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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 RAUL AGUIRRE BARAJAS,
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13 Petitioner,
14 v.
15
16 W. L. MONTGOMERY, Warden, et
17 al.,
18 Respondents.

Case No. 16cv2122-BTM (KSC)

ORDER:

**(1) ADOPTING IN PART AS MODIFIED
AND DECLINING TO ADOPT IN PART
THE FINDINGS AND CONCLUSIONS OF
UNITED STATES MAGISTRATE JUDGE;**

**(2) GRANTING IN PART AND DENYING
IN PART MOTION TO DISMISS;**

**(3) DISMISSING THE PETITION FOR A
WRIT OF HABEAS CORPUS WITHOUT
PREJUDICE; and**

**(4) ISSUING A CERTIFICATE OF
APPEALABILITY**

23 Petitioner is a state prisoner proceeding pro se and in forma pauperis with a First
24 Amended Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (ECF
25 No. 11.) He challenges a 2013 prison disciplinary action at Pelican Bay State Prison arising
26 from his participation in a hunger strike, which resulted a guilty finding of willfully
27 delaying a peace officer in the performance of duty, and the forfeiture of ninety days of
28 good conduct custody credits. (Pet. at 1-2, 7-9.) Although Petitioner initially filed this

1 action in the District Court for the Northern District of California, where Pelican Bay State
2 Prison is located, it was transferred to this Court because Petitioner is currently incarcerated
3 at Calipatria State Prison, located in the Southern District of California, and the preferred
4 forum for a challenge to the execution of a sentence is the custodial court. (ECF No. 5.)
5 Respondent has filed a Motion to Dismiss the Petition contending that: (a) it is untimely,
6 and (b) this Court lacks habeas jurisdiction because success on Petitioner's claims will not
7 necessarily result in his speedier release from custody. (ECF No. 17-1 at 2-7.)

8 Presently before the Court is a Report and Recommendation ("R&R") by United
9 States Magistrate Judge Karen S. Crawford which recommends granting Respondent's
10 Motion to Dismiss. (ECF No. 19.) The Magistrate Judge found that this action is untimely
11 because it was commenced 41 days after expiration of the one-year statute of limitations,
12 and that the Court lacks habeas jurisdiction because success on his claims will not result in
13 Petitioner's earlier release from custody. (R&R at 6-12.) No objections to the R&R have
14 been filed.

15 The Court has reviewed the R&R pursuant to 28 U.S.C. § 636(b)(1), which provides
16 that: "A judge of the court shall make a de novo determination of those portions of the
17 report or specified proposed findings or recommendations to which objection is made. A
18 judge of the court may accept, reject, or modify, in whole or in part, the findings or
19 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

20 The Magistrate Judge found that Petitioner is not entitled to statutory tolling during
21 the 70-day gap after the state superior court denied his habeas petition on March 9, 2015,
22 and the filing of his habeas petition in the appellate court on May 18, 2015, on the basis
23 that "precedent dictates" that an unexplained 70-day gap is unreasonable under California
24 law. (R&R at 8-9.) However, this Court is not bound by the unpublished decision of the
25 District Court for the Eastern District of California relied on by the R&R. (R&R at 9.) In
26 addition, the Magistrate Judge, in finding the 70-day delay unreasonable, failed to take into
27 account that Petitioner was apparently still housed at the Pelican Bay Security Housing
28 Unit at the relevant time (see Lodgment No. 3 at 1 [ECF No. 18-3 at 1]), and to consider

1 what delays, if any, may have resulted. See Evans v. Chavis, 546 U.S. 189, 199-200 (2006)
2 (finding that delay of over 60 days is presumptively unreasonable, but suggesting that a
3 prison lockdown or other circumstances preventing a prisoner from timely filing could
4 rebut that presumption). The Court therefore declines to adopt the finding that Petitioner
5 is not entitled to statutory tolling during that 70-day gap. A habeas action brought pursuant
6 to 28 U.S.C. § 2254 would be timely under the one-year statute of limitations applicable to
7 such petitions if Petitioner was entitled to statutory tolling for those 70 days. (See R&R at
8 9.) The Court does not need to make a determination, however, because that one-year
9 statute of limitations does not apply to this action. As discussed below, Petitioner may not
10 proceed with his claims on federal habeas, but must present them to a federal court, if at
11 all, in a civil rights Complaint filed pursuant to 42 U.S.C. § 1983, which has a different
12 statute of limitations. Accordingly, the Court **DECLINES TO ADOPT** the Magistrate
13 Judge’s findings and conclusions regarding the statute of limitations, and **DENIES IN**
14 **PART** Respondent’s Motion to Dismiss on statute of limitations grounds.

15 The Magistrate Judge found that Petitioner has failed to invoke this Court’s habeas
16 jurisdiction on the basis that success on the merits of his claims would not necessarily result
17 in his earlier release from custody, because he is statutorily ineligible to accrue custody
18 credits, and because he could be denied parole even if his disciplinary infraction is
19 invalidated. (R&R at 10-12.) With the following modifications, the Court adopts the
20 finding that this Court lacks habeas jurisdiction over Petitioner’s claims.

21 A state prisoner’s claims either lie at “the core of habeas corpus” and are subject to
22 the provisions of the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), or they
23 “challenge[] any other aspect of prison life” and are subject to the provisions of the Prison
24 Litigation Reform Act (“PLRA”) and “must be brought, if at all, under § 1983.” Nettles v.
25 Grounds, 830 F.3d 922, 931 (9th Cir. 2016) (en banc), cert. denied, 137 S.Ct. 645 (2017),
26 citing Preiser v. Rodriguez, 411 U.S. 475, 487 (1973), and Skinner v. Switzer, 562 U.S.
27 521, 535 n.13 (2011). A district court may construe a habeas petition which presents claims
28 which do not lie at the core of habeas as a § 1983 action “after notifying and obtaining

1 informed consent from the prisoner.” Id. at 936 (“If the complaint is amenable to
2 conversion on its face, meaning it names the correct defendants and seeks the correct relief,
3 the court may recharacterize the petition so long as it warns the *pro se* litigant of the
4 consequences of the conversion and provides an opportunity for the litigant to withdraw or
5 amend his or her complaint.”)

6 Petitioner here, as with the California state prisoner in Nettles, is serving an
7 indeterminate term of life imprisonment with the possibility of parole (see Lodgment No.
8 2 at 1 [ECF No. 18-2 at 1]), and, as with Nettles, claims that his federal constitutional rights
9 were violated by the prison disciplinary action, not only because he lost custody credits but
10 because the existence of the disciplinary infraction has the potential to affect future parole
11 proceedings. Nettles, 830 F.3d at 925. The Ninth Circuit found that Nettles’ claim did not
12 lie within the core of habeas corpus because custody credits earned by inmates serving an
13 indeterminate term “go toward advancing only their minimum eligible release date, not
14 their actual release from prison,” and that success “would not necessarily lead to immediate
15 or speedier release because the expungement of the challenged disciplinary violation would
16 not necessarily lead to a grant of parole.” Id. at 934-35 (“A rules violation is merely one
17 of the factors shedding light on whether a prisoner” is suitable for parole); see also Ramirez
18 v. Galaza, 334 F.3d 850, 859 (9th Cir. 2003) (“Here, if successful, Ramirez will not
19 necessarily shorten the length of his confinement because there has been no showing by
20 the State that the expungement [of the disciplinary infraction] Ramirez seeks is likely to
21 accelerate his eligibility for parole.”); see also In re Jenkins, 50 Cal.4th 1167, 1179-80
22 (2010) (noting that a prisoner serving an indeterminate life sentence has his or her
23 minimum parole eligibility date advanced though custody credits, but their actual release
24 from prison is wholly dependent on the parole decision). Thus, because there is no showing
25 that success on the merits would “necessarily” have an effect on the duration of his
26 confinement, Petitioner’s claims do not lie at “the core of habeas corpus” and “must be
27 brought, if at all, under § 1983.” Nettles, 830 F.3d at 927.

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1 Accordingly, the Court **ADOPTS AS MODIFIED** the finding of the Magistrate
2 Judge that Petitioner has not invoked this Court’s habeas jurisdiction, and that his claims
3 must be brought in federal court, if at all, in a civil rights Complaint filed pursuant to 42
4 U.S.C. § 1983. Respondent’s Motion to Dismiss is **GRANTED IN PART** on that basis,
5 and this action is **DISMISSED** without prejudice to Petitioner to proceed with his claims,
6 if he wishes, in a civil rights Complaint filed pursuant to 42 U.S.C. § 1983.

7 Although the Court may construe a habeas petition which presents claims which do
8 not lie at the core of habeas as a § 1983 action, “after notifying and obtaining informed
9 consent from the prisoner,” the Court declines to so construe this action. See Nettles, 830
10 F.3d at 936 (“If the complaint is amenable to conversion on its face, meaning it names the
11 correct defendants and seeks the correct relief, the court may recharacterize the petition so
12 long as it warns the *pro se* litigant of the consequences of the conversion and provides an
13 opportunity for the litigant to withdraw or amend his or her complaint.”) There are no
14 allegations against the named Respondents in this action (the California Attorney General
15 and the Warden of the correctional institution where Petitioner is currently confined, not
16 where he was confined at the time of the disciplinary action), and it is unclear who
17 Petitioner seeks to hold personally responsible for the alleged denial of his federal rights.
18 See e.g. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (“The inquiry into causation
19 must be individualized and focus on the duties and responsibilities of each individual
20 defendant whose acts or omissions are alleged to have caused a constitutional
21 deprivation.”), citing Rizzo v. Goode, 423 U.S. 362, 370-71 (1976).

22 Further, venue for such a § 1983 action lies in the Northern District of California,
23 and not in the Southern District of California. A “civil action may be brought in – (1) a
24 judicial district in which any defendant resides, if all defendants are residents of the State
25 in which the district is located; [or] (2) a judicial district in which a substantial part of the
26 events or omissions giving rise to the claim occurred, or a substantial part of property that
27 is the subject of the action is situated[.]” 28 U.S.C. § 1391(b); Costlow v. Weeks, 790
28 F.2d 1486, 1488 (9th Cir. 1986). The Magistrate Judge found that Petitioner could have

1 chosen to file a § 1983 action if the AEDPA one-year statute of limitations had not expired.
2 (R&R at 12 n.8.) The Court **DECLINES TO ADOPT** that finding because the statute of
3 limitations for a § 1983 action is not controlled by AEDPA, and because the limitations
4 period for Petitioner’s § 1983 claim does not appear to expire for several months yet.
5 Petitioner’s claim accrued when he was found guilty of the disciplinary infraction on July
6 25, 2013. Maldonado v. Harris, 370 F.3d 945, 955 (9th Cir. 2004) (“Under federal law, a
7 claim accrues when the plaintiff knows or has reason to know of the injury which is the
8 basis of the action.”) The statute of limitations began tolling 38 days later when Petitioner
9 began exhausting his administrative remedies on September 3, 2013, when he filed his first
10 level grievance (ECF No. 11 at 49), and continued to toll until the final decision at the
11 director’s level of review on December 23, 2013 (*id.* at 57). See Brown v. Valoff, 422 F.3d
12 926, 943 (9th Cir. 2005) (finding that “the applicable statute of limitations must be tolled
13 while a prisoner completes the mandatory exhaustion process” required by 42 U.S.C.
14 § 1997e(a)). The effective statute of limitations for most California prisoners is four years,
15 the two year limitations period plus two years statutory tolling due to incarceration. Jones
16 v. Blanas, 393 F.3d 918, 927 (9th Cir. 2002). Although the Court makes no determination
17 regarding the statute of limitations, it appears Petitioner has four years, less 38 days, from
18 December 23, 2013, to timely file a § 1983 action in the Northern District of California if
19 he wishes to do so.

20 Because venue over such an action lies in the Northern District of California and not
21 in this District, because the Petition is not amenable to conversion on its face, because
22 Petitioner has not chosen to proceed with a § 1983 action, and because this action was
23 transferred to this Court from the Northern District, it does not appear that the interests of
24 justice counsel in favor of this Court construing this action as a § 1983 Complaint and
25 transferring it back to the Northern District. In addition to the reasons set forth above, it
26 might also expose Petitioner to the provisions of the PLRA, one of which provides that the
27 entire \$350 civil filing fee must be collected even if he qualifies to proceed in forma
28 pauperis, and regardless of whether his action is ultimately dismissed. Bruce v. Samuels,

1 577 U.S. ___, 136 S. Ct. 627, 630 (2016). Accordingly, the Court declines to construe this
2 action as a civil rights complaint pursuant to 42 U.S.C. § 1983. See Nettles, 830 F.3d at
3 936.

4 **CONCLUSION AND ORDER**

5 As set forth above, the Court **DECLINES TO ADOPT IN PART** and **ADOPTS**
6 **IN PART AS MODIFIED** the findings and conclusions of the Magistrate Judge, and
7 **GRANTS IN PART** and **DENIES IN PART** Respondent’s Motion to Dismiss. The
8 Petition for a writ of habeas corpus is **DISMISSED** without prejudice to Petitioner to
9 proceed with his claims, if he wishes, in a Complaint filed in the Northern District of
10 California pursuant to 42 U.S.C. § 1983.

11 The threshold for granting a Certificate of Appealability is “relatively low.”
12 Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002). “[T]he petitioner need not
13 show that he should prevail on the merits,” and the inquiry is “whether jurists of reason
14 would find it debatable whether the district court was correct in its procedural ruling.”
15 Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000). Petitioner may be entitled to
16 a certificate when the “questions are adequate to deserve encouragement to proceed
17 further.” Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983) (citation omitted), superseded
18 on other grounds by 28 U.S.C. § 2253(c)(2). Accordingly, the Court **ISSUES** a Certificate
19 of Appealability. The Clerk shall enter judgment accordingly.

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22 DATED: August 29, 2017



23 BARRY TED MOSKOWITZ
24 UNITED STATES DISTRICT JUDGE
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