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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

CHRIS GRANT,	)	Case No.: 1:19-cv-01242-SKO (HC)
	)	
Petitioner,	)	ORDER TO ASSIGN DISTRICT JUDGE TO CASE
	)	
v.	)	FINDINGS AND RECOMMENDATION TO
	)	DISMISS PETITION
	)	
STU SHERMAN, Warden,	)	[TWENTY-ONE DAY OBJECTION DEADLINE]
	)	
Respondent.	)	
	)	

Petitioner is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation (“CDCR”) serving a sentence of 40 years-to-life for his convictions in Santa Clara County of two counts of robbery. In this petition, Petitioner challenges a state court decision upholding the CDCR’s determination that he is not entitled to parole consideration under California’s Proposition 57. Upon review of the petition, it is clear that Petitioner is not entitled to habeas relief. Therefore, the Court recommends that the petition be **SUMMARILY DISMISSED**.

**I. PROCEDURAL BACKGROUND**

On January 13, 2009, Petitioner was convicted of two counts of second degree robbery in violation of Cal. Penal Code § 212.5(c), with multiple enhancements under Cal. Penal Code §§

1 667(a)(1) and 1170.12(a)-(d). (Doc. 1 at 28.) On March 27, 2009, Petitioner was sentenced to a total  
2 term of 40 years-to-life. (Doc. 1 at 1.)

3 On November 8, 2016, California voters adopted Proposition 57, known as “The Public Safety  
4 and Rehabilitation Act of 2016.” Proposition 57 granted authority to the Secretary of the CDCR to  
5 adopt new regulations governing credit earning for inmates. Thereafter, Petitioner submitted a CDCR  
6 Form 22 “Inmate/Parolee Request” in which he sought early parole consideration pursuant to  
7 Proposition 57. (Doc. 1 at 54.) Petitioner was advised that he was ineligible for early parole  
8 consideration, because he had been convicted of a violent offense. (Doc. 1 at 54.) He requested review  
9 by a supervisor, but he was again informed that he did not qualify because of his convictions for bank  
10 robbery. (Doc. 1 at 54.) Petitioner then filed an administrative appeal. (Doc. 1 at 47.) His appeal was  
11 denied at the first level for the same reason. (Doc. 1 at 48.) He next filed an administrative appeal at  
12 the second level of review, and his appeal was rejected for the same reason. (Doc. 1 at 45-46.)  
13 Petitioner then appealed to the third level of review, and the appeal was denied. (Doc. 1 at 43-44.)

14 On October 19, 2018, Petitioner filed a petition for writ of habeas corpus in the Kings County  
15 Superior Court alleging that he is entitled to early parole consideration because his convictions for  
16 bank robbery are not violent felonies. (Doc. 1 at 29-30.) On November 30, 2018, the superior court  
17 denied the petition, noting that “Petitioner is serving a [sic] felony terms for two counts of robbery,  
18 which are classified as violent felonies pursuant to [Cal.] Penal Code section 667.5, subdivision (c)(9).  
19 Accordingly, Petitioner has been properly classified as a violent offender and he is not entitled to early  
20 parole under Proposition 57.” (Doc. 1 at 30.) On January 7, 2019, Petitioner filed a habeas petition in  
21 the California Court of Appeal, Fifth Appellate District (“Fifth DCA”). (Doc. 1 at 27.) On February  
22 28, 2019, the Fifth DCA summarily denied the petition. (Doc. 1 at 27.) Petitioner then filed a habeas  
23 petition in the California Supreme Court, and the petition was summarily denied on June 19, 2019.  
24 (Doc. 1 at 26.) On September 6, 2019, Petitioner filed the instant federal petition in this Court.

## 25 **II. DISCUSSION**

### 26 A. Preliminary Review of Petition

27 Rule 4 of the Rules Governing Section 2254 Cases requires the Court to make a preliminary  
28 review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition “[i]f it

1 plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in  
2 the district court . . .” Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990). The Advisory  
3 Committee Notes to Rule 8 indicate that the Court may dismiss a petition for writ of habeas corpus,  
4 either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after an  
5 answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir. 2001).

6 B. Failure to State a Cognizable Federal Claim

7 Petitioner challenges the state court decision denying his request for early parole consideration.  
8 He claims the CDCR wrongly denied his request, because his convictions for bank robbery do not  
9 qualify as violent felonies for purposes of California’s Proposition 57.

10 Proposition 57 added Article I, section 32 to the California Constitution which provides:

11 § 32. Public Safety and Rehabilitation Act of 2016

12 (a) The following provisions are hereby enacted to enhance public safety, improve  
13 rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding  
anything in this article or any other provision of law.

14 (1) *Parole Consideration: Any person convicted of a nonviolent felony offense and*  
15 *sentenced to state prison shall be eligible for parole consideration after completing the*  
*full term for his or her primary offense.*

16 (A) For purposes of this section only, the full term for the primary offense  
17 means the longest term of imprisonment imposed by the court for any  
18 offense, excluding the imposition of an enhancement, consecutive sentence,  
or alternative sentence.

19 (2) *Credit Earning: The Department of Corrections and Rehabilitation shall have*  
20 *authority to award credits earned for good behavior and approved rehabilitative or*  
*educational achievements.*

21 (b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of  
22 these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall  
certify that these regulations protect and enhance public safety.

23 Cal. Const. art. I, § 32 (emphasis added). Essentially, Proposition 57 provides an inmate who has  
24 completed his base term with a hearing before the Board of Parole Hearings. (Cal. Const. Art I, Sec.  
25 32(a)).

26 For purposes of Proposition 57, violent felonies are defined in California Penal Code §  
27 667.5(c). See People v. Harris, 2017 WL 423084 at \*2 (Cal. App. 2017). Section 667.5(c)(9) defines  
28 the meaning of violent felony to include “any robbery.” Therefore, Petitioner was convicted of a

1 violent felony rendering Proposition 57 inapplicable to his case. The state court’s determination that  
2 California's Proposition 57 is inapplicable to Petitioner’s case is binding on this court. See Bradshaw  
3 v. Richey, 546 U.S. 74, 76 (2005) (“We have repeatedly held that a state court's interpretation of state  
4 law, including one announced on direct appeal of the challenged conviction, binds a federal court  
5 sitting in habeas corpus”). As the Supreme Court held in Swarthout v. Cooke, 562 U.S. 216, 222  
6 (2011), it is not this Court's role to determine whether California's laws or regulations were correctly  
7 applied in Petitioner's case. Therefore, Petitioner's claim is not cognizable under federal habeas  
8 review.

9 In addition, in Nettles v. Grounds, 830 F.3d 922, 934-35 (9th Cir. 2016), *cert. denied*, 137 S.  
10 Ct. 645 (2017), the Ninth Circuit held that a prisoner's claim, if successful, will not necessarily lead to  
11 immediate or speedier release from custody falls outside the “core of habeas corpus” and must be  
12 pursued (if at all) in a civil rights action under 42 U.S.C. § 1983, rather than in a habeas action.  
13 Nettles, 830 F.3d at 927-28; *see, e.g.*, Borstad v. Hartley, 668 Fed.Appx. 696, 697 (9th Cir. 2016)  
14 (success on petitioners' claims that the lengthening of intervals between parole hearings caused by  
15 Marsy's Law violated their rights under Ex Post Facto Clause “would not necessarily result in a  
16 shortening of their sentences. Thus, the district court in each case lacked jurisdiction to grant 28  
17 U.S.C. § 2254 habeas relief. Nettles, 830 F.3d at 935–37.”).

18 In this case, success on Petitioner’s claims will not necessarily lead to immediate or more  
19 speedy release from custody and therefore falls outside the core of habeas corpus. If he prevails on his  
20 claim that he is entitled to relief under Proposition 57, it does not necessarily follow that he will be  
21 released from prison on a date sooner than otherwise would occur. This is because Proposition 57, if  
22 applicable, only makes Petitioner eligible for parole consideration, and does not command his release  
23 from prison. He still must be found suitable for parole before he may be released from prison. If he  
24 prevails on any of his claims, the remedy would be a parole consideration hearing rather than an  
25 outright release from prison. Under Nettles, Petitioner’s only potential recourse in federal court is to  
26 file a § 1983 complaint because his claim falls outside the core of habeas corpus.

27 In an appropriate case, a habeas petition may be construed as a civil rights complaint under 42  
28 U.S.C. § 1983. Wilwording v. Swenson, 404 U.S. 249, 251 (1971); *see* Nettles, 830 F.3d at 935-36.

1 Although the court may construe a habeas petition as a civil rights complaint, it is not required to do  
2 so. Since the time when Wilwording was decided there have been significant changes in the law. For  
3 example, the filing fee for a habeas petition is five dollars; for civil rights cases, the fee is now \$400  
4 (with \$50 of that fee reduced if the prisoner is allowed to proceed in forma pauperis). A prisoner is  
5 now required to pay the fee, even if granted in forma pauperis status, by way of deductions from  
6 income to the prisoner's trust account. See 28 U.S.C. § 1915(b). A prisoner who might be willing to  
7 file a habeas petition for which he would not have to pay a filing fee might feel otherwise about a civil  
8 rights complaint for which the \$350 fee would be deducted from income to his prisoner trust account.  
9 Also, a civil rights complaint that is dismissed as malicious, frivolous, or for failure to state a claim  
10 counts as a “strike” under 28 U.S.C. § 1915(g), which is not true for habeas cases. Further, Petitioner’s  
11 petition is not amenable to conversion because it does not name the proper defendant or seek the  
12 correct relief. See Nettles, 830 F.3d at 936 (quoting Glaus v. Anderson, 408 F.3d 382, 388 (7th Cir.  
13 2005)) (in order to be converted, petition must be ““amenable to conversion on its face, meaning that it  
14 names the correct defendants and seeks the correct relief.””)

15 It is important to note that this court has not determined that a claim would succeed if brought  
16 in a civil rights action under 42 U.S.C. § 1983. The court has referred to § 1983 as “potential recourse”  
17 because it would be premature in this habeas action to decide whether a claim actually could be stated  
18 under 42 U.S.C. § 1983. The Court only decides today that a habeas petition is the wrong vehicle for a  
19 prisoner to pursue enforcement of any federal rights he has as a result of the passage of Proposition 57.

20 **III. ORDER**

21 IT IS HEREBY ORDERED that the Clerk of Court is **DIRECTED** to assign a District Judge  
22 to the case.

23 **IV. RECOMMENDATION**

24 The Court HEREBY RECOMMENDS that the petition be **SUMMARILY DISMISSED** with  
25 prejudice.

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

1 twenty-one days after being served with a copy, Petitioner may file written objections with the court  
2 and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate  
3 Judge’s Findings and Recommendation.” The Court will then review the Magistrate Judge’s ruling  
4 pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections within the  
5 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d  
6 1153 (9th Cir. 1991).

7  
8 IT IS SO ORDERED.

9 Dated: September 10, 2019

/s/ Sheila K. Overt  
UNITED STATES MAGISTRATE JUDGE