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

DAVID WAYNE JOHNSON,

Petitioner,

No. CIV S-10-1568 KJM DAD P

vs.

SWARTHOUT, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding pro se, has filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging a prison disciplinary conviction. On September 16, 2010, the undersigned ordered respondent to file and serve a response to the petition. On November 15, 2010, respondent filed the pending motion to dismiss, arguing that petitioner’s amended petition fails to state a cognizable claim because the challenged prison disciplinary conviction does not affect the legality or duration of petitioner’s confinement. Petitioner has filed an opposition to the motion, and respondent has filed a reply.

BACKGROUND

In January 2008, prison officials charged petitioner with a disciplinary violation for engaging in “conduct which could lead to violence.” According to the rules violation report, petitioner asked a fellow inmate for some ice and he told petitioner to come back later. The two

1 started arguing and petitioner pushed the other prisoner down onto the floor. At petitioner's
2 disciplinary hearing, prison officials found him guilty of the charge and assessed him thirty days
3 loss of time credits. Petitioner successfully challenged the disciplinary conviction through an
4 administrative appeal. Thereafter, prison officials vacated the conviction and reissued and
5 reheard the charge. In April 2009, prison officials found petitioner guilty of the disciplinary
6 charge once more, but they dismissed the rules violation and instead reported petitioner's
7 misconduct in an administrative counseling chrono with no loss of credits. (Am. Pet. at 12.1.-
8 12.3 & Exs. A-D, Resp't's Mot. to Dismiss Ex. 1.)

9 **RESPONDENT'S MOTION TO DISMISS**

10 I. Respondent's Motion

11 Respondent moves to dismiss the pending habeas petition, arguing that petitioner
12 has failed to state a cognizable claim. Specifically, respondent argues that petitioner has not
13 forfeited any time credits as a result of the challenged disciplinary action and therefore cannot
14 show that expunging the disciplinary conviction from his record is likely to accelerate his
15 eligibility for parole. Moreover, respondent argues that any contention by petitioner that a
16 disciplinary conviction could be detrimental to him at future parole hearings is too speculative to
17 serve as the basis for federal habeas corpus relief. (Resp't's Mot. to Dismiss at 3.)

18 II. Petitioner's Opposition

19 In opposition to respondent's motion to dismiss, petitioner argues that his prison
20 disciplinary conviction has affected the duration of his confinement. Specifically, petitioner
21 contends that in June 2010, he appeared before the Board of Parole Hearings ("Board").
22 According to petitioner, the District Attorney sent a letter to the Board that relied on the same
23 disciplinary conviction(s) at issue here to persuade the Board that petitioner was unsuitable for
24 release on parole. (Pet'r's Opp'n to Resp't's Mot. to Dismiss at 2 & Ex. 1.)

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1 III. Respondent's Reply

2 In reply, respondent argues that the District Attorney's letter cited by petitioner is
3 not evidence that the disciplinary conviction at issue in this case was, or will ever be, detrimental
4 to any parole suitability determination in his case. In respondent's view, the District Attorney's
5 letter supports the position that any claim of detriment stemming from this disciplinary
6 conviction is speculative. Respondent argues that the District Attorney's letter listed numerous
7 factors indicating petitioner's unsuitability for parole, including eighteen other prison
8 disciplinary convictions, fourteen administrative counseling chronos, tentative parole plans, an
9 unfavorable psychological evaluation, petitioner's need for more substance abuse treatment and
10 self-help, his need to develop coping skills, his alleged lack of insight, and the nature of his
11 commitment offense. Respondent concludes that because petitioner has not shown that the
12 challenged disciplinary conviction resulted in a loss of time credits or that its expungement
13 would otherwise accelerate his release from prison, he has provided no basis for the granting of
14 federal habeas relief. (Resp't's Reply at 1-2.)

15 ANALYSIS

16 A writ of habeas corpus is the appropriate federal remedy when "a state prisoner is
17 challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a
18 determination that he is entitled to an immediate or speedier release from that imprisonment."
19 Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). "Habeas corpus jurisdiction also exists when a
20 petitioner seeks expungement of a disciplinary finding from his record if expungement is likely
21 to accelerate the prisoner's eligibility for parole." Bostic v. Carlson, 884 F.2d 1267, 1269 (9th
22 Cir. 1989). See also Docken v. Chase, 393 F.3d 1024, 1031 (9th Cir. 2004) ("[W]e understand
23 Bostic's use of the term 'likely' to identify claims with a sufficient nexus to the length of
24 imprisonment so as to implicate, but not fall squarely within, the 'core' challenges identified by
25 the Preiser Court.")

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1 In the court’s experience, a prison disciplinary conviction can and oftentimes does
2 affect the Board’s parole suitability determination. Pursuant to 15 Cal. Code Regs. § 2402(a), a
3 prisoner that “will pose an unreasonable risk of danger to society if released from prison” is not
4 suitable for release from prison, regardless of the amount of time served. In considering a
5 prisoner’s suitability for parole, the Board is required to consider “all relevant, reliable
6 information available,” including “behavior before, during, and after the crime.” Id. § 2402(b).
7 The circumstances tending to show unsuitability include whether “[t]he prisoner has engaged in
8 serious misconduct in prison or jail.” Id. § 2402(c)(6). Likewise, institutional behavior is given
9 additional consideration among the circumstances tending to show suitability for parole because
10 “[i]nstitutional activities indicate an enhanced ability to function within the law upon release.”
11 Id. § 2402(d)(9). The unsuitability and suitability factors are “set forth as general guidelines” for
12 the parole board to consider. Id. § 2402(c), (d).

13 Under the circumstances of this case, the undersigned cannot accept respondent’s
14 contention that petitioner’s due process claims in connection with his prison disciplinary
15 conviction do not pose a proper challenge to the fact or duration of his confinement. This court
16 has reviewed numerous transcripts from California parole hearings at which the Board denies
17 inmates parole due, at least in part, to the presence of one or more prison disciplinary
18 convictions. Moreover, in denying parole the Board consistently advises inmates to become or
19 remain disciplinary free pending their next parole hearing.

20 Here, petitioner’s disciplinary conviction (as well as his underlying misconduct) is
21 the type of relevant information that section 2402(b) requires the Board to consider because it
22 reflects on a prisoner’s behavior “after the crime” and is a possible indicator that the prisoner is
23 unable or unwilling to comply with society’s rules. In this regard, expungement of petitioner’s
24 disciplinary conviction, if warranted, is both “likely” to accelerate his eligibility for parole,”
25 Bostic, 884 F.2d at 1269, and “could potentially affect the duration of [his] confinement.”
26 Docken, 393 F.3d at 1031. See also Hardney v. Carey, No. CIV S-06-0300 LKK EFB, 2011 WL

1 1302147 at *5-8 (E.D. Cal. Mar. 31, 2011) (finding petitioner stated a cognizable claim for
2 habeas corpus relief even though prison officials did not assess him a loss of time credits because
3 expungement of a disciplinary conviction is likely to accelerate his eligibility for parole); Murphy
4 v. Dep't of Corrs. & Rehabilitation, No. C 06-4956 MHP, 2008 WL 111226 at *7 (N.D.Cal. Jan.
5 9, 2008) (habeas corpus jurisdiction is proper over challenge to disciplinary guilty finding
6 because “[a]s a matter of law, it is well established that a disciplinary violation may affect the
7 duration of an inmate’s confinement.”); Drake v. Felker, S-07-0577 JKS, 2007 WL 4404432 at
8 *2 (E.D. Cal. Dec. 13, 2007) (habeas corpus jurisdiction found to exist over a challenge to a
9 disciplinary decision because “a negative disciplinary finding, at least in California, necessarily
10 affects potential eligibility for parole”); Dutra v. Dep't of Corrs. & Rehabilitation, No. C 06-0323
11 MHP, 2007 WL 3306638 at *6 (N.D. Cal. Nov. 6, 2007) (claim seeking expungement of
12 disciplinary conviction cognizable on habeas review because “convictions secured for
13 disciplinary violations in such a proceeding may be a factor in an inmate’s parole consideration
14 hearing”).

15 CONCLUSION

16 Accordingly, IT IS HEREBY RECOMMENDED that:

17 1. Respondent’s November 15, 2010 motion to dismiss (Doc. No. 13) be denied;

18 and

19 2. Respondent be directed to file an answer to petitioner’s amended petition
20 within sixty days. See Rule 4, Fed. R. Governing § 2254 Cases. The answer shall be
21 accompanied by all transcripts and other documents relevant to the issues presented in the
22 petition. See Rule 5, Fed. R. Governing § 2254 Cases.

23 These findings and recommendations are submitted to the United States District
24 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
25 one days after being served with these findings and recommendations, any party may file written
26 objections with the court and serve a copy on all parties. Such a document should be captioned

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
2 shall be served and filed within seven days after service of the objections. The parties are
3 advised that failure to file objections within the specified time may waive the right to appeal the
4 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5 DATED: April 21, 2011.

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9 DALE A. DROZD
10 UNITED STATES MAGISTRATE JUDGE

8 DAD:9
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