

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

MARVIN DEAN NOOR,

Petitioner,

No. 2:08-cv-1656-WBS-JFM (HC)

vs.

M. MARTELL, Warden (A),

Respondent.

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_/

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a 2006 prison disciplinary conviction for inappropriate conduct in the visiting room pursuant to which he suffered a thirty day loss of behavior credits and was placed on no-visit status for ninety days from July 23, 2006 to October 22, 2006. Petitioner raises three claims in his application. First, he contends that prison officials improperly classified the disciplinary as a serious offense, contrary to applicable rules and regulations. Second, petitioner contends that the conviction for a “serious” rules violation is not supported by “some evidence.” Petition for Writ of Habeas Corpus, filed July 18, 2008, at 4. Finally, petitioner contends that respondent improperly withheld exculpatory evidence, namely, a twenty-three minute DVD recording; petitioner contends that he was given a redacted copy of the video recording, that the senior hearing officer “viewed substantially more

1 of the video recording” than was provided to petitioner to prepare his defense, and that the only  
2 “reasonable inference” that can be drawn from the failure to provide petitioner with the full  
3 recording is that the unredacted portion contains exculpatory evidence. Id. at 5.

#### 4 FACTS<sup>1</sup>

5 In 1980, petitioner plead guilty to first-degree murder and was  
6 sentenced to life imprisonment with the possibility of parole.  
7 (Habeas Pet. ¶ 4.) Petitioner has been eligible for parole since  
8 1993 but has been denied parole six times, including the most  
9 recent denial in October 2005. (Resp’t’s Mem. Ex. B.) In July  
10 2006, petitioner was charged with the rules violation of  
11 “Inappropriate Conduct in the Visiting Room” based on his alleged  
12 “excessive contact” with his wife during a supervised visit. (Id.  
13 Ex. A at 3-4.) Although petitioner denied the charges, he was  
14 found guilty and, as a consequence, was placed on “no-visit” status  
15 for ninety days and assessed thirty days “loss of behavioral credit.”  
16 (Id.) After exhausting his administrative and state judicial  
17 remedies, petitioner filed this habeas action, seeking to expunge  
18 the 2006 prison disciplinary action and findings from his record.  
19 (Habeas Pet. ¶¶ 10-13.)

20 Order filed July 2, 2009, at 1-2.

#### 21 ANALYSIS

##### 22 I. Standards for a Writ of Habeas Corpus

23 Federal habeas corpus relief is not available for any claim decided on the merits in  
24 state court proceedings unless the state court’s adjudication of the claim:

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

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

28 U.S.C. § 2254(d).

Under section 2254(d)(1), a state court decision is “contrary to” clearly  
established United States Supreme Court precedents if it applies a rule that contradicts the

---

<sup>1</sup> The are taken from the July 2, 2009 Order of the district court denying respondent’s  
motion to dismiss.

1 governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially  
2 indistinguishable from a decision of the Supreme Court and nevertheless arrives at different  
3 result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406  
4 (2000)).

5 Under the “unreasonable application” clause of section 2254(d)(1), a federal  
6 habeas court may grant the writ if the state court identifies the correct governing legal principle  
7 from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the  
8 prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ  
9 simply because that court concludes in its independent judgment that the relevant state-court  
10 decision applied clearly established federal law erroneously or incorrectly. Rather, that  
11 application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75  
12 (2003) (internal citations omitted) (it is “not enough that a federal habeas court, in its  
13 independent review of the legal question, is left with a ‘firm conviction’ that the state court was  
14 ‘erroneous.’”)

15 The court looks to the last reasoned state court decision as the basis for the state  
16 court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court  
17 reaches a decision on the merits but provides no reasoning to support its conclusion, a federal  
18 habeas court independently reviews the record to determine whether habeas corpus relief is  
19 available under section 2254(d). Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

## 20 II. Petitioner’s Claims

21 As noted above, petitioner raises three challenges to the disciplinary conviction.  
22 First, he contends that prison officials improperly classified the rules violation report at issue as a  
23 “serious” violation, in contravention of controlling rules and regulations. Petitioner contends that  
24 “nowhere” in the rules violation report was it alleged that petitioner’s actions “‘breached’ or were  
25 a ‘hazard to’ facility security,” a necessary prerequisite to classification of a rules violation as  
26 serious, and that respondent didn’t make these allegations until more than a year after the

1 disciplinary proceedings had concluded. Second, he contends that he was not provided with a  
2 complete video tape recording of the alleged incident that led to the disciplinary proceedings, but  
3 only with a redacted version, and that the evidence he was provided prior to the hearing is  
4 insufficient to support the conviction. Finally, petitioner contends that the senior hearing officer  
5 “viewed substantially more of the video recording” than was provided to petitioner to prepare his  
6 defense, that the unredacted portion was improperly withheld from him, and that the only  
7 “reasonable inference” that can be drawn from the failure to provide petitioner with the full  
8 recording is that the unredacted portion contains exculpatory evidence. Petition at 5.

9           The last reasoned state court rejection of petitioner’s claim is the March 5, 2008  
10 order of the Amador County Superior Court denying petitioner’s petition for a writ of habeas  
11 corpus. The state court found “some evidence” to support both the finding that petitioner was  
12 guilty of the rules violation and the classification of the offense as serious, as follows:

13           California Code of Regulations, title 15, section 3175 provides,  
14 in pertinent part:

15           (a) Inmates and visitors shall comply with all laws, regulations, and  
16 institution/facility procedures. Any violation may result in denial,  
17 termination, suspension, or revocation, of visiting as described in  
18 section 3176...(e) At the beginning and end of each visit, inmates  
19 and their visitors may briefly embrace and/or kiss...(g) Except as  
20 provided in this section, no other bodily contact shall be permitted.

21           The respondent produced a videotape of the incident in  
22 question. The videotape depicts the petitioner and his wife in a  
23 visiting area. They are seated knee to knee. On the videotape,  
24 Petitioner fondled and kissed his wife’s left breast area; fondled his  
25 wife’s breasts with his left hand with her hair somewhat blocking  
26 the view; touched his wife’s breast area with his left index finger;  
kissed his wife’s chest between her breasts; and fondled his wife’s  
breasts with his left hand while kissing her breast area. The  
videotape also depicts the petitioner and his wife engaged in  
prolonged kissing.

          The conduct depicted in the videotape constitutes “some  
evidence” to support the hearing officer’s adjudication of guilty for  
violation of California Code of Regulations, title 15, section 3175.  
The petitioner and his wife engaged in “excessive contact” within  
the meaning of said regulation.

////

1 California Code of Regulations, title 15, section 3315 provides,  
2 in pertinent part:

3 (a) Inmate misconduct reported on a CDC Form 115 shall be  
4 classified as serious if: (2) It involves any one or more of the  
5 following circumstances: (B) A breach of or hazard to facility  
6 security....(3) Section rules violations include but are not limited  
7 to:....(N) Mail or visiting room violations presenting a threat as  
8 described in (2) above.

9 In this instance, the excessive conduct constituted a threat of  
10 breach of or hazard to facility security, as the conduct could have  
11 resulted in the passing of contraband between the parties.  
12 Therefore, the violation was appropriately classified as serious,  
13 pursuant to California Code of Regulations, title 15, section 3315.

14 Ex. B to Answer to Petition for Writ of Habeas Corpus, filed September 28, 2009, In re: Marvin  
15 Noor, No. 07HC0867 (Mar 5, 2008), slip op. at 2-3.

16 As noted above, petitioner raises three claims in his petition: he contends that  
17 prison officials improperly classified the disciplinary as a serious offense, contrary to applicable  
18 rules and regulations; that the conviction for a “serious” rules violation is not supported by “some  
19 evidence”; and that respondent improperly withheld exculpatory evidence, namely, a twenty-  
20 three minute DVD recording.

21 Habeas corpus is unavailable for alleged error in the interpretation or application  
22 of state law. Middleton, 768 F.2d at 1085; see also Lincoln v. Sunn, 807 F.2d 805, 814 (9th Cir.  
23 1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986). To the extent that petitioner  
24 claims that the disciplinary was improperly classified as a serious offense under applicable state  
25 regulations it is based solely on an interpretation of state law and is not cognizable in this  
26 proceeding.

27 The United States Supreme Court has held that “[w]here a prison disciplinary  
28 hearing may result in the loss of good time credits, ... the inmate must receive: (1) advance  
29 written notice of the disciplinary charges; (2) an opportunity ... to call witnesses and present  
30 documentary evidence in his defense; and (3) a written statement by the factfinder of the  
31 evidence relied on and the reasons for the disciplinary action.” Superintendent, Mass.

1 Correctional Inst. v. Hill, 472 U.S. 445, 454 (1985) (citing Wolff v. McDonnell, 418 U.S. 539,  
2 563-67 (1974)). In addition, the decision must be supported by “some evidence.”  
3 Superintendent v. Hill, id.

4           After review of the record herein, including the video recording of the visit  
5 between petitioner and his wife that led to the charges, the court finds that the state court’s  
6 determination that there was some evidence to support the disciplinary conviction for excessive  
7 contact, and the finding that the offense was a serious violation within the meaning of applicable  
8 regulations, is fully supported by the record and that the state court’s rejection of petitioner’s  
9 federal due process claim was based on a reasonable determination of the facts. Accordingly,  
10 petitioner’s second claim should be denied.

11           Finally, petitioner’s claim that his constitutional rights were violated by  
12 production to him of only a redacted portion of the videotape should be denied. Petitioner’s  
13 assertion that the unredacted portion of the tape must contain exculpatory evidence is entirely  
14 unfounded. This court has reviewed approximately thirteen minutes of the video recording of  
15 petitioner’s visit with his wife<sup>2</sup> and finds that there is no exculpatory evidence in the recording.  
16 The court need not decide whether petitioner should have been provided with a complete copy of  
17 the recording because any alleged error is manifestly harmless.

18           For all of the foregoing reasons, petitioner’s application for a writ of habeas  
19 corpus should be denied. Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the  
20 United States District Courts, “[t]he district court must issue or a deny a certificate of  
21 appealability when it enters a final order adverse to the applicant.” Rule 11, 28 U.S.C. foll. §  
22 2254. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has  
23 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The

---

24  
25 <sup>2</sup> The video shows petitioner and his wife sitting on an outside patio area. They are  
26 shown on the recording from approximately 13:55 to 14:08, after which the video recording  
moves from the patio area to an inside room in the prison and petitioner and his wife are no  
longer part of the recording.

1 court must either issue a certificate of appealability indicating which issues satisfy the required  
2 showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).  
3 For the reasons set forth in these findings and recommendations, petitioner has not made a  
4 substantial showing of the denial of a constitutional right. Accordingly, no certificate of  
5 appealability should issue.

6 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 7 1. Petitioner's application for a writ of habeas corpus be denied; and
- 8 2. The district court decline to issue a certificate of appealability.

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

17 DATED: May 27, 2010.

18  
19   
20 UNITED STATES MAGISTRATE JUDGE

21 12  
22 noor1656.157