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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD DAVIS,

Petitioner,

No. 2: 10-cv-01029 KJM DAD P

vs.

JAMES HAVILAND,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Therein petitioner challenges three 2007 prison disciplinary convictions he incurred for smoking, possession of contraband, and possession of obscene material, all on the same day. Before the court is respondent’s second motion to dismiss the petition pursuant to Rule 4 of the Rules Governing § 2254 Cases. Petitioner has filed an opposition to the motion.

BACKGROUND

On August 16, 2010, respondent filed his first motion to dismiss. (Doc. No. 14.) Therein respondent argued that petitioner had failed to establish that success on his habeas petition filed with this court would shorten the duration of his confinement. Although petitioner was assessed thirty days loss of time credits on the disciplinary convictions for possession of

1 credits stemming from the challenged disciplinary convictions will have no actual impact on the
2 duration of petitioner’s confinement. (Id.) Rather, because petitioner is now serving a life term,
3 he will not be released until he is found suitable for parole by the Board of Parole Hearings.

4 Respondent argues that in his amended petition, petitioner makes only vague
5 allegations that the 2007 prison disciplinary convictions will be considered by the Board in
6 determining his parole suitability. (Id. at 7.) Respondent refers to the court’s August 1, 2011
7 order and contends that petitioner has failed to clarify his claims and to address the impact of the
8 challenged disciplinary convictions on his future prospects for release on parole. (Id.)

9 On August 22, 2007, three months before petitioner received the three challenged
10 disciplinary convictions, petitioner was found unsuitable for parole and his next parole hearing
11 was deferred for four years. (Id.) Respondent contends that petitioner’s next hearing could have
12 been deferred for one year and since petitioner failed to attach a copy of the hearing transcript to
13 his amended petition, it is unclear why the Board deferred his next hearing for four years. (Id. at
14 8.) Nonetheless, respondent argues “there must have been other compelling factors the Board
15 relied on to deny parole for four years.” (Id.) Respondent also notes that in 2011, petitioner was
16 due for a parole suitability hearing but chose to postpone his hearing. (Id.) Respondent
17 acknowledges that petitioner contends he postponed his 2011 parole suitability hearing in order
18 to first challenge his disciplinary convictions. However, citing the decision in Sandin v. Connor,
19 515 U.S. 472, 487 (1995), respondent argues that even if this court were to grant federal habeas
20 relief and invalidate the challenged disciplinary convictions, the possibility that the Board will
21 find petitioner suitable for parole is speculative at best. (Id.) Accordingly, respondent argues
22 that the pending amended petition should be dismissed because habeas jurisdiction is absent.

23 **II. Petitioner’s Opposition**

24 Petitioner contends that the three prison disciplinary convictions he seeks to
25 challenge here were cited by the Board in finding him unsuitable for release on parole in 2011.
26 In addition, petitioner contends that the three disciplinary convictions were also cited in his

1 psychological evaluation which the Board considered in making its decision to deny him parole
2 at that time. Petitioner has provided the court s a copy of the transcript from his parole
3 consideration hearing held on October 12, 2011. The transcript reflects that in denying parole at
4 that time the Board panel stated as follows:

5 Deputy Commissioner Fassnacht: I just want to let you know
6 that what's troubling is there was a cluster of 115s that you
7 acquired this review period, starting with, you know, the most
8 recent, which was the August the 27th, 2008, and then you had the
9 smoking in the building in 2007, then you had the November 2007
10 contraband, and a Motorola adapter for charging a cell phone and
11 the Metro PCS headset, and then the administrative 115 for
12 obscenity, drawing a female having sex with a man, exposing her
13 breasts. Something is going on at that, because it was just a
14 cluster, so it was just somewhat troubling. I hope you can just go
15 ahead and - - just no more 115s. You've had that before, that's
16 why I thought where is this cluster coming from. Okay, thank you.

17 * * *

18 Commissioner Fritz: I just wanted to add, in regard to your factors
19 that we determined to be unsuitable, you were convicted of the
20 murder charge a long time ago, you were convicted of the 288 back
21 in '86 and that occurred a long time ago as well, what we've seen
22 recently is the 115s. And stepping back a little bit, although you
23 said in your statement that you claim responsibility, it appeared to
24 the Panel that you had some denial as far as the non-controlling
25 offense, claiming that it occurred. And then when we fast-forward
26 to the most recent rules violations, the 2007s and the 2008s, the
discussion with the Panel, too, were that you weren't taking full
responsibility for the rules violations as well. So, that's really why
we determined that you are currently dangerous, because we still
see some of the same type of mindset recently, okay, and so that's
something that I think that you need to think about and work on.
Of course, we don't want to see any more rules violations, but
thinking about taking the responsibility for that and the pattern
that's going on there. And so, I just wanted to add that in.

27 (Doc. No. 34 at 152 and 155.)¹

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29 ¹ As noted, petitioner also contends that the disciplinary convictions he seeks to
30 challenge here were cited as a factor in finding that he posed an elevated risk of recidivism if
31 released in his 2011 psychological evaluation which, in turn, was relied upon by the Board.

1 **II. Impact of Prison Disciplinary Convictions on Duration of Confinement**

2 Respondent argues that in his amended petition petitioner does not challenge the
3 fact or duration of his confinement because the loss of credits will not shorten the length of his
4 actual confinement. Respondent contends this is so because petitioner has passed his minimum
5 eligible parole date and the impact of the challenged disciplinary convictions on the granting or
6 denial of parole in his case is speculative. In his opposition, petitioner refers to his most recent
7 parole consideration hearing and the Board’s decision to deny parole in which the Board panel
8 specifically referred to the three disciplinary convictions in denying him parole.

9 In considering suitability for parole, the Board is required to consider “all
10 relevant, reliable information available,” including “behavior before, during, and after the
11 crime[.]” Cal. Code Regs. tit. 15, § 2402(a) & (b). Circumstances tending to show unsuitability
12 for parole include whether “[t]he prisoner has engaged in serious misconduct in prison or jail.”
13 Id. at § 2402(c)(6). Institutional behavior is given additional consideration among the
14 circumstances tending to show suitability for parole because “[i]nstitutional activities indicate an
15 enhanced ability to function within the law upon release.” Id. at § 2402(d)(9).

16 The Ninth Circuit has held that federal habeas jurisdiction exists where the
17 expungement of a challenged prison disciplinary record is “likely to accelerate the prisoner’s
18 eligibility for parole.” Ramirez v. Galaza, 334 F.3d 850, 858 (9th Cir. 2003) (quoting Bostic v.
19 Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989)). See also Docken v. Chase, 393 F.3d 1024, 1031
20 (9th Cir. 2004) (“[T]he potential relationship between [petitioner’s] claim and the duration of his
21 confinement is undeniable. In such a case, we are reluctant to unnecessarily constrain our
22 jurisdiction to entertain habeas petitions absent clear indicia of congressional intent to do so.”);
23 Martin v. Tilton, No. 08-55392, 430 Fed. Appx. 590, 591 (9th Cir. April 29, 2011) (“Even
24 though Martin did not forfeit any work-time credits as a result of the disciplinary finding, we
25 have jurisdiction because the Board of Parole will consider the charge [mutual combat without

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1 serious injury] when it evaluates Martin’s eligibility for parole.”²; Dunn v. Swarthout, No. 2:11-
2 cv-2731 JAM GGH P, 2012 WL 3143889, at *3 (E.D. Cal. Aug. 1, 2012) (“It is at least ‘likely
3 that expungement of the disciplinary finding could accelerate petitioner’s eligibility for parole at
4 any future parole hearing.”), report and recommendations adopted by 2012 WL 4468589 (E.D.
5 Cal. Sept. 26, 2012); Birdwell v. Martel, No. CIV S-10-2523 LKK EFB P, 2012 WL 761914
6 (E.D. Cal. Mar. 7, 1012) (concluding that based on the decisions in Bostic and Docken, habeas
7 jurisdiction existed over petitioner’s habeas petition challenging his disciplinary conviction with
8 no time credit loss because expungement could potentially accelerate his release on parole),
9 report and recommendation adopted by 2012 WL 1131540 (E. D. Cal. Mar. 30, 2012); Avina v.
10 Adams, No. 1:10-cv-00790 AWI MJS HC, 2011 WL 6752407, at *18 (E.D. Cal. Dec. 23, 2011)
11 (“The Board explicitly relied on petitioner’s disciplinary findings as one of many reasons in
12 denying him parole. Thus, it is at least ‘likely’ that expungement of the disciplinary finding
13 could accelerate petitioner’s eligibility for parole.”), report and recommendation adopted by 2012
14 WL 1130610 (E.D. Cal. Mar. 30, 2012); Nguon v. Walker, No. CIV S-10-0704 FCD DAD P,
15 2011 WL 3501011, at *7 (E.D. Cal. Aug. 8, 2011) (“Expungement of a disciplinary conviction
16 from an inmate’s record is likely to accelerate his eligibility for parole and could potentially
17 affect the duration of his confinement.”); Rodriquez v. Swarthout, No. 2:10-cv-1226 GEB KJN
18 P, 2011 WL 23126, at *2 (E.D. Cal. Jan. 4, 2011) (reversal or expungement of the rules violation
19 conviction in question was likely to accelerate petitioner’s eligibility for parole particularly where
20 in denying parole the Board specifically warned petitioner that he should become disciplinary
21 free), report and recommendation adopted by 2011 WL 1899799 (E.D. Cal. May 19, 2011);
22 Maxwell v. Neotti, No. 09cv2660-L (BLM), 2010 WL 3338806, at *6 (S.D. Cal. July 15, 2010)
23 (concluding that habeas relief could be pursued where the petitioner sought expungement of a
24 disciplinary conviction that was likely to effect parole consideration under state law), report and

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26 ² Citation to this unpublished Ninth Circuit opinion issued after January 1, 2007 is
appropriate pursuant to Ninth Circuit Rule 36-3(b).

1 recommendation adopted by 2010 WL 3338803 (S.D. Cal. Aug. 24, 2010); Drake v. Felker, No.
2 2:07-cv-00577(JKS), 2007 WL 4404432, at *2 (E.D. Cal. Dec. 13, 2007) (concluding that a
3 habeas action was cognizable to challenge a prison disciplinary conviction for battery on a peace
4 officer because it “will almost certainly come back to haunt . . . [petitioner] when the parole
5 board reviews his suitability for parole.”).³

6 Here, the undersigned finds respondent’s contention that the vacating of the prison
7 disciplinary convictions petitioner seeks is not likely to effect his eligibility for release on parole
8 to be unpersuasive. This court has reviewed the transcript of petitioner’s 2011 parole suitability
9 hearing as well as transcripts of numerous such hearings at which the Board denies inmates
10 parole due, at least in part, to the presence of one or more prison disciplinary convictions in their
11 record. In denying parole the Board panels regularly advise inmates to become or remain
12 disciplinary free pending their next parole suitability hearing, just as the panel did at petitioner’s
13 2011 hearing.

14 Moreover, here petitioner’s prison disciplinary convictions and the alleged
15 misconduct from which they stemmed is the type of relevant information that the Board is to
16 consider because it reflects on a prisoner’s behavior “after the crime” and is a possible indicator
17 that the prisoner is unable or unwilling to comply with society’s rules. See Cal. Code Regs. tit.

18
19 ³ As has been noted by other courts, “there has been inconsistency inasmuch as some
20 district courts have found no habeas jurisdiction in this context.” Dunn v. Swarthout, No. 2:11-
21 cv-2731 JAM GGH P, 2012 WL 3143889, at *3 (E.D. Cal. Aug. 1, 2012), report and
22 recommendations adopted by 2012 WL 4468589 (E.D. Cal. Sept. 26, 2012). See also Avina v.
23 Adams, No. 1:10-cv-00790 AWI MJS HC, 2011 WL 6752407, at *9-10 (E.D. Cal. Dec. 23,
24 2011) (noting divergence of views), report and recommendation adopted by 2012 WL 1130610
25 (E.D. Cal. March 30, 2012); Nguon v. Walker, No. CIV S-10-0704 FCD DAD P, 2011 WL
26 3501011, at *8, n.4 (E.D. Cal. Aug. 8, 2011) (observing that under some circumstances the
impact of a challenged disciplinary conviction upon future parole suitability consideration “is
simply too speculative to base federal habeas jurisdiction upon.”) In this case, however, the
impact of the challenged prison rules violation on the parole suitability determination with
respect to petitioner is clearly not speculative. In his amended habeas petition pending before
this court petitioner has alleged, under penalty of perjury, that at his 2011 parole suitability
hearing, the disciplinary convictions challenged here were specifically relied upon by the Board
panel in finding him unsuitable for parole. (See Doc. No. 2 at 2, 9.) The transcript of the hearing
submitted by petitioner supports that allegation.

1 15, § 2402. Accordingly, expungement of petitioner’s disciplinary conviction, if warranted, is
2 both “likely” to accelerate his eligibility for parole,” Bostic, 884 F.2d at 1269, and “could
3 potentially affect the duration of [his] confinement.” Docken, 393 F.3d at 1031.

4 Therefore, respondent’s motion to dismiss the petition for lack of habeas
5 jurisdiction should be denied.⁴

6 **CONCLUSION**

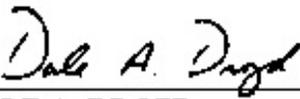
7 For the reasons set forth above, IT IS HEREBY RECOMMENDED that:

- 8 1. Respondent’s January 23, 2013 motion to dismiss (Doc. No. 32) be denied;
9 and
10 2. Respondent be ordered to file and serve an answer within thirty days of any
11 order adopting these findings and recommendations and that petitioner be ordered to file and
12 serve a traverse thirty days thereafter.

13 These findings and recommendations are submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
15 days after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. Such a document should be captioned
17 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
18 shall be served and filed within seven days after service of the objections. The parties are
19 advised that failure to file objections within the specified time may waive the right to appeal the
20 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: June 19, 2013.

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23 _____
24 DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

25 ⁴ Finally, the court notes that although respondent contends it will have no practical
26 effect on the duration of his confinement, petitioner was in fact assessed a loss of time credits as
a result of the disciplinary convictions he seeks to challenge in this habeas proceeding.