



1 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the state's  
2 procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9<sup>th</sup> Cir. 1990) (using Rule 4 to  
3 evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d  
4 599, 602-03 (9<sup>th</sup> Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state  
5 procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same). Thus,  
6 a respondent can file a motion to dismiss after the court orders a response, and the court should use  
7 Rule 4 standards to review the motion. Id.

8 In this case, Respondent's motion to dismiss is based on failure to state a cognizable federal  
9 claim and failure to exhaust state remedies. Therefore, the Court will review Respondent's motion to  
10 dismiss pursuant to its authority under Rule 4.

11 **B. Failure to State a Cognizable Federal Claim**

12 Respondent contends that the basis for Petitioner's claims, i.e., a due process violation at a  
13 prison disciplinary hearing resulting in loss of good-time credits, is not properly subject to federal  
14 habeas corpus jurisdiction because, as a prisoner serving an indeterminate sentence, Petitioner cannot  
15 establish that the adverse disciplinary finding would "necessarily spell speedier release." (Doc. No.  
16 12.) The Court agrees with Respondent.

17 A federal court may only grant a petition for writ of habeas corpus if the petitioner can show  
18 that "he is in custody in violation of the Constitution . . ." 28 U.S.C. § 2254(a). "Challenges to the  
19 validity of any confinement or to particulars affecting its duration are the province of habeas corpus;  
20 requests for relief turning on circumstances of confinement may be presented in a § 1983 action."  
21 Muhammad v. Close, 540 U.S. 749, 750 (2004) (per curiam). "[The Supreme] Court has long held  
22 that habeas is the exclusive vehicle for claims brought by state prisoners that fall within the core of  
23 habeas, and such claims may not be brought in a § 1983 action." Nettles v. Grounds, 830 F.3d 922,  
24 927 (9<sup>th</sup> Cir. 2016) (citing Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005)). Conversely, if a  
25 "prisoner's claim does not lie at 'the core of habeas corpus,' it may not be brought in habeas corpus . .  
26 . ." Nettles, 830 F.3d at 931 (internal citation omitted) (citing Skinner v. Switzer, 562 U.S. 521, 535 n.  
27 13 (2011)).

28 With respect to prison disciplinary and administrative proceedings, it is established that a

1 constitutional claim concerning the application of rules administered by a prison or penal  
2 administrator that challenges the duration of a sentence is a cognizable claim of being in custody in  
3 violation of the Constitution pursuant to 28 U.S.C. § 2254. See, e.g., Superintendent v. Hill, 472 U.S.  
4 445, 454 (1985) (determining a procedural due process claim concerning loss of time credits resulting  
5 from disciplinary procedures and findings). The Supreme Court has held that challenges to prison  
6 disciplinary adjudications that have resulted in a loss of time credits must be raised in a federal habeas  
7 corpus action and not in a § 1983 action because such a challenge is to the very fact or duration of  
8 physical imprisonment, and the relief sought is a determination of entitlement of immediate or  
9 speedier release. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

10 Nevertheless, it is also established in this circuit that where a successful challenge to a  
11 disciplinary hearing or administrative sanction will not necessarily shorten the overall length of  
12 confinement, then habeas jurisdiction is lacking. Recently, in Nettles, the Ninth Circuit considered a  
13 petition challenging a prison disciplinary action by a prisoner serving a life sentence who had already  
14 passed his minimum eligible parole release date. Nettles, 830 F.3d 922. The Ninth Circuit noted that  
15 the parole board could deny parole regardless of whether the disciplinary violation was expunged. Id.  
16 at 935. The appellate court held that habeas corpus jurisdiction was absent, because “success on  
17 Nettles’s claims would not necessarily lead to his immediate or earlier release from confinement,” and  
18 thus his “claim does not fall within ‘the core of habeas corpus.’” Id. (quoting Skinner, 562 U.S. at 535  
19 n. 13).

20 The same is true here. Petitioner is a life inmate whose release on parole depends on the parole  
21 board’s discretion. Petitioner has been convicted of murder so he is ineligible to earn any credits to  
22 advance his minimum eligible parole date. Cal. Penal Code § 2933.2. Therefore, success on his  
23 petition would not necessarily lead to immediate or earlier release. Indeed, success would not  
24 necessarily even advance the date of his first parole hearing. Therefore, Petitioner’s claims fall  
25 outside the core of habeas corpus. Respondent’s motion to dismiss should be granted.

### 26 C. Exhaustion

27 Respondent also contends the petition is unexhausted because Petitioner has failed to first seek  
28 relief for his claims in the state courts. Petitioner did not oppose Respondent’s assertion.

1 A petitioner who is in state custody seeking relief by way of a petition for writ of habeas  
2 corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is  
3 based on comity to the state court and gives the state court the initial opportunity to correct the state's  
4 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991).

5 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a  
6 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.  
7 Henry, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court was given a full  
8 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the  
9 claim's factual and legal basis. Id. (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1 (1992) (factual  
10 basis).

11 Respondent's exhibits show that Petitioner has never filed a petition raising his claims in the  
12 California Supreme Court. (See Resp't's Mot., Exs. 2, 3.) Therefore, the petition is unexhausted and  
13 should be dismissed.

#### 14 D. Recharacterization of Petition

15 In Nettles, the Ninth Circuit held that a district court has the discretion to construe a habeas  
16 petition as a civil rights action under § 1983. Nettles, 830 F.3d at 936. However, recharacterization is  
17 appropriate only if it is "amenable to conversion on its face, meaning that it names the correct  
18 defendants and seeks the correct relief," and only after the petitioner is warned of the consequences of  
19 conversion and is provided an opportunity to withdraw or amend the petition. Id. Here, the Court  
20 does not find recharacterization to be appropriate. Petitioner has not named the proper defendants and  
21 he is not seeking the correct relief. Accordingly, the Court should not exercise its discretion to  
22 recharacterize the action.

## 23 **II. RECOMMENDATION**

24 Accordingly, the Court RECOMMENDS that Respondent's motion to dismiss be GRANTED,  
25 and the petition be DISMISSED for failure to state a cognizable claim and failure to exhaust state  
26 remedies.

27 This Findings and Recommendation is submitted to the United States District Court Judge  
28 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the

1 Local Rules of Practice for the United States District Court, Eastern District of California. Within  
2 twenty-one days after being served with a copy, any party may file written objections with the court  
3 and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate  
4 Judge’s Findings and Recommendation.” Replies to the objections shall be served and filed within ten  
5 court days (plus three days if served by mail) after service of the objections. The Court will then  
6 review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised  
7 that failure to file objections within the specified time may waive the right to appeal the District  
8 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

9  
10 IT IS SO ORDERED.

11 Dated: March 1, 2017

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE