

1 *Patterson*, No. B251202, 2014 Cal. App. Unpub. LEXIS 4510, at *4 (June 26, 2014).
2 “[Petitioner] and an accomplice began demanding money. At one point, [Petitioner] pointed
3 a gun at the father’s leg and demanded money. The father said he had none, but offered his
4 semiautomatic gun. After taking the gun and two cell phones, [Petitioner] and the accomplice
5 left the family’s home.” *Id.* Based on these facts, in June 2004, a jury “found [Petitioner]
6 guilty of five counts of home invasion robbery ([California Penal Code (hereinafter, “Penal
7 Code”)] § 211) and one count of possession of a firearm by a felon (§ 12021(a)(1))” and “also
8 found true the allegation that as to the five robbery counts [Petitioner] personally used a
9 firearm. (§ 12022.53(b)).” *People v. Patterson*, 2014 Cal. App. Unpub. LEXIS 4510, at *1.
10 Additionally, “[Petitioner] admitted the truth of the allegation that he had suffered one prior
11 strike conviction pursuant to section 667 (a)(1) and the “Three Strikes” law. (§§ 1170.12(a)-
12 (d), 667(b)-(i)).” *Id.*

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14 On appeal, the California Court of Appeal reduced Petitioner’s aggregate sentence to 43
15 years in state prison. *People v. Patterson*, 2014 Cal. App. Unpub. LEXIS 4510, at 2. Several
16 habeas petitions followed, including a 2008 petition filed in this Court. *See Norice Patterson*
17 *v. Warden*, C.D. Cal. No. CV 08-6459-PA (RC), at Dkt. Nos. 1 (“2008 Petition”), 27 (“2009
18 Final Report and Recommendation”), 28 (2009 Order Adopting Report and
19 Recommendations).

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21 In July 2013, Patterson filed in the trial court a “Motion to Vacate the Judgment.”
22 *People v. Patterson*, 2014 Cal. App. Unpub. LEXIS 4510, at *2. The trial court declined to
23 take any action, and Petitioner appealed. *Id.* The California Court of Appeal dismissed the
24 appeal. *Id.*

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and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned pursuant to Rule 201(b)(2) of the Federal Rules of Evidence).

1 responded to the Court’s May 5, 2020 Order to Show Cause by initiating a separate cause of
2 action—but not by defending his filing of a state habeas petition in this case. Therefore, the
3 findings and conclusions in Judge Stevenson’s Report and Recommendation in this case are
4 correct, and the action may properly be dismissed for failure to prosecute. **This dismissal will**
5 **have no effect on Plaintiff’s related civil rights case that is currently pending.**

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7 **THE PETITION DOES NOT STATE A COGNIZABLE CLAIM**

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9 Because the Court accepts the Magistrate Judge’s conclusion that the action should be
10 dismissed for failure to prosecute, the Court need not also address the arguments in Petitioner’s
11 Objections that, according to Petitioner, support maintaining this habeas action in addition to
12 the civil rights case. However, in the interests of justice, the Court has reviewed Petitioner’s
13 arguments. Specifically, Petitioner asserts that he was charged and prosecuted within the
14 meaning of two conflicting statutes: California Penal Code §§ 1192.7(c) and 667.5(c).
15 (Objections at 2.) This assertion is inconsistent the California Court of Appeal’s description
16 of Petitioner’s underlying conviction, which states that Petitioner was found to have:
17 committed five counts of home invasion robbery in violation of Penal Code § 211; committed
18 one count of possession of a firearm by a felon in violation of Penal Code § 12021(a)(1);
19 personally used a firearm in the commission of the offense pursuant to Penal Code §
20 12022.53(b); and suffered one prior strike conviction pursuant to the “Three Strikes” law
21 (Penal Code §§ 1170.12(a)-(d), 667(b)-(i)).

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23 Nevertheless, Petitioner observes that he was convicted of robbery and, whereas Penal
24 Code § 1192.7(c) includes robbery in a list of crimes defined as “serious,” Penal Code §
25 667.5(c) includes robbery in a list of crimes it defines as “violent.” (Objections at 2.)
26 Petitioner asserts that, given this discrepancy, the CDCR violated his constitutional rights by
27 finding that Petitioner’s convictions for robbery constitute “violent” crimes under Penal Code
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1 § 667.5(c), thereby barring him from consideration for parole under Proposition 57.⁴
2 (Objections at 2-4.) Petitioner asks the Court to apply the “Rule of Lenity” and find that his
3 convictions for robbery (with the firearm enhancement) are, in fact, only “serious” crimes
4 under Penal Code § 1192.7(c), which, he contends, would make him eligible for parole
5 consideration under Propositions 57. (Objections at 3, 4.)
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7 Even if the Court assumes *arguendo* that Petitioner is correct and his multiple robbery
8 convictions involving the use of a firearm are not “violent” felonies that bar parole
9 consideration, Petitioner’s claims are still not cognizable in this habeas action. At best,
10 Petitioner’s success in this case would result in *consideration* under Proposition 57 for earlier
11 release; it would not necessarily result in his actual release from custody. *See Skinner v.*
12 *Switzer*, 562 U.S. 521, 535 n.13 (2011) (“[W]hen a prisoner’s claim would not necessarily
13 spell speedier release, that claim does not lie at the core of habeas corpus and may be brought,
14 if at all, under § 1983.”) (citations and internal quotation marks omitted). Accordingly,
15 Petitioner’s arguments regarding the classification of his underlying conviction as a “violent”
16 offense, thereby barring his eligibility for parole consideration under Proposition 57, are
17 properly brought in his recently initiated civil rights action but do not present a cognizable
18 claim for habeas relief. *See Neal v. Shimoda*, 131 F.3d 818, 824 (9th Cir. 1997) (holding that
19 prisoners’ claim they had been wrongfully classified as sex offenders for purposes of parole
20 eligibility was properly brought under § 1983 because the only benefit from prevailing would
21 be “a ticket to get in the door of the parole board”); *see also Wilkinson v. Dotson*, 544 U.S. 74,
22 82 (2005) (holding that prisoners’ challenges to parole eligibility rules were properly brought
23 under § 1983 because success “at most will speed *consideration* of a new parole application”)
24 (emphasis in original); *see also Suarez v. Sherman*, No. CV 18-6605 JLS (SS), 2019 WL
25 994986, at *1 (C.D. Cal. Feb. 21, 2019) (recognizing that claims under Proposition 57 would
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27 ⁴ In order for a person to be eligible for parole consideration under Proposition 57, that person must not have
28 committed a “violent felony” which the Proposition 57 implementing regulations define as “a crime or enhancement as
defined in subdivision (c) of section 667.5 of the Penal Code.” Cal. Code Regs. tit. 15, § 3490 (2019). The crimes listed
as “violent felonies” in subdivision (c) of section 667.5 include “any robbery.” Cal. Penal Code § 667.5(c)(9).


1 fall under § 1983) (citing *Travers v. People of the State of California*, No. 17-cv-06126-SI,
2 2018 WL 707546, at *3 (N.D. Cal. Feb. 5, 2018)).

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4 For the foregoing reasons, the Court, having conducted a *de novo* review of those
5 portions of the Report to which objections have been stated, accepts the findings and
6 recommendations set forth in the Report and it is ORDERED that the Petition is DISMISSED
7 WITHOUT PREJUDICE.

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9 In addition, pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the
10 United States District Courts, the Court has considered whether a certificate of appealability
11 is warranted in this case. *See* 28 U.S.C. § 2253 (c) (2); *Slack v. McDaniel*, 529 U.S. 473,
12 484-85 (2000). The Court concludes that a certificate of appealability is unwarranted and,
13 thus, a certificate of appealability is DENIED.

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15 LET JUDGMENT BE ENTERED ACCORDINGLY.

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17 DATED: July 14, 2020

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PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

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22 Presented by:

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KAREN L. STEVENSON
25 UNITED STATES MAGISTRATE JUDGE
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