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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

CARLOS MARTINEZ,

Petitioner,

v.

SECRETARY OF CALIFORNIA  
DEPARTMENT OF CORRECTIONS AND  
REHABILITATION,

Respondents.

Case No. 1:22-cv-00805-SAB-HC

FINDINGS AND RECOMMENDATION TO  
DISMISS PETITION FOR WRIT OF  
HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT  
TO RANDOMLY ASSIGN DISTRICT  
JUDGE

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

**I.**

**BACKGROUND**

On June 30, 2022, Petitioner filed the instant federal petition for writ of habeas corpus wherein Petitioner challenges the issuance of a counseling only rules violation report for failing to report for education testing. Petitioner asserts that failure to report for education testing was minor misconduct that should have been corrected by verbal counseling. (ECF No. 1 at 5–6.)<sup>1</sup>

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<sup>1</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

1 **II.**

2 **DISCUSSION**

3 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a  
4 habeas petition and allows a district court to dismiss a petition before the respondent is ordered  
5 to file a response, if it “plainly appears from the petition and any attached exhibits that the  
6 petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing Section 2254  
7 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

8 **A. Habeas Jurisdiction**

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

21 Here, Petitioner challenges the issuance of a counseling only rules violation report. (ECF  
22 No. 1 at 5, 29.) Petitioner does not allege, and the record does not reflect, that he was penalized  
23 with any credit loss or a term in the Security Housing Unit. Thus, success on Petitioner’s claim  
24 would not necessarily lead to immediate or earlier release from custody. Accordingly,  
25 Petitioner’s claim is not cognizable in federal habeas corpus.

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

27 “If the complaint is amenable to conversion on its face, meaning that it names the correct  
28 defendants and seeks the correct relief, the court may recharacterize the petition so long as it

1 warns the *pro se* litigant of the consequences of the conversion and provides an opportunity for  
2 the litigant to withdraw or amend his or her complaint.” Nettles, 830 F.3d at 936 (quoting Glaus  
3 v. Anderson, 408 F.3d 382, 388 (7th Cir. 2005)). The Court notes, however, that habeas corpus  
4 and prisoner civil rights actions differ in a variety of respects, such as the proper defendants,  
5 filing fees, exhaustion requirements, and restrictions on future filings (e.g., the Prison Litigation  
6 Reform Act’s three-strikes rule). Nettles, 830 F.3d at 936 (citing Robinson v. Sherrod, 631 F.3d  
7 839, 841 (7th Cir. 2011); Glaus, 408 F.3d at 388).

8 Due to these differences and the disadvantages that recharacterization may have on  
9 Petitioner’s claim, the Court finds that it would be inappropriate to construe the habeas petition  
10 as a civil rights complaint under 42 U.S.C. § 1983. The Court notes that the filing fee for § 1983  
11 civil rights cases is \$350, and Petitioner is required to pay the full amount by way of deductions  
12 from income to Petitioner’s trust account, even if granted *in forma pauperis* status. See 28 U.S.C.  
13 § 1915(b)(1). Moreover, the petition names the Secretary of the California Department of  
14 Corrections and Rehabilitation as the Respondent and thus, does not name the correct defendant.  
15 See Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (“[A] plaintiff must plead that each  
16 Government-official defendant, through the official’s own individual actions, has violated the  
17 Constitution.”). This conclusion, however, does not preclude Petitioner from pursuing his claim  
18 in a properly filed civil action brought pursuant to 42 U.S.C. § 1983.

### 19 III.

#### 20 RECOMMENDATION & ORDER

21 Accordingly, the Court HEREBY RECOMMENDS that the petition for writ of habeas  
22 corpus be DISMISSED without prejudice to refile the claim in a properly filed civil action  
23 brought pursuant to 42 U.S.C. § 1983.

24 Further, the Clerk of Court is DIRECTED to randomly assign this action to a District  
25 Judge.

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

1 Within **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may  
2 file written objections with the Court and serve a copy on all parties. Such a document should be  
3 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” The assigned  
4 District Judge will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C.  
5 § 636(b)(1)(C). Petitioner is advised that failure to file objections within the specified time may  
6 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)  
7 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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9 IT IS SO ORDERED.

10 Dated: July 26, 2022

  
UNITED STATES MAGISTRATE JUDGE

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