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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**
9

10 STEVE FEGAN,

11 Petitioner,

12 v.

13 ARNOLD,

14 Respondent.

Case No. 1:17-cv-00519-SAB-HC

ORDER

15
16 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
17 pursuant to 28 U.S.C. § 2254. Petitioner has consented to the jurisdiction of the United States
18 Magistrate Judge. (ECF No. 4).

19 **I.**

20 **BACKGROUND**

21 Petitioner is currently in the custody of the California Department of Corrections and
22 Rehabilitation (“CDCR”) serving an imprisonment term of life without the possibility of parole.
23 (ECF No. 1 at 1).¹ On April 10, 2017, Petitioner filed a federal petition for writ of habeas corpus,
24 which sought a parole hearing date and asserted that the CDCR erroneously dismissed his
25 request for a parole hearing. (ECF No. 1). On May 4, 2017, the Court found that Petitioner’s
26 claim is not cognizable in federal habeas and granted Petitioner leave to assert his claims in a
27 civil rights complaint under 42 U.S.C. § 1983. (ECF No. 5).

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 On May 17, 2017, the Court received Petitioner’s notice of appeal of the Court’s order.
2 (ECF No. 6). On May 30, 2017, as the appeal was pending, the Court received an amended
3 petition for writ of habeas corpus. (ECF No. 9). On June 15, 2017, the Ninth Circuit dismissed
4 the appeal for lack of jurisdiction. (ECF No. 12).

5 II.

6 DISCUSSION

7 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
8 habeas petition and allows a district court to dismiss a petition before the respondent is ordered
9 to file a response if it “plainly appears from the petition and any attached exhibits that the
10 petitioner is not entitled to relief in the district court.”

11 A. Federal Habeas Jurisdiction

12 By statute, federal courts “shall entertain an application for a writ of habeas corpus in
13 behalf of a person in custody pursuant to the judgment of a State court only on the ground that he
14 is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
15 § 2254(a). A claim falls within the “core of habeas corpus” when a prisoner challenges “the fact
16 or duration of his confinement” and “seeks either immediate release from that confinement or the
17 shortening of its duration.” Preiser v. Rodriguez, 411 U.S. 475, 489 (1973). The Ninth Circuit
18 has adopted a rule that a “state prisoner’s claim [that] does not lie at ‘the core of habeas corpus’
19 . . . must be brought, ‘if at all,’ under § 1983.” Nettles v. Grounds, 830 F.3d 922, 934 (9th Cir.
20 2016) (en banc) (quoting Preiser, 411 U.S. at 487; Skinner v. Switzer, 562 U.S. 521, 535 n.13
21 (2011)). Therefore, if “success on [Petitioner]’s claims would not necessarily lead to his
22 immediate or earlier release from confinement, [Petitioner]’s claim does not fall within ‘the core
23 of habeas corpus,’ and he must instead bring his claim under § 1983.” Nettles, 830 F.3d at 935
24 (quoting Skinner, 562 U.S at 535 n.13).

25 In the amended petition, Petitioner again asserts that the CDCR erroneously dismissed his
26 request for a parole hearing under the Elderly Parole Program. (ECF No. 9 at 2–3). Petitioner
27 seeks consideration for parole suitability. (ECF No. 9 at 8). However, success on Petitioner’s
28 claim would not necessarily lead to his immediate or earlier release from confinement. See

1 Nettles, 830 F.3d at 935 (noting that under California law, the parole board must consider all
2 relevant reliable information in determining suitability for parole and has the authority to deny
3 parole on the basis of any grounds presently available to it). Based on the foregoing, Petitioner's
4 claim is not cognizable in federal habeas corpus.

5 **B. Conversion to § 1983 Civil Rights Action**

6 Petitioner may convert his petition to a civil rights action under 42 U.S.C. § 1983. See
7 Nettles, 830 F.3d at 936 ("If the complaint is amenable to conversion on its face, meaning that it
8 names the correct defendants and seeks the correct relief, the court may recharacterize the
9 petition so long as it warns the pro se litigant of the consequences of the conversion and provides
10 an opportunity for the litigant to withdraw or amend his or her complaint.") (quoting Glaus v.
11 Anderson, 408 F.3d 382, 388 (7th Cir. 2005)). The Court notes, however, that habeas corpus and
12 prisoner civil rights actions differ in a variety of respects, such as the proper defendants, filing
13 fees, exhaustion requirements, and restrictions on future filings (e.g., the Prison Litigation
14 Reform Act's three-strikes rule). Nettles, 830 F.3d at 936 (citing Robinson v. Sherrod, 631 F.3d
15 839, 841 (7th Cir. 2011); Glaus, 408 F.3d at 388).

16 If Petitioner chooses to convert the instant matter to a civil rights action, Petitioner will
17 be required to amend his pleading to name the proper defendants and to seek the appropriate
18 relief. The filing fee for § 1983 civil rights cases is \$350, and Petitioner is required to pay the full
19 amount by way of deductions from income to Petitioner's trust account, even if granted in forma
20 pauperis status. See 28 U.S.C. § 1915(b)(1).²

21 Petitioner also may, at his option, voluntarily dismiss his habeas petition without
22 prejudice to refiling his claims as a § 1983 civil rights action. However, Petitioner is forewarned
23 that dismissal and refiling may subject Petitioner to a possible statute of limitations bar as well as
24 other complications as set forth above.

25 Once Petitioner informs the Court on how he wishes to proceed in this matter, the
26 Court will provide further instructions.

27
28 ² The Court previously authorized Petitioner to proceed in forma pauperis in this case. (ECF No. 3).

1 **III.**

2 **ORDER**

3 Accordingly, the Court HEREBY ORDERS that:

- 4 1. Within **TWENTY- ONE (21) days** from the date of service of this order, Petitioner shall
5 return the attached form advising the Court whether he would like to:
- 6 a. convert his habeas petition to a § 1983 civil rights action and file an amended
7 complaint, which would require Petitioner to pay the full \$350 filing fee by way
8 of deductions from income to Petitioner's trust account; OR
- 9 b. voluntarily dismiss the instant action without prejudice to refiling his claims in a
10 § 1983 action, subject any statute of limitations issues.
- 11 2. If Petitioner fails to submit the attached form, the Court will dismiss the instant action
12 without prejudice to Petitioner refiling his claims in a § 1983 action.

13
14 IT IS SO ORDERED.

15
16 Dated: **June 20, 2017**

17 
18 UNITED STATES MAGISTRATE JUDGE

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PETITIONER'S NOTICE REGARDING
HOW TO PROCEED

15
16 **CHECK ONLY ONE AND RETURN TO CLERK'S OFFICE WITHIN 14 DAYS.**

17 **If Petitioner fails to submit this form, the Court will dismiss the instant action without**
18 **prejudice to Petitioner refiling his claims in a § 1983 action.**
19

20 _____ Petitioner wishes to convert his habeas petition to a § 1983 civil rights action and file an
21 amended complaint, which would require Petitioner to pay the full \$350 filing fee by way
22 of deductions from income to Petitioner's trust account.
23

24 _____ Petitioner wishes to voluntarily dismiss the instant action without prejudice to refiling his
25 claims in a § 1983 action, subject any statute of limitations issues.
26

27 DATED: _____

Steve Fegan

Petitioner

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