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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL D. FOOTE,

Petitioner,

No. 2:08-cv-1029 LKK JFM (PC)

vs.

MIKE KNOWLES,

Respondent.

ORDER AND

FINDINGS & RECOMMENDATIONS

_____/

Petitioner is a state prisoner presently housed at California Medical Facility (“CMF”) proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On January 22, 1979, petitioner began an indeterminate term of seven years to life for first degree murder, in violation of California Penal Code § 187. In the petition before the court, petitioner contends his due process rights were violated by the California Department of Corrections (“CDCR”) when it refused to reissue and rehear a 2005 disciplinary hearing. Petitioner claims his liberty interest in parole was affected because the Board of Parole Hearings considered the disciplinary violation in denying parole on September 12, 2006.

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1 Review was denied on March 12, 2008. (Ans., Ex. 6.)

2 Petitioner filed a petition for writ of habeas corpus in this court on May 12, 2008.

3 Respondent filed an answer on July 14, 2008. Petitioner filed a traverse on July 24, 2008.

4 ANALYSIS

5 I. Standards for a Writ of Habeas Corpus

6 Federal habeas corpus relief is not available for any claim decided on the merits
7 in
8 state court proceedings unless the state court's adjudication of the claim:

9 (1) resulted in a decision that was contrary to, or involved an
10 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

11 (2) resulted in a decision that was based on an unreasonable
12 determination of the facts in light of the evidence presented in the
State court proceeding.

13 28 U.S.C. § 2254(d).

14 Under section 2254(d)(1), a state court decision is “contrary to” clearly
15 established United States Supreme Court precedents if it applies a rule that contradicts the
16 governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially
17 indistinguishable from a decision of the Supreme Court and nevertheless arrives at different
18 result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406
19 (2000)).

20 Under the “unreasonable application” clause of section 2254(d)(1), a federal
21 habeas court may grant the writ if the state court identifies the correct governing legal principle
22 from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the
23 prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ
24 simply because that court concludes in its independent judgment that the relevant state-court
25 decision applied clearly established federal law erroneously or incorrectly. Rather, that
26 application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75

1 (2003) (it is “not enough that a federal habeas court, in its independent review of the legal
2 question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”) The court looks
3 to the last reasoned state court decision as the basis for the state court judgment. Avila v.
4 Galaza, 297 F.3d 911, 918 (9th Cir. 2002).

5 II. Petitioner’s Motions

6 A. Motion to Change Name of Respondent

7 On September 15, 2010, petitioner filed a motion to change the name of
8 respondent from “Mike Knowles” to “Matthew Cate,” Secretary of the CDCR.

9 A petitioner seeking habeas relief must name the state officer having custody of
10 him as the respondent to the petition. Rule 2(a) of the Rules Governing Section 2254 Cases;
11 Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme
12 Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having custody of the prisoner is
13 the warden of the prison because the warden has “day to day control over” the prisoner.
14 Brittingham v. United States, 982 F.2d 378, 279 (9th Cir. 1992). Rule 25 of the Federal Rules
15 of Civil Procedure allows the successor of a public office to automatically be substituted as a
16 party.

17 Petitioner’s request is partially granted. The current warden of CMF, where
18 petitioner is presently housed, is Kathleen Dickinson, not Matthew Cate. The Clerk of the Court
19 will be directed to modify the name of the respondent.

20 B. Motion to Expand the Record

21 On November 5, 2010, petitioner field a motion for expansion of the record. For
22 the reasons set forth in this court’s October 4, 2010 order, this motion is denied.

23 C. Motion for an Evidentiary Hearing

24 Petitioner seeks an evidentiary hearing. Under 28 U.S.C. § 2254(e)(2), a district
25 court presented with a request for an evidentiary hearing must first determine whether a factual
26 basis exists in the record to support a petitioner’s claims and, if not, whether an evidentiary

1 hearing “might be appropriate.” Baja v. Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999); see
2 also Earp v. Ornoski, 431 F.3d 1158, 1166 (9th Cir. 2005); Insyxiengmay v. Morgan, 403 F.3d
3 657, 669-70 (9th Cir. 2005). “[W]here the petitioner establishes a colorable claim for relief and
4 has never been afforded a state or federal hearing on this claim, we must remand to the district
5 court for an evidentiary hearing.” Earp, 431 F.3d at 1167 (citing Insyxiengmay, 403 F.3d at 670;
6 Stankewitz v. Woodford, 365 F.3d 706, 708 (9th Cir. 2004); Phillips v. Woodford, 267 F.3d 966,
7 973 (9th Cir. 2001)). In other words, a hearing is required if: “(1) [the defendant] has alleged
8 facts that, if proven, would entitle him to habeas relief, and (2) he did not receive a full and fair
9 opportunity to develop those facts[.]” Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004).

10 Here, petitioner’s request does not establish that these requirements are satisfied
11 such that an evidentiary hearing would be appropriate. Accordingly, the court denies petitioner’s
12 request.

13 D. Motion to Show Cause

14 Petitioner filed a motion to show cause. Petitioner provides no details as to the
15 nature of this motion. Thus, this motion is denied.

16 E. Motion to Appoint Counsel

17 Petitioner has requested the appointment of counsel. There currently exists no
18 absolute right to appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d
19 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of counsel at
20 any stage of the case “if the interests of justice so require.” See Rule 8(c), Fed. R. Governing
21 § 2254 Cases. In the present case, the court does not find that the interests of justice would be
22 served by the appointment of counsel. Therefore, this motion is denied.

23 III. Petitioner’s Claim

24 Petitioner claims his due process rights were violated when the CDCR failed to
25 reissue a RVR and rehear the charge of mutual combat. Examination of the petition and the
26 traverse convinces the court that petitioner’s claim is, in fact, composed of three sub-claims: (1)

1 petitioner's due process rights were violated because he did not receive a revised RVR and a
2 rehearing on the mutual combat charge; (2) the CDCR violated its own regulations when it
3 issued a modification order rather than an order to reissue and rehear the disciplinary violation;
4 and (3) the reports in petitioner's file concerning the Battery charge and/or the mutual combat
5 charge should be expunged.

6 The last reasoned rejection of this claim is the decision of the Riverside County
7 Superior Court:

8 Pursuant to California Rule of Court 4.551, the petition is denied due to
9 the failure of the petition to state a prima facie factual case supporting petitioner's
10 release. While the petition states a number of factual conclusions, these broad
conclusions are not backed up with specific details, and/or are not supported by
the record in this case.

11 (Ans., Ex. 2.)

12 Here, the Superior Court reached a decision on the merits and concluded that
13 petitioner failed to state a prima facie case. The Superior Court, however, did not provide
14 reasoning to support its conclusion. The California Court of Appeal and the California Supreme
15 Court also denied petitioner's habeas petitions without analysis. Accordingly, the court will
16 conduct an independent review of the record to ascertain whether the state court's denial was
17 contrary to or involved an unreasonable application of Supreme Court precedent.

18 In a prison disciplinary hearing the concept of due process exists because an
19 inmate has a liberty interest in having good time or earned time credited against his sentence.
20 Once that good time or earned time has been credited against the sentence, the sentence has been
21 shortened. The inmate has a liberty interest in being released on the earlier date. See Wolff v.
22 McDonnell, 418 U.S. 539 (1974). Thus, good time that has been credited against a sentence
23 cannot be taken away without affording due process. Pursuant to Wolff, an inmate facing
24 disciplinary proceedings which may result in the loss of good time/behavioral credits must
25 receive: (1) advance written notice of the disciplinary charges; (2) an opportunity, when
26 consistent with institutional safety and correctional goals, to call witnesses and present

1 documentary evidence in his defense; and (3) a written statement by the factfinder of the
2 evidence relied upon and the reasons for the disciplinary action. Id. at 563-67.

3 Additionally, the findings of the prison disciplinary decision-maker must be
4 supported by some evidence in the record. Superintendent v. Hill, 472 U.S. 445, 454 (1985).
5 There must be “some evidence” from which the conclusion of the decision-maker could be
6 deduced. Id. at 455. An examination of the entire record is not required nor is an independent
7 assessment of the credibility of witnesses or weighing of the evidence. Id. The relevant question
8 is whether there is any evidence in the record that could support the conclusion reached by the
9 disciplinary decision-maker. Id.

10 A. Revised RVR and Rehearing

11 Petitioner argues that he was denied due process because the CDCR failed to
12 reissue a RVR to reflect the mutual combat charge and failed to rehear the matter. Upon review,
13 the undersigned finds that petitioner’s assertion is without merit.

14 Following a disciplinary hearing on a Battery charge, wherein petitioner admitted
15 to fighting another prisoner, petitioner was found guilty and assessed a loss of good time credits.
16 On appeal, petitioner alleged due process violations and requested that the Battery charge be
17 reduced to mutual combat. At the second level of review, the charge was reduced to mutual
18 combat, but no due process violations were found. Petitioner appealed to the Director’s level of
19 appeal, seeking expungement of reports related to the Battery charge. At that level, petitioner
20 was erroneously informed that the matter was to be “reissued and reheard.”

21 Petitioner has seized upon this language in seeking expungement of not only all
22 material related to both charges of Battery and mutual combat, but also the guilty finding for
23 mutual combat. Petitioner’s insistence continues despite being informed repeatedly that the
24 Director’s level of review in his initial appeal mischaracterized the action taken at the second
25 level of review – that is, the second level of review issued a modification order, not an order to
26 reissue and rehear.

1 The court notes that petitioner does not contend that the finding of guilt for the
2 mutual combat charge is erroneous or without “some evidence.” See Hill, 472 U.S. at 455. In
3 fact, in his initial appeal, petitioner affirmatively sought a reduction of the Battery charge to
4 mutual combat. “Some evidence” also exists in the form of petitioner’s admission at the
5 disciplinary hearing that he participated in mutual combat and health records showing that the
6 other prisoner sustained injuries. (See Pet., Ex. A at 3, 7-11.)

7 Therefore, petitioner’s claim that his due process rights were violated by the
8 CDCR for its failure to reissue the RVR and rehear the matter is without merit because a reissue
9 and rehearing was never ordered.

10 B. Reissue / Rehearing v. Modification Order

11 Petitioner also argues that even if a modification order was issued, he should have
12 received an order to reissue / rehear the matter pursuant to 15 Cal. Code of Regs. § 3084.5(h).
13 This claim is not cognizable on habeas review. A writ of habeas corpus is available under 28
14 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts.
15 Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985). Petitioner’s claims regarding his
16 prison appeals is not grounded in federal law and is therefore not cognizable in this federal
17 habeas corpus proceeding. Petitioner has no federal constitutional right to have his prison
18 appeals addressed in any particular manner. Cf. Franzen v. Brinkman, 877 F.2d 26 (9th Cir.
19 1989) (errors in a state post-conviction review proceeding are not addressable through federal
20 habeas corpus).

21 C. Expungement

22 Lastly, petitioner requests expungement of material related to the Battery and/or
23 the mutual combat charges.

24 Under Docken v. Chase, 393 F.2d 1024, 1028-29 (9th Cir. 2004), the question
25 before the court is whether expungement of these records is “likely” to accelerate petitioner’s
26 eligibility for parole, Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989), or “could

1 potentially affect the duration of his confinement.” Docken, 393 F.3d at 1031. As a matter of
2 law, it is well established that a disciplinary violation may affect the duration of an inmate’s
3 confinement. Pursuant to CCR section 2402(a), a prisoner that “will pose an unreasonable risk
4 of danger to society if released from prison” is not suitable for release from prison, regardless of
5 the amount of time served. In considering suitability, the Board is required to consider “all
6 relevant, reliable information available,” including “involvement in other criminal misconduct
7 which is reliably documented” and “behavior before, during, and after the crime.” 15 Cal. Code
8 Regs. § 2402(b). The circumstances tending to show unsuitability include whether “[t]he
9 prisoner has engaged in serious misconduct in prison or jail.” Id. § 2402(c)(6). Likewise,
10 institutional behavior is given additional consideration amongst the circumstances tending to
11 show suitability for parole because “[i]nstitutional activities indicate an enhanced ability to
12 function within the law upon release.” Id. § 2402(d)(9). The unsuitability and suitability factors
13 are “set forth as general guidelines” to be considered by the parole board. Id. § 2402(c), (d).

14 For the reasons set forth above, petitioner is not entitled to expungement of the
15 mutual combat conviction or any materials related thereto, and any reference to the mutual
16 combat conviction by the Board of Parole Hearings is not improper.

17 Insofar as petitioner is requesting that the material related to the Battery charge be
18 expunged, this request should be denied because petitioner has not shown that expungement of
19 these materials is likely to accelerate his eligibility for parole or potentially affect the duration of
20 his confinement. See Bostic, 884 F.2d at 1269; Docken, 393 F.3d at 1031. The record reflects
21 that at the parole hearing on September 12, 2006, the parole board relied only on the mutual
22 combat conviction in denying parole. (See Pet., Ex. I at 22-23, 36-40, 48, 53, 64-65.) The
23 record also reflects that petitioner repeatedly admitted his involvement in the fight. (See id. at
24 22-23, 37-38.) The only reference to the Battery charge occurred when the parole board referred
25 to petitioner’s appeals in the matter, which were before them at the hearing, whereupon
26 petitioner argued that the CDCR should have reissued and reheard the disciplinary violation.

1 (Id. at 36-40.) Ultimately, the parole board denied parole in reliance on numerous factors,
2 including “a recent serious 115 disciplinary report . . . for mutual combat.” (See id. at 59-66.)

3 Petitioner’s supplemental exhibits also show that only petitioner’s mutual combat
4 conviction was considered by the parole board at subsequent hearings on October 6, 2008 and
5 November 6, 2009. (See Ex. K (Doc. No. 15) at 63, 72-76, 110; Ex L (Doc. No. 18) at 100-01.)
6 Notably, petitioner was granted parole at the November 2009 hearing. (See Ex. L at 95.) The
7 parole grant, however, was reversed on April 5, 2010 by Governor Arnold Schwarzenegger
8 relying, in part, on the mutual combat charge. (See Ex. M (Doc. No. 19) at 9.)

9 Petitioner thus fails to demonstrate that the state court’s determination was
10 contrary to clearly established federal law or resulted in an unreasonable determination of the
11 facts. Accordingly, petitioner is not entitled to federal habeas relief.

12 For all of the foregoing reasons, petitioner’s application for a writ of habeas
13 corpus should be denied. Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the
14 United States District Courts, “[t]he district court must issue or a deny a certificate of
15 appealability when it enters a final order adverse to the applicant.” Rule 11, 28 U.S.C. foll.
16 § 2254. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant
17 has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).
18 The court must either issue a certificate of appealability indicating which issues satisfy the
19 required showing or must state the reasons why such a certificate should not issue. Fed. R. App.
20 P. 22(b). The undersigned finds that petitioner has not made a substantial showing and thus
21 recommends that a certificate of appealability should not issue.

22 Accordingly, IT IS HEREBY ORDERED that

- 23 1. Petitioner’s motion to change the name of the respondent is granted. The
24 Clerk of the Court is directed to change the name of respondent to Kathleen Dickinson;
- 25 2. Petitioner’s motion for expansion of the record is denied;
- 26 3. Petitioner’s motion for an evidentiary hearing is denied;

- 1 4. Petitioner’s order to show cause is denied;
2 5. Petitioner’s motion to appoint counsel is denied; and

3 IT IS HEREBY RECOMMENDED that

- 4 1. Petitioner’s application for a writ of habeas corpus be denied; and
5 2. The district court should decline to issue a certificate of appealability.

6 These findings and recommendations are submitted to the United States District
7 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
8 days after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
11 objections shall be filed and served within fourteen days after service of the objections. The
12 parties are advised that failure to file objections within the specified time may waive the right to
13 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 DATED: November 29, 2010.

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17 UNITED STATES MAGISTRATE JUDGE

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