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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

FRANCISCO RODRIGUEZ,  
  
Plaintiff,  
  
v.  
  
W.F. MONTGOMERY, Warden,  
  
Defendant.

Case No.: 16cv2948-MMA (PCL)

**REPORT AND  
RECOMMENDATION DISMISSING  
PETITION FOR WRIT OF HABEAS  
CORPUS**

**I. INTRODUCTION**

Petitioner Francisco Rodriguez, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus. (Doc 1.) Petitioner is in the lawful custody of California Department of Corrections and Rehabilitation (CDCR) following his March 12, 2014 guilty plea and conviction for one count of voluntary manslaughter with a weapons enhancement, for which he was serving a determinate prison term of twelve years. (See Doc. 1, at 1-2.) Petitioner does not challenge his underlying conviction or the imposition of his sentence but rather seeks to overturn the ruling of an institutional administrative disciplinary action in which he was found guilty of possessing

1 methamphetamine on March 21, 2016. (Doc. 1, at 3.) For the reasons given below,  
2 Petitioner's Petition should be dismissed without prejudice.

3 **II. FACTUAL AND PROCEDURAL BACKGROUND**

4 The following facts are taken from the Superior Court of California's Order denying  
5 his habeas petition. (Lodgment 4.)

6 On Monday, October 27, 2014, Officer R. Ramos, acting as B4 Floor Officer  
7 #1, approached cell B4-110 for a random cell search. Cell B4-110 was assigned  
8 to Petitioner, who was not present, and Inmate Anguiano was present. Inmate  
9 Anguiano was cuffed, escorted out, and subjected to an unclothed search with  
10 negative results for contraband. Officer Ramos returned to the cell and searched  
11 it, finding a white crystal substance wrapped in clear plastic on the upper shelf  
belonging to the upper bunk. He took possession of the substance, concluded  
the search, and then turned the substance over to Officer R. Steele.

12 Officer Ramos was present with Officer Steele when Officer Steele opened,  
13 weighed, tested, and photographed the bindle. Officer Steele obtained a weight  
14 of 1 gram, and, using a Presumptive Field Test (NIK Test), determined that the  
15 substance was methamphetamine. The substance was then packaged and  
16 everything was secured into evidence locker #7 in sub-evidence room #430-  
144.

17 The same day, Officer Steele had Petitioner provide a urine sample. He advised  
18 Petitioner of the results of the NIK Test, and Petitioner elected to reject the  
19 results. It appears that ultimately, on April 28, 2015, Petitioner opted to accept  
the NIK Test results.

20 On June 1, 2015, a hearing was held before Senior Hearing Officer J. Coronado,  
21 during which Petitioner pled not guilty, stating "I'm not guilty because it's not  
22 mine." Inmate Anguiano appeared at the hearing, and acknowledged ownership  
23 of the contraband, stating that he obtained it a few minutes after Petitioner left  
the cell.

24 The Senior Hearing Officer found Petitioner guilty of violation of Cal. Code  
25 Regs., tit. 15, § 3016, subd. (a) POSSESSION OF A CONTROLLED  
26 SUBSTANCE – METHAMPHETAMINE based on the Officers' reports, the  
27 physical evidence, and the testimony of Petitioner and Inmate Anguiano.  
28 Petitioner was assessed penalties consistent with a Division "B" offense.

1  
2 Petitioner argues that there is insufficient evidence the drugs were within his  
3 possession or under his control [because of] the fact he was forced to double  
4 cell and his cellmate confessed to ownership of the drugs. Petitioner includes a  
5 copy of a declaration from Inmate Anguiano in which he reaffirms his  
6 ownership of the drugs and Petitioner's lack of knowledge.

7  
8 Petitioner takes issue with the concept of "constructive possession" which is  
9 frequently the basis for findings of guilt in CDCR Form 115 proceedings  
10 involving the existence of contraband in relatively confined areas shared by  
11 more than one inmate, for example, two inmate cells. The case that provides the  
12 answer to Petitioner's question is *In re v. Zepeda* (4<sup>th</sup> Dist., 2006) 141 Cal. App.  
13 4<sup>th</sup> 1493. That case held that merely by virtue of being an occupant of the cell,  
14 the petitioner had constructive possession of contraband sufficient to warrant  
15 the disciplinary measures imposed. (*Id.*, at 1499-1500.)

16  
17 The court's review of the evidence in these cases is limited to whether the  
18 decision of the hearing officer is supported by some evidence. (*In re v. Zepeda*,  
19 *supra*, 141 Cal. App. 4<sup>th</sup> 1493, 1493.).

20  
21 (Lodgment 4, at 1-3.)

22  
23 Petitioner then appealed the Superior Court's ruling to the California Court of  
24 Appeal. The Justices issued the following ruling:

25  
26 In 2015, petitioner Francisco Rodriguez was incarcerated at Calipatria State  
27 Prison, where he was found guilty of a rules violation for possession of a  
28 controlled substance and assessed a forfeiture of custody credits. Rodriguez  
contends there is insufficient evidence to support the decision of the senior  
hearing officer because the narcotics belonged to his cellmate and he was  
outside the cell at the time of the search.

Rodriguez is not entitled to habeas corpus relief. "[T]he requirements of due  
process are satisfied if some evidence supports the decision by the prison  
disciplinary board to revoke good time credits." (*Superintendent v. Hill* (1985)  
472 U.S. 445, 455.) The report of the correctional officer that the controlled  
substance was found in a common area of Rodriguez's prison cell in an area  
readily accessible to both inmates constitutes "some evidence" he committed  
the disciplinary violation. Rodriguez's "reliance on the evidence that supports

1 his assertion not to have known about the [controlled substance], such as his  
2 cellmate’s acknowledgment of ownership and [Rodriguez’s] own claim of  
3 innocence, does not change the analysis under *Hill*. *Hill* emphasizes that the  
4 reviewing court is not to engage in an ‘examination of the entire record’ or  
5 ‘weighing of the [conflicting] evidence.’ [Citation.] Rather, the narrow role  
6 assigned to the reviewing court is solely to determine whether there is ‘*any*  
7 *evidence* in the record that *could support* the conclusion reached by the  
8 disciplinary board.’ [Citation.] Here, there is such evidence, even if, as  
9 [Rodriguez] contends, there is other evidence that supports his assertion of  
10 innocence.” (*In re Zepeda* (2006) 141 Cal. App. 4<sup>th</sup> 1493, 1500.)

11 (Lodgment 6.)

12 Petitioner then filed a petition for writ of habeas corpus with the California  
13 Supreme Court, in which he alleged the same claims he has advanced in his current  
14 federal Petition. (Lodgment 7.) On November 9, 2016, the California Supreme Court  
15 denied Petitioner’s habeas petition without comment. (Lodgment 8.)

### 16 **III. DISCUSSION**

17 The Supreme court has recognized that “[f]ederal law opens two main avenues to  
18 relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C.  
19 §2254, and a complaint under the Civil Rights Act of 1871, 42 U.S.C. §1983.”  
20 Muhammad v. Close, 540 U.S. 749, 750 (2004). “Challenges to the validity of any  
21 confinement or to particulars affecting its duration are the province of habeas corpus;  
22 requests for relief turning on circumstances of confinement may be presented in a §1983  
23 action.” Id. (internal citation omitted). “[A] §1983 action is the exclusive vehicle for  
24 claims brought by state prisoners that are not within the core of habeas corpus.” Nettles v.  
25 Grounds, 830 F.3d 922, 927 (9<sup>th</sup> Cir. 2016).

26 In Nettles, the loss of good time credits that Nettles complained about in his habeas  
27 petition did not necessarily prevent him from early release based on good behavior.  
28 “Because the parole board has the authority to deny parole ‘on the basis of any of the  
grounds presently available to it,’ the presence of a disciplinary infraction does not

1 compel the denial of parole, nor does an absence of an infraction compel the grant of  
2 parole.” Nettles v. Grounds, 830 F.3d 922, 935 (9<sup>th</sup> Cir. 2016) (citation omitted). The  
3 Ninth Circuit decided that unless it was with absolute certainty that Nettles would be  
4 released from prison if his good time credits were restored, Nettles’s claim would not fall  
5 “within the core of habeas corpus” but rather should be brought in a civil rights complaint  
6 filed under 42 U.S.C. § 1983. Id. (citation omitted). In instances where a petitioner has  
7 inappropriately filed a writ of habeas corpus and the prisoner’s habeas petition is  
8 amendable to conversion to a § 1983 action on its face, the court may recharacterize the  
9 petition so long as it warns the pro se litigant of the consequences of the conversion and  
10 the petition is amenable to conversion. Id. at 936. However, if conversion is not an  
11 option, the petition must be dismissed without prejudice. Id.

12 Here, as in Nettles, Petitioner is not challenging the validity of his confinement or  
13 the particulars affecting the length of his prison sentence. Rather, Petitioner challenges a  
14 ruling from a disciplinary board that affects the circumstances of Petitioner’s  
15 confinement. Although Petitioner alleges that had he not been found guilty of possession  
16 of methamphetamine while incarcerated he would have been released from prison sooner,  
17 there are no facts to indicate that Petitioner would have been immediately released from  
18 prison if his good time credits were restored. As such, a §1983 action is the exclusive  
19 vehicle for the type of claim described in this petition and for the relief that he seeks.  
20 Moreover, the Petition is not amenable to conversion to a § 1983 complaint on its face.  
21 While “[t]he right respondent in a § 2254 action is the warden of the prison, the right  
22 defendants in a §1983 suit are the persons whose wrongful acts harmed the plaintiff (and  
23 the warden is rarely a proper defendant, because he is not vicariously liable for  
24 subordinates’ acts).” Glaus v. Anderson, 408 F.3d 382, 389 (7<sup>th</sup> Cir. 2005) (citation and  
25 quotation marks omitted). Petitioner only named the warden on the face of his Petition  
26 and did not name the proper defendants who allegedly convicted him of  
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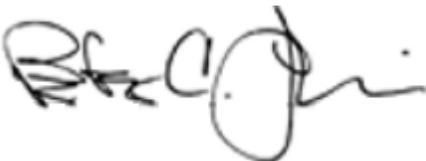
1 methamphetamine possession without an evidentiary basis. Because his Petition is not  
2 amenable to conversion in its current form, the Court recommends that the Petition be  
3 DENIED.

4 **IV. CONCLUSION AND RECOMMENDATION**

5 The court submits this Report and Recommendation to United States District Judge  
6 Anello under 28 U.S.C. §636(b)(1) and Local Civil Rule HC.2 of the United State Distrct  
7 Court for the Southern District of California. For the reasons outlined, **IT IS HEREBY**  
8 **RECOMMENDED** that the Court issue an Order (1) approving and adopting this Report  
9 and Recommendation, and (2) directing that the Petition be DISMISSED.

10 **IT IS HEREBY ORDERED** that any party of this action may file written  
11 objections with the Court and serve a copy on all parites no later than October 18, 2017.  
12 The document should be captioned “Objections to Report and Recommendation.” The  
13 parties are advised that failure to file objections with the specified time may waive their  
14 right to raise those objections on appeal of the Court’s Order. *See Turner v. Duncan*, 158  
15 F.3d 449, 455 (9<sup>th</sup> Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9<sup>th</sup> Cir. 1991).

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17 DATE: DATE: October 2, 2017

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21 Peter C. Lewis  
22 United States Magistrate Judge  
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