IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THEODORE WILLIS,

Petitioner, No. CIV S-10-0642 MCE EFB P

vs.

R. GROUNDS,

Respondent. FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding without counsel on a petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. Respondent moves to dismiss the petition on the grounds that it fails to state a cognizable claim. For the reasons that follow, the motion to dismiss should be denied.

I. Background

Petitioner is serving an indeterminate life term. Pet. at 2, 8.[1] He challenges a 2008 disciplinary action taken against him for allegedly having contraband (weapons and a cell phone) in his cell. *Id.* at 8. Petitioner was found guilty of possession of a deadly weapon, was assessed a SHU term, lost 360 days of good time credits, lost his privilege group status and was placed in

[1] The page numbers cited herein are those assigned by the court's electronic docketing system and not those assigned by the parties.

a different level of custody. *Id.* at 15, 16. Petitioner alleges that the contraband belonged to his cellmate and he had no knowledge of it, that he was deprived of due process at the disciplinary hearing when he was not allowed to call witnesses, that staff falsified evidence against him, and that the evidence against him "is so slim as to be nonexistent." *Id.* at 9, 18, 21.

Petitioner alleges that because he has been found guilty of possessing a weapon and a cell phone, there is a "very strong likelihood" that he will be denied parole at his next hearing, whereas "absent the guilty finding, petitioner stood an excellent chance of receiving a parole date, after 30 years of incarceration." *Id.* at 16. He states that his chance to parole depends heavily on his conduct, and that he "had maintained an exemplary record of conduct and reform since receiving his last disciplinary violation . . . more than 18 years" ago. *Id.* at 14.

He further alleges that his loss of night yard, weekend and holiday yard, and night dayroom, and his loss of the right to pursue his vocation (which is needed in order to be found suitable for parole), show that he has been denied a liberty interest. *Id.* at 17.

II. Respondent's Motion to Dismiss

Respondent moves to dismiss the petition pursuant to Rule 4 of the Rules Governing § 2254 Cases in the U.S. District Courts for failure to state a cognizable claim. This court has authority under Rule 4 to dismiss a petition if it "plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court . . . ." As a corollary to that rule, the court may also consider a respondent's motion to dismiss, filed in lieu of an answer, on the same grounds. *See, e.g., O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate a motion to dismiss for failure to exhaust state remedies); *White v. Lewis*, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as the procedural vehicle to review a motion to dismiss for state procedural default). Respondent argues that petitioner's claim is not cognizable in a habeas petition because petitioner has not established that issuance of the writ (i.e. ordering that the disciplinary conviction be expunged) would necessarily shorten the duration of his confinement.

"Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev Stat § 1979, as amended, 42 U.S.C. § 1983. Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . .; requests for relief turning on circumstances of confinement may be presented in a § 1983 action." *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). While not expressly framed as such, respondent's argument is a jurisdictional one – respondent claims that success on the petition will not impact petitioner's custody and thus the court is without power to hear the case under the habeas statute. *See Docken v. Chase*, 393 F.3d 1024, 1028-29 (9th Cir. 2004) (treating the issues of whether a claim that could potentially impact the duration of custody was cognizable or was within the court's federal habeas jurisdiction as interchangeable). Because the question presented on the motion necessarily calls into question the court's subject matter jurisdiction, analysis of the motion must begin with the fundamental threshold question of whether there is jurisdiction to hear petitioner's claim.

The party seeking to invoke the jurisdiction of a federal court bears the initial burden of pleading facts sufficient to establish jurisdiction. *McNutt v. Gen'l Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936); *Jackson v. Cal. Dep't of Mental Health*, 399 F.3d 1069, 1074 (9th Cir. 2005); *United States v. Bustillos*, 31 F.3d 931, 933 (10th Cir. 1994). Thus, the court must determine whether petitioner has alleged sufficient facts in the petition to show that the challenged actions impacted his custody in a manner sufficient to invoke the court's jurisdiction under the habeas statute.

Generally, a prisoner challenging a disciplinary action with an attendant loss of time credits must pursue the challenge in a habeas petition, because a decision in the case in the prisoner's favor would require restoration of the lost time credits and would therefore accelerate the inmate's date of release, making the case the type of "core" habeas challenge that must be pursued by habeas petition. *Preiser*, 411 U.S. at 487-88, 490. Here, however, petitioner is a

life-term inmate who passed his Minimum Eligible Parole Date ("MEPD") in 2005. Dckt. No. 1 at 45.[2] Respondent argues that because petitioner has passed his MEPD, the loss of credits will not "necessarily spell speedier release" and that therefore the petition is not cognizable in habeas. Dckt. No. 11 at 4.

Petitioner has been sentenced to life for murder, so the California Code of Regulations, Title 15, Article 11 (Parole Consideration Criteria and Guidelines for Murders Committed on or After November 8, 1978) applies. *See* Dckt. No. 1 at 1. This statute explains that an inmate's MEPD is established by statute, and may be reduced by "good conduct" credits. Cal. Code Regs. tit. 15, § 2400. Inmates receive their initial parole hearing one year before the MEPD, and they continue to receive parole hearings until they are found suitable for parole. Cal. Penal Code § 3041(a). One factor "tending to show unsuitability" for parole is "[t]he prisoner has engaged in serious misconduct in prison or jail." Cal. Code Regs. tit. 15, § 2402(c)(6).

Once an inmate has been found suitable for parole, the Board of Prison Terms determines the length of time a prisoner must serve prior to actual release on parole by setting a base term and then adjusting the term by accounting for aggravating or mitigating circumstances. *Id.* at § 2400, 2403-2409. Next, the Board determines the amount of "postconviction" credit an inmate should be granted, which reduces the length of time the inmate must serve. *Id.* at §§ 2403, 2410. In determining the amount of postconviction credit, the Board "shall" consider the inmate's behavior in prison. *Id.* at § 2410(c)(3). The regulations state that *no* postconviction credit "shall be granted in the case of any prisoner who commits serious . . . infractions of departmental regulations, violates any state law, or engages in other conduct which could result in rescission of a parole date (see Section 2451) unless the panel finds evidence in mitigation and supports such finding with a statement of its reasoning." *Id.* at § 2410(d). Section 2451 specifically provides that "possession of a weapon without permission" and "possession of escape tools

[2] This exhibit to the petition is an institutional classification committee record that states that petitioner's MEPD is 6/14/05.

without permission" are examples of conduct that may result in the rescission proceedings.

Respondent seems to argue that because petitioner had already passed his MEPD at the time of the disciplinary proceeding, the 360-day credit loss that he was assessed will not affect when he is released from prison. Dckt. No. 11 at 4. But petitioner argues that his 360 days of credit loss "will be assessed once he receives a parole date." Dckt. No. 1 at 15.

It appears that there are two possible ways that the disciplinary conviction may affect the length of petitioner's sentence. First, the Parole Board may find (possibly at multiple hearings) that petitioner is unsuitable for parole because of the disciplinary conviction. Second, if the Board eventually does find petitioner suitable for parole, the disciplinary conviction will likely prevent petitioner from receiving his postconviction credits, and the duration of his confinement will be lengthened. Thus, to rule on respondent's motion to dismiss, the court must determine whether federal habeas jurisdiction exists in an action where a petitioner challenges prison discipline that will potentially or likely, but not definitely, impact the duration of his confinement.

Courts within the Ninth Circuit have not responded uniformly to this issue. *Compare, e.g., Bostic v. Carlson*, 884 F.2d 1267, 1269 (9th Cir. 1989) ("Habeas corpus jurisdiction . . . exists when a petitioner seeks expungement of a disciplinary finding from his record if expungement is likely to accelerate the prisoner's eligibility for parole."); *Hardney v. Carey*, No. CIV S-06-0300 LKK EFB P, 2011 U.S. Dist. LEXIS 35603, at *18-22 (E.D. Cal. Mar. 31, 2011) (recommending that the district court find that a challenge to a disciplinary conviction carrying no credit loss was cognizable in habeas because of its likely impact on parole eligibility, adopted in full by district court order dated June 6, 2011); *Johnson v. Swarthout*, No. CIV S-10-1568 KJM DAD P, 2011 U.S. Dist. LEXIS 43798, at *4-8 (E.D. Cal. Apr. 22, 2011) (same); and *Silva v. Cal. Dep't of Corr.*, No. CIV S-03-1508 DFL GGH P, 2005 U.S. Dist. LEXIS 32046, at *2-3 (E.D. Cal. Dec. 9, 2005) (same, adopted in full by 2006 U.S. Dist. LEXIS 3661 (E.D. Cal. Jan. 31, 2006)) with *Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003) (stating that "habeas

jurisdiction is absent, and a § 1983 action proper, where a successful challenge to a prison condition will not necessarily shorten the prisoner's sentence."); *Everett v. Yates*, No. CIV F-11-00150 AWI GSA HC, 2011 U.S. Dist. LEXIS 23224, at *2-5 (E.D. Cal. Mar. 8, 2011) (recommending the dismissal of a habeas petition challenging a disciplinary conviction with no attendant credit loss, because the potential impact of the conviction on the petitioner's parole prospects was "entirely speculative"); and *Perrotte v. Salazar*, No. ED CV 06-00539-JOHN (VBK), 2010 U.S. Dist. LEXIS 140385, at *9-16 (C.D. Cal. Nov. 8, 2010) (same, adopted in full by 2011 U.S. Dist. LEXIS 6606 (C.D. Cal. Jan 24, 2011)).[3] As is apparent from these cases, courts within this circuit have varied when addressing habeas challenges to prison disciplinary decisions that would have an impact on the duration of confinement only to the extent that they may affect the petitioners' parole eligibility. A brief discussion of the apparent source of the disagreement and the various approaches courts have taken is appropriate.

Three Ninth Circuit cases are central to the controversy: *Bostic v. Carlson*, 884 F.2d 1267 (9th Cir. 1989), *Ramirez v. Galaza*, 334 F.3d 850 (9th Cir. 2003), and *Docken v. Chase*, 393 F.3d 1024 (9th Cir. 2004). In *Bostic*, the court of appeals reviewed district court dismissals

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[3] Unsurprisingly, courts have also disagreed as to whether a life-term prisoner past his MEPD may challenge a disciplinary conviction in a habeas petition for the same reasons that they have disagreed as to whether prisoners in general may challenge disciplinary findings with no attendant loss of time credits in a habeas petition. *Compare Calderon-Silva v. Uribe*, No. SACV 09-832 MMM(JC), 2010 U.S. Dist. LEXIS 138292, at *4-8 (C.D. Cal. Aug. 31, 2010) (recommending dismissal of a habeas petition in which a life-term prisoner challenged a disciplinary conviction because restoration of the lost credits would not advance the petitioner's parole date and "the mere possibility that the . . . disciplinary conviction could be detrimental to petitioner in future parole hearings is too speculative to serve as the basis for a habeas corpus petition," adopted in full by 2010 U.S. Dist. LEXIS 138310 (C.D. Cal. Dec. 21, 2010) *and Thomas v. Wong*, No. C 09-0733 JSW (PR), 2010 U.S. Dist. LEXIS 39748, at *3-10 (N.D. Cal. Mar. 26, 2010) (dismissing a habeas petition in which a life-term prisoner challenged a disciplinary finding because the credit loss imposed could not increase petitioner's minimum or maximum prison terms) *with Oberpriller v. Grounds*, No. C 09-5531 CRB (PR), 2010 U.S. Dist. LEXIS 123998, at *1-4 (N.D. Cal. July 14, 2010) (rejecting respondent's argument that the petition of a post-MEPD life-term inmate challenging a serious disciplinary finding was not cognizable, because the serious disciplinary finding constituted "an obstacle to a favorable parole decision" and thus its expungement would likely accelerate the petitioner's parole eligibility).

of ten separate habeas petitions filed by the same petitioner, challenging nine prison disciplinary actions taken against him. 884 F.2d at 1269. Prison officials had assessed a forfeiture of good-time credits for some of the infractions, but the remainder did not carry a loss of time credits – only a term of segregated housing. *Id.* at 1269. In each of the petitions, the petitioner sought expungement of the infractions from his disciplinary record. *Id.* The court "assume[d]" that habeas jurisdiction existed over all the petitions, even those challenging discipline with no attendant credit loss, stating:

> Habeas corpus jurisdiction is available under 28 U.S.C. § 2241 for a prisoner's claim that he has been denied good time credits without due process of law. [citations] Habeas corpus jurisdiction is also available for a prisoner's claims that he has been subjected to greater restriction of his liberty, such as disciplinary segregation, without due process of law.[4] [citations] Habeas corpus jurisdiction also exists when a petitioner seeks expungement of a disciplinary finding from his record if expungement is likely to accelerate the prisoner's eligibility for parole. [*McCollum v. Miller*, 695 F.2d 1044, 1047 (7th Cir. 1982)].

Id. at 1269 (emphasis added). The court did not elaborate on when expungement would be "likely to accelerate" parole-eligibility.[5]

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[4] This statement has been undercut by the Supreme Court's indication in *Muhammad* that claims that do not in any way implicate the fact or duration of confinement are not cognizable under the federal habeas statutes. *See* 540 U.S. at 754-55 (stating that the plaintiff, who brought a retaliation claim against a prison official, had raised no claim on which habeas relief could have been granted on any recognized theory); *see also Crawford*, 599 F.2d at 891 ("[T]he writ of habeas corpus is limited to attacks upon the legality or duration of confinement."). Further, placement in administrative segregation does not give rise to an actionable claim under the Due Process Clause unless the segregated housing presents a "dramatic departure from the basic conditions of [the inmate's] sentence." *Sandin v. Conner*, 515 U.S. 472, 485 (1995); *Wilkinson v. Austin*, 545 U.S. 209, 222-23 (2005).

[5] *Bostic* spoke of "eligibility" for parole. In California, release on parole is a two-step process – first, the prisoner must become "eligible" to be *considered* for parole (sometimes referred to simply as "eligibility") and, second, the prisoner must be found "eligible" to be *released* on parole (sometimes referred to simply as "suitability"). *See Neal v. Shimoda*, 131 F.3d 818, 824 (9th Cir. 1997) (highlighting this distinction for purposes of § 1983 challenge to Hawaii's Sex Offender Treatment Program). It is unclear whether the *Bostic* panel's jurisdictional pronouncement was limited to claims likely to accelerate eligibility for consideration or covered both those claims and claims likely to accelerate eligibility for release, as both concepts can be covered broadly by the term "eligibility" and courts often do not distinguish between the two steps. *See* The Free Merriam-Webster Dictionary entry for "eligible," http://www.merriam-webster.com/dictionary/eligible (last checked July 5, 2011)

The court revisited *Bostic*'s statements on habeas jurisdiction in *Ramirez*. 334 F.3d at 858-59. In *Ramirez*, a prisoner brought a civil rights action under § 1983 rather than a habeas petition to challenge the procedures used in imposing disciplinary sanctions of ten days of disciplinary detention, 60 days loss of privileges (but no loss of time credits), and a referral to administrative segregation. *Id.* at 852-53. He sought expungement of the disciplinary record from his file and an injunction prohibiting the state from considering it "when they fix plaintiff's terms and decide whether plaintiff should be released on parole." *Id.* at 859 n.6. The district court dismissed the case, finding it barred by *Heck*'s favorable termination rule after determining that success in the case would necessarily imply that the disciplinary finding was invalid. *Id.* at 852; *see supra* n.2.

The Court of Appeals reversed, holding that the favorable termination rule does not apply to prison disciplinary sanctions that do not necessarily affect the fact or length of a prisoner's confinement. *Id.* at 854-58; *see supra* n.2. The court rejected the state's *Bostic*-based argument that the plaintiff's claim that his disciplinary hearing violated due process was "logically inseparable from an attack on the outcome of that hearing, and that a judgment in his favor would necessarily imply the invalidity of his disciplinary conviction." *Id.* at 859. The court reasoned that the favorable termination rule applies only if success in the § 1983 action would necessarily imply the invalidity of a disciplinary finding and necessitate a reduction in the plaintiff's length of confinement. *Id.* The state had failed to show that expungement of the disciplinary finding would necessarily accelerate the plaintiff's release, because the parole board

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(defining "eligible" as "qualified to participate or to be chosen" and "worthy of being chosen"). The undersigned assumes, absent definitive indication to the contrary, that the court intended that habeas jurisdiction exists both when success on the claim is likely to accelerate the date on which the petitioner becomes eligible for parole consideration as well as when success on the claim is likely to accelerate the date on which the petitioner will ultimately be found suitable for release on parole. This assumption is consistent with the underlying purpose of the writ of habeas corpus, which is concerned with the petitioner's ultimate release. So long as success on the claim is likely to accelerate release under *Bostic*, the court sees no reason to distinguish between "eligibility" and "suitability."

could still deny parole on the basis of other factors. *Id.* ("As Ramirez's suit does not threaten to advance his parole date, his challenge to his disciplinary hearing is properly brought under § 1983.").

In the course of its analysis, the court discussed *Bostic* in some detail:

> Bostic does not hold that habeas corpus jurisdiction is always available to seek the expungement of a prison disciplinary record. Instead, a writ of habeas corpus is proper only where expungement is "likely to accelerate the prisoner's eligibility for parole." Bostic, 884 F.2d at 1269 (emphasis added). . . . Bostic thus holds that the likelihood of the effect on the overall length of the prisoner's sentence from a successful § 1983 action determines the availability of habeas corpus."

Id. at 858. From this, the court made the following leap, assuming that the courts' jurisdiction over habeas petitions and their jurisdiction over § 1983 actions are mutually exclusive: "[H]abeas jurisdiction is absent, and a § 1983 action proper, where a successful challenge to a prison condition will not necessarily shorten the prisoner's sentence." *Id.* at 859 (emphasis added). For ease of discussion, this quote will be referred to herein as the "mutual exclusivity rule." This language has created uncertainty, because challenges to prison conditions that will necessarily shorten the prisoner's sentence fall squarely within the "core" of habeas jurisdiction identified in *Preiser*, and the *Ramirez* language indicates that only "core" habeas cases can be brought in federal habeas petitions. It is important to recall that *Preiser* simply held that "core" cases had to be brought in habeas petitions but did not hold that habeas jurisdiction was limited to such cases. However, *Bostic* – quoted with apparent approval by the *Ramirez* panel – squarely found habeas jurisdiction to exist in a non-"core" situation, where success would not necessarily spell earlier release, but was merely likely to accelerate parole-eligibility. Thus, *Ramirez*'s mutual exclusivity rule quoted above appears inconsistent both with the opinion's prior reliance on *Bostic* for the proposition that "the likelihood of the effect on the overall length of the prisoner's sentence from a successful § 1983 action determines the availability of habeas corpus" and with *Bostic* itself.

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One year after *Ramirez*, the court again visited the intersection of habeas and § 1983 in *Docken*. 393 F.3d at 1026-31. In *Docken*, as in *Bostic*, the court reviewed the dismissal of a habeas petition for want of jurisdiction. *Id.* at 1025, 1026. Unlike *Bostic*, the petitioner in *Docken* did not challenge a prison disciplinary finding, but rather the timing of his parole-eligibility reviews. *Id.* at 1025-26. The district court had concluded that the claim could only be brought under § 1983 rather than habeas, because the plaintiff's success in the case would not "entitle" him to release, just an earlier eligibility review. *Id.*

In reversing that conclusion, the Court of Appeals discussed at length U.S. Supreme Court and Ninth Circuit precedent. The first conclusion the court drew from that precedent was that, "although Supreme Court law makes clear that § 1983 is not available where a prisoner's claim 'necessarily' implicates the validity or duration of confinement, it does not set out any mirror-image limitation on habeas jurisdiction." *Id.* at 1028. The court, citing *Bostic*, noted that its own precedent held that habeas jurisdiction was available in some non-"core" circumstances. *See id.* ("In [*Bostic*], for example, we held that 'habeas corpus jurisdiction . . . exists when a petitioner seeks expungement of a disciplinary finding from his record if expungement is likely to accelerate the prisoner's eligibility for parole.'").

> Importantly, in speaking of claims only "likely to accelerate" eligibility for parole, Bostic defined a class of suits outside the "core" habeas claims identified in *Preiser*. Success on the merits in such cases would not "necessarily" implicate the fact or duration of confinement. Instead, such claims have, at best, only a possible relationship to the duration of a prisoner's confinement, as eligibility for parole is distinct from entitlement for parole.

Id. at 1028-29. Thus, the court recognized that, under *Bostic*, habeas jurisdiction was proper even where success on the claim would not necessarily shorten the plaintiff's sentence – a view of habeas jurisdiction squarely at odds with the mutual exclusivity rule announced in *Ramirez*. In fact, the *Docken* court went further than *Bostic*, finding cognizable not only those challenges that, if successful, were "likely to accelerate" release, but also those that, if successful, "*could potentially* affect the duration of . . . confinement." *Id.* at 1031 (emphasis added).

Unfortunately, the *Docken* panel did not expressly resolve the inconsistency between *Bostic* and *Ramirez*. It did attempt to distinguish *Ramirez*'s mutual exclusivity rule in a footnote by stating that it was limited to the circumstances presented in that case, where the prisoner challenged "internal disciplinary procedures" and consequent administrative segregation that did not "deal with the fact or duration of his confinement." *Id.* at 1030 n.4. A close reading of *Ramirez* reveals that the case cannot be distinguished from *Bostic* on those grounds, however. As in *Ramirez*, the petitioner in *Bostic* challenged at least one prison disciplinary action that resulted in administrative segregation but no loss of time credits. Importantly, in both cases, the prisoners sought expungement of a disciplinary finding from their records, and the prisoner in *Ramirez* specifically argued that the challenged disciplinary findings would have an adverse impact on his parole eligibility. *Ramirez*, 334 F.3d at 859 n.6; *Bostic*, 884 F.2d at 1269. Thus, both cases "deal[t] with the fact or duration of confinement" in the same manner.

Here, this court must decide whether to follow *Ramirez*'s mutual exclusivity rule or the approach of *Bostic* and *Docken*. Some district courts that have taken the latter route have reasoned that *Ramirez*'s mutual exclusivity rule was dictum and thus not binding. *E.g.*, *Foster v. Washington-Adduci*, No. CV 09-07987-PSG (DTB), 2010 U.S. Dist. LEXIS 41578, at *12 (C.D. Cal. Mar. 24, 2010); *Hickey v. Adler*, No. 1:08-cv-00826-JMD-HC, 2009 U.S. Dist. LEXIS 67064, at *6 n.4 (E.D. Cal. July 27, 2009); *Dutra v. Cal. Dep't of Corr. & Rehab.*, No. C 06-0323 MHP, 2007 U.S. Dist. LEXIS 82377, at *16-17 (N.D. Cal. Nov. 6, 2007); *Drake v. Felker*, No. 2:07-cv-00577 (JKS), 2007 WL 4404432, at *2 (E.D. Cal. Dec. 13, 2007). The undersigned agrees with that reasoning. The mutual exclusivity rule was not essential to the holding in *Ramirez*, which held simply that *Heck*'s favorable termination rule does not apply to § 1983 cases where success in the action would not necessitate earlier release. That holding is not contrary to, and may coexist beside, *Docken*'s conclusion that § 1983 and habeas are not mutually exclusive but instead may both be available to prisoners in some instances, specifically in those challenges that implicate the duration of confinement but would not necessarily, if

successful, result in speedier release.[6]

Accordingly, the court finds that, under *Bostic* and *Docken*, habeas jurisdiction exists over the instant petition, because expungement of the disciplinary action challenged by petitioner could potentially accelerate petitioner's release. Petitioner alleges that because he has been found guilty of possessing a weapon and a cell phone, there is a "very strong likelihood" that he will be denied parole at his next hearing, whereas "absent the guilty finding, petitioner stood an excellent chance of receiving a parole date, after 30 years of incarceration." Dckt. No. 1 at 16. He alleges that his chance to parole depends heavily on his conduct, and that he "had maintained an exemplary record of conduct and reform since receiving his last disciplinary violation . . . more than 18 years" ago. *Id.* at 14. That assertion is expressly bourne out by the regulations governing parole.

The Board is statutorily obligated to consider petitioner's conduct while incarcerated as a factor in deciding parole suitability. One factor "tending to show unsuitability" for parole is whether "[t]he prisoner has engaged in serious misconduct in prison or jail." Cal. Code Regs. tit. 15, § 2402(c)(6). Petitioner has been found guilty of possessing weapons and a cellphone; expungement of this finding could potentially accelerate his release, especially since he had been disciplinary-free for the previous 18 years. Indeed, the seriousness of these two offenses makes it probable that failure to expunge the finding would result in petitioner serving a longer period of incarceration because of the affect on parole consideration.

In addition, assuming that the Board eventually finds petitioner suitable for parole, the disciplinary finding will very likely impact the length of time petitioner serves for the further reason that he will not be granted postconviction credit. *See id.* at §§ 2410(c)(3), 2410(d), 2451

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[6] Additionally, even if *Ramirez*'s mutual exclusivity pronouncement was essential to its holding, its weight appears to be undermined by *Bostic*'s earlier ruling to the contrary. *See Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam) (noting that rulings by three-judge panels are "law of the circuit," and are binding on subsequent three-judge panels).

(the Board shall not grant postconviction credit if an inmate has been found guilty of possessing a weapon or escape tools "unless the panel finds evidence in mitigation and supports such finding with a statement of its reasoning"). Because the court finds that expungement of the disciplinary conviction not only could potentially accelerate petitioner's release, but likely will do so, habeas jurisdiction exists.[7]

IV. Mootness

Although petitioner's claims are within the jurisdiction of the habeas statute for the reasons just discussed, the court must also examine whether that petitioner's claims are nevertheless moot and are thus outside the court's jurisdiction under Article III of the U.S. Constitution. Under Article III, § 2, a federal court's jurisdiction is limited to those cases which present "cases-or-controversies." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). In habeas actions, the case-or-controversy requirement mandates that a petitioner must have suffered, or be threatened with, an actual injury traceable to the respondent and redressable by issuance of the writ. *See id.* Respondent does not argue that petitioner's claims are moot, but federal courts "have an independent duty to consider" mootness sua sponte. *Demery v. Arpaio*, 378 F.3d 1020, 1025 (9th Cir. 2004). Like jurisdiction under the habeas statute, it is petitioner's obligation to allege facts sufficient to show that his claim is within the court's power under Article III. *Jackson*, 399 F.3d at 1074.

In general, a habeas petition challenging a prison disciplinary action no longer presents such a case or controversy, and therefore becomes moot, when the punishment for the action has been withdrawn or completed at the time of the petition. *See Wilson v. Terhune*, 319 F.3d 477, 479, 481-82 (9th Cir. 2003). Where the petitioner can show that so-called "collateral consequences" flow from the disciplinary action (i.e., circumstances beyond the punishment imposed that constitute an actual injury), however, the case remains justiciable. *Id.* at 479-80;

[7] The court does not rule on petitioner's argument that his loss of privileges constitute a denial of his liberty interests.

see Spencer, 523 U.S. at 14-16. This court must therefore determine whether petitioner has alleged facts showing that the disciplinary sanctions against him have not yet been completed or that collateral consequences of the disciplinary action cause his case to remain live.

Here, petitioner alleges that at the time the petition was filed, he was at a more favorable level of custody, and had lost night yard, weekend and holiday yard, and night dayroom privileges, and had lost his right to work. Dckt. No. 1 at 17. These allegations are sufficient to show that, at this stage of the proceedings, petitioner's case is not moot because the disciplinary sanctions against him have not yet been completed. Therefore, the court need not decide address the collateral consequences doctrine because the disciplinary finding may be used against petitioner in future parole proceedings.[8]

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[8] A brief summary of the relevant authorities regarding whether potential impact on parole-eligibility constitutes a collateral consequence follows. In *Spencer v. Kemna*, the Supreme Court considered whether an order revoking parole carried collateral consequences. 523 U.S. at 14-16. The petitioner in *Spencer* argued that the order could be used against him in a future parole proceeding. *Id.* at 14. The Court found this possibility insufficient to be considered a collateral consequence, however, because, the potential use of the parole revocation order in a future parole suitability hearing was merely "a possibility rather than a certainty or even a probability." *Id.* This was so, the court concluded, because under state law, the order would be only one factor among many to be considered by the parole authority in a future parole proceeding, and the parole authority had almost unlimited discretion to determine suitability. *Id.*

In *Wilson v. Terhune*, the petitioner argued that a prison disciplinary finding (based on an escape attempt) would adversely affect his future parole prospects. 319 F.3d at 482. The Ninth Circuit similarly concluded that such a possibility did not constitute a collateral consequence, because "the decision to grant parole is discretionary" and the disciplinary finding would be only one factor among many considered by the BPH. *Id.*; *see also Carranza v. Gomez*, 221 Fed. Appx. 582, 583 (9th Cir. 2007) (characterizing *Wilson* as holding that "impaired parole prospects do not constitute collateral consequences."). The court also noted that the BPH would likely consider the underlying conduct, which the petitioner did not deny, rather than the disciplinary finding itself, so expunging the disciplinary conviction would not improve his parole prospects. *Wilson*, 319 F.3d at 482.

Here, unlike *Wilson*, petitioner denies the charges underlying his disciplinary finding. It is therefore possible that expungement of the finding from his record would improve his parole prospects to the extent that the discipline, and the conduct underlying it, would no longer be considered by the BPH or by petitioner's evaluating psychologists. This is especially likely in a case such as this one, where petitioner alleges that he had remained disciplinary-free for eighteen years before this disciplinary conviction. At the same time, the discipline remains but one consideration among many reviewed by the BPH and the Governor in deciding petitioner's parole suitability. The undersigned takes no position on whether the potential use of the disciplinary conviction in future parole proceedings is too speculative to be considered a

V. Conclusion

Accordingly, it is hereby RECOMMENDED that respondent's motion to dismiss be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: August 31, 2011.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

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collateral consequence. *Compare Maxwell v. Neotti*, No. 09cv2660-L (BLM), 2010 U.S. Dist. LEXIS 88062, *18-25 (S.D. Cal. July 15, 2010) (finding a habeas challenge to a disciplinary conviction with no attendant credit loss cognizable in habeas but nonetheless moot because the BPH had "complete discretion in determining whether, and to what extent" to consider the rules violation in determining parole eligibility, making it "no more than a possibility that the conviction would impact Petitioner's parole eligibility, thereby rendering this potential consequence too speculative to satisfy Article III's 'injury in fact' requirement.") *with Noor v. Martel*, No. CIV. 08-1656 WBS JFM, 2009 U.S. Dist. LEXIS 56966, at *8-13 (E.D. Cal. July 2, 2009) (finding a habeas challenge to a disciplinary conviction with no attendant credit loss not moot where the petitioner submitted transcripts of prior suitability hearings at which the BPH emphasized that petitioner must demonstrate his ability to be "disciplinary-free" for a long period of time in order to be found suitable for release and where petitioner challenged both the disciplinary conviction and the underlying conduct).