercation. Staff discovered Mills near the
6 volleyball court with injuries consistent with his having been involved in an altercation. Both
7 Weakley and Mills were escorted to Health Services where each was assessed. Weakley was
8 referred for outside treatment. Mills refused treatment at an outside hospital despite being
9 advised of his need for further treatment.

10 Staff review of video surveillance tapes following the incident revealed that the altercation
11 began when Mills attacked Weakley from behind. The inmates fell to the ground, fighting over
12 the weapon that was in Weakley's possession when Petitioner intervened.

13 On July 11, 2010, SIS Tech B. Calton filed an incident report charging Petitioner with
14 assaulting with serious injury. When the Unit Disciplinary Committee ("UDC") met on July 14,
15 2010, Petitioner denied assaulting anyone. On July 16, 2010, the UDC referred the matter to a
16 Disciplinary Hearing Officer ("DHO") with the recommendation that Petitioner lose 41 days of
17 good conduct time and loss of commissary privileges for 180 days.

18 The DHO heard the matter on July 27, 2010. Petitioner pleaded guilty, stating
19 "Everything is true. I walked up to Weakley because he had a knife. I put my foot on his arm,
20 wanting Mills to break away. I wasn't trying to assault anyone." Doc. 1 at 30. Petitioner waived
21 witnesses Mills, Weakley, and Nicholas Vasiliades, both verbally and by signing the notice of
22 disciplinary hearing. The DHO found that Petitioner violated Inmate Disciplinary Policy code
23 224, Assaulting Without Serious Injury. He wrote:

24 Though you denied this prohibited act, the DHO based his decision,
25 in part, on your statement, that you put your foot on his
(Weakley's) arm, wanting Mills to break away. Making your
26 behavior the unwanted touching of another, along with the
reporting officer's account of the incident, in which your behavior
27 was captured via recorded VICON surveillance, depicting you walk
to where inmates Weakley and Mills were engaged in an
altercation, then placing your foot on Weakley's arm and upper
28 area, rendering Weakley unable to defend himself. You freely

1 chose to intervene into what was clearly an armed confrontation,
2 during which serious injuries had been inflicted. Your assertion
3 that you only wanted Mills to break away lacks credibility. The
4 DHO concludes that you intervened upon determining that Weakley
5 was effectively defending himself against Mills' assault. You
6 clearly demonstrated that you knew your actions and behavior to be
7 assaultive by both leaving the area to avoid identification and by
8 failing to notify staff of your involvement.

9 Doc. 1 at 31.

10 The DHO sanctioned Petitioner with (1) disallowance of 27 days' good conduct time, (2)
11 15 days of disciplinary segregation (suspended for 90 days), and (3) loss of visiting privileges for
12 120 days.

13 On November 1, 2010, Petitioner filed a petition for writ of habeas corpus pursuant to 28
14 U.S.C. § 2241 in the U.S. District Court for the Western District of Virginia. *See Jordan v. Zych*,
15 2011 WL 2447937 (W.D. Va. June 15, 2011) (Civil No. 7:10-cv-00491). Petitioner asserted
16 twenty grounds for habeas relief. *Id.* Respondent moved to dismiss the petition. *Id.* In a written
17 opinion, the Court dismissed Petitioner's due process claims as lacking merit (*Id.* at *4), rejected
18 Petitioner's claims that prison officials violated his due process rights by violating various federal
19 procedural provisions (*Id.* at *6), dismissed Petitioner's claims under 42 U.S.C. § 2000bb-1(a)
(*Id.*), and denied Petitioner's motion to transfer the petition to the district court for the district in
20 which Petitioner then was incarcerated (*Id.*). On June 15, 2011, the Virginia district court
21 dismissed the petition. *Id.* at *7.

22 On May 4, 2011, the Bureau of Prisons issued an amended DHO report. In the report, the
23 DHO further clarified his rejection of Petitioner's claim that he sought only to permit Mills to
24 escape the stand-off:

25 Your assertion that you only wanted Mills to break away lacks
26 merit in deciding the issue without question. The DHO considered
27 your staff representative[']s statement he observed your behavior
from recorded video to be exactly as your statement given, but your
behavior to step on Weakley's arm constituted an assault regardless
of your intention. While it is unclear to the DHO who initiated the
altercation and who was the aggressor based on the injuries both
sustained, your involvement [sic] to involve yourself in it by
stepping on one of the participant[']s arm could not be overlooked
or ignored under any circumstance.

28 Doc. 1 at 39.

The DHO added:

The action on the part of any inmate to assault or attempt to assault another person, whether or not serious injury is inflicted, threatens the health, safety, and welfare of not only the inmate involved, but that of all other staff and inmates. Inmates observing the assault may become involved thus creating a larger disturbance for staff to control. Assaults make it difficult to provide security for all concerned.

Doc. 1 at 40.

After Petitioner exhausted his administrative appeals of the 2011 determination, he filed a petition for writ of habeas corpus in the U.S. District Court for the Middle District of Pennsylvania. *Jordan v. Bledsoe* (M.D.Pa. No. 1:11-cv-01836 WWC).

The incident report was reissued on September 27, 2012, and a new DHO hearing was held on October 9, 2012. The DHO presented the written, sworn statement of Weakley, who wrote, “I really don’t have anything to say about this. The video shows everything.”¹ Doc. 1 at 52. Petitioner disputed the authenticity of Weakley’s statement to prison officials and attempted unsuccessfully to introduce an earlier, contradictory affidavit prepared by Weakley, which the DHO rejected as unverifiable. Petitioner also submitted statements signed by 18 inmates, who claimed to have been eyewitnesses to the incident and to have seen Petitioner do nothing more than attempt to break up the fight, and who attested to Petitioner’s leadership, intelligence, and good reputation. Petitioner also made a statement, which was summarized as follows:

[B]asically, I won't argue with the video, but I do take issue with the statement that Weakley could not defend himself. These guys were tussling on the ground. Weakley had a knife. Mills was unarmed. I walked over to break up the altercation and stepped on Weakley's arm so he could not use the knife. I told Mills to get up and told him not to worry about the knife. He did so. I then let Weakley up. I didn't know Mills or Weakley at the time.

Doc. 1 at 54.

On May 1, 2013, Petitioner moved to voluntarily dismiss the 2011 petition without prejudice in lieu of filing an amended petition to address the 2012 determination. *Jordan v. Bledsoe*, Doc. 37 (M.D.Pa. No. 1:11-cv-01836 WWC).

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¹ Mills was not called to testify because he had died since the altercation.

1 Petitioner pursued his administrative appeals as to the DHO's 2012 determination. On
2 December 30, 2014, the Acting Administrator of National Inmate Appeals, denied Petitioner's
3 motion for expunction and found the DHO decision to have been reasonable and supported by the
4 evidence submitted at the hearing. The Administrator rejected Petitioner's claim that his due
5 process rights were violated and found the sanctions imposed to have been commensurate with
6 the level of the offense and in compliance with policy. On December 21, 2015, Petitioner filed
7 the above-captioned petition for writ of habeas corpus.

8 On January 29, 2016, the BOP notified petitioner of its intent to conduct a second
9 rehearing on January 29, 2016. Despite Mills' earlier death, Petitioner refused to sign the notice
10 of disciplinary hearing (Form BPS 294) after officials refused to arrange to call Mills as a
11 witness.

12 On February 8, 2016, Petitioner mailed a motion for a temporary restraining order to
13 prohibit the Bureau of Prisons from conducting a rehearing of the disciplinary action that is the
14 subject of the above-captioned petition.

15 Following a delay to permit Petitioner to arrange to present Vasiliades as a witness, the
16 rehearing was held on February 10, 2016. Vasiliades provided a statement; Weakley's full
17 witness statement on behalf of Petitioner was presented. Petitioner stated, "I intervened to break
18 up the incident. I did put my foot on Weakley's hand to break it up. I have written statement
19 [sic] as well. Thank you for giving me a fair shot. I got all my evidence in." Doc. 19-4 at 2. The
20 DHO prepared an extensive discussion of the evidence presented and the reasoning applied in
21 evaluating it. "Based on the greater weight of the evidence (the officer's written report, the
22 supporting memo, the video and the statements of [Petitioner], the inmate witnesses statements
23 [and] the staff representative review of the video," the DHO found that Petitioner violated Code
24 224, assaulting a person without serious injuries.

25 This Court received Petitioner's motion for a temporary restraining order on February 11,
26 2016. On February 25, 2016, the Court denied as moot Petitioner's motion for a temporary
27 restraining order.

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1 On March 28, 2016, Petitioner filed an administrative appeal of the 2016 rehearing with
2 the BOP Regional Director. The Regional Director denied relief on April 14, 2016.

3 On May 20, 2016, contending that the above-captioned petition was moot, Respondent
4 filed the pending motion to dismiss for lack of jurisdiction.

5 **II. Petition Must Be Dismissed as Moot**

6 Federal courts' constitutional jurisdiction extends only to actual cases or controversies.
7 *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70-71 (1983). The case or controversy
8 requirement, articulated in Article II, Section 2 of the U.S. Constitution, prevents federal courts
9 from deciding "questions that cannot affect the rights of litigants in the case before them." *Lewis*
10 *v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (internal quotation marks omitted). A
11 petitioner for writ of habeas corpus becomes moot when it no longer presents a case or
12 controversy. *Wilson v. Terhune*, 319 F.3d 477, 479 (9th Cir. 2003). When a federal court cannot
13 redress a party's actual injury with a favorable judicial decision, the case is moot and must be
14 dismissed. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). "Mootness is jurisdictional." *Burnett v.*
15 *Lampert*, 432 F.3d 996, 1000-01 (9th Cir. 2005).

16 In support of this motion to dismiss, Respondent has submitted documentation of the 2016
17 rehearing of the charge against Petitioner. In the ensuing determination, the DHO (1) addressed
18 Petitioner's claims concerning his ability to present witnesses on his behalf and (2) more fully
19 articulated the reasoning by which Petitioner's admitted action in intervening in Mills' and
20 Weakley's fight constituted assault. The 2016 determination again finds that Petitioner violated
21 Code 224, assaulting a person without serious injuries, and imposes the same penalties.

22 The 2016 determination renders the 2012 determination moot. Because Petitioner's loss
23 of good conduct time is now based on the 2016 determination, addressing his claims relating to
24 the 2012 determination will not provide meaningful relief. When, as a result of intervening
25 events, a court cannot provide effectual relief in favor of the petitioner, the court should dismiss
26 the proceeding as moot. *Calderon v. Moore*, 518 U.S. 149, 150 (1996).

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1 **III. Certificate of Appealability**

2 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a
3 district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*
4 *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a
5 certificate of appealability is 28 U.S.C. § 2253, which provides:

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7 (a) In a habeas corpus proceeding or a proceeding under section 2255
8 before a district judge, the final order shall be subject to review, on appeal, by
9 the court of appeals for the circuit in which the proceeding is held.

10 (b) There shall be no right of appeal from a final order in a proceeding
11 to test the validity of a warrant to remove to another district or place for
12 commitment or trial a person charged with a criminal offense against the
13 United States, or to test the validity of such person's detention pending
14 removal proceedings.

15 (c) (1) Unless a circuit justice or judge issues a certificate of
16 appealability, an appeal may not be taken to the court of appeals from—

17 (A) the final order in a habeas corpus proceeding in which the
18 detention complained of arises out of process issued by a State court; or

19 (B) the final order in a proceeding under section 2255.

20 (2) A certificate of appealability may issue under paragraph (1)
21 only if the applicant has made a substantial showing of the denial of a
22 constitutional right.

23 (3) The certificate of appealability under paragraph (1) shall
24 indicate which specific issues or issues satisfy the showing required by
25 paragraph (2).

26 If a court denies a habeas petition, the court may only issue a certificate of appealability
27 "if jurists of reason could disagree with the district court's resolution of his constitutional claims
28 or that jurists could conclude the issues presented are adequate to deserve encouragement to
29 proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

30 Although the petitioner is not required to prove the merits of his case, he must demonstrate
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1 "something more than the absence of frivolity or the existence of mere good faith on his . . .
2 part." *Miller-El*, 537 U.S. at 338.

3 Reasonable jurists would not find the Court's determination that Petitioner is not entitled
4 to federal habeas corpus relief to be debatable or wrong, or conclude that the issues presented
5 required further adjudication. Accordingly, the Court declines to issue a certificate of
6 appealability.

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8 **IV. Conclusion and Recommendation**

9 The undersigned recommends that the Court dismiss the Petition for writ of habeas corpus
10 and decline to issue a certificate of appealability.

11 These Findings and Recommendations will be submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty**
13 (**30**) **days** after being served with these Findings and Recommendations, either party may file
14 written objections with the Court. The document should be captioned "Objections to Magistrate
15 Judge's Findings and Recommendations." Replies to the objections, if any, shall be served and
16 filed within **fourteen (14) days** after service of the objections. The parties are advised that failure
17 to file objections within the specified time may constitute waiver of the right to appeal the District
18 Court's order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v.*
19 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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21 IT IS SO ORDERED.

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23 Dated: October 11, 2016

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25 /s/ *Sheila K. Oberlo*
26 UNITED STATES MAGISTRATE JUDGE