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6 UNITED STATES DISTRICT COURT
7 SOUTHERN DISTRICT OF CALIFORNIA
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9 RAMON DEL RIO,

10 Petitioner,

11 v.

12 DANIEL PARAMO,

13 Respondent.
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Case No.: 17CV608 GPC (BGS)

**REPORT AND
RECOMMENDATION FOR ORDER
GRANTING RESPONDENT’S
MOTION TO DISMISS
PETITIONER’S PETITION FOR
WRIT OF HABEAS CORPUS**

16 Petitioner Ramon Del Rio (hereinafter “Petitioner” or “Del Rio”) is a California
17 Prisoner proceeding pro se. Del Rio has filed a Petition for Writ of Habeas Corpus
18 pursuant to 28 U.S.C. § 2254 (“Petition”). (ECF No. 1.) Pending before the Court is
19 Respondent’s Motion to Dismiss the Petition (“Motion”). (ECF No. 8.) Petitioner has
20 filed an Opposition to the Motion to Dismiss (“Opposition”). (ECF No. 11.)

21 This case is before the undersigned Magistrate Judge pursuant to S.D. Cal. Civ. R.
22 72.1(d) for a report and recommendation. The Court submits this Report and
23 Recommendation to United States District Judge Gonzalo P. Curiel pursuant to 28 U.S.C.
24 § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the
25 Southern District of California.

26 The Court has considered Respondent’s Motion to Dismiss, Petitioner’s
27 Opposition, the Petition, and all exhibits and lodgments submitted by Petitioner and
28 Respondent. For the reasons set forth below, this Court recommends that Respondent’s

1 Motion to Dismiss be **GRANTED** and the Petition dismissed because the claims asserted
2 do not fall within “the core of habeas corpus.” *Nettles v. Grounds*, 830 F.3d 922, 934
3 (9th Cir. 2016) (en banc) (citations omitted).

4 **I. BACKGROUND**

5 On January 25, 1978 Petitioner was convicted of two counts of first-degree
6 murder. (Lodgment 1 at 1.) On February 22, 1978, Petitioner was sentenced to seven
7 years to life in prison with the possibility of parole. (Pet. at 18;¹ Motion at 2.) Petitioner
8 reached his minimum eligible parole date (“MEPD”)² on May 19, 1984. (Lodgment 2.)

9 On September 22, 2015, Petitioner was issued a Rules Violation Report (“RVR”)
10 by a correctional officer for refusing to provide a urine sample. (Pet. at 29-32.) Petitioner
11 claims the reason he did not comply with the correctional officer’s request was due to a
12 medical condition. (*Id.* at 12, 19, 21.) On October 24, 2015, Petitioner was found guilty
13 of refusing a urinalysis in violation of prison rules. (Lodgment 3 at 16.) For this offense,
14 Petitioner lost 30 days of behavioral credit, 90 days of yard privileges, 180 days of visits
15 followed by 180 days of only non-contact visits, was confined to quarters (“CTQ”) for 10
16 days, and was required to submit to one year of mandatory drug testing. (Pet. at 32.)

17 A few months before the RVR was issued, on June 9, 2015, Petitioner was denied
18 parole. (Lodgment 9.) In explaining its decision to deny parole, the Board of Parole
19 Hearings (“the Board) stated that “Del Rio does pose an unreasonable risk of danger or
20 threat to public safety and is not suitable for parole.” (*Id.* at 2.) The Board goes on to
21 explain and summarize its reasons for denying Petitioner parole, including his lack of
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24 ¹ The Court cites the CM/ECF pagination when referencing the Petition and attached
25 exhibits, (ECF No.1), and Lodgment 3, Del Rio’s Habeas Petition to the San Diego
26 Superior Court with exhibits. (ECF No. 9-3.) Page citations as to other lodgments
reference the lodgment’s pagination.

27 ² “Under California law, prisoners with life terms . . . may not be released before their
28 minimum eligible parole date (MEPD).” *Nettles*, 830 F.3d at 925. “If the prisoner is
found suitable for parole and has reached the MEPD, the prisoner is entitled to release.”
Id. (citing Cal. Penal Code § 3014(a)).

1 credibility, insufficient understanding of the causative factors of his commitment offense
2 and the heinous nature of it, his previous record of violence and unstable social history,
3 insufficient prison programming, a 2013 rules violation, an unfavorable Comprehensive
4 Risk Assessment finding that Del Rio presented a statistically high risk to reoffend in the
5 free community, and two confidential memoranda unresponsive of release. (*Id.* at 3–9.)
6 The Board then considered the appropriate time until Petitioners next parole hearing and
7 set it for seven years.³ (*Id.* at 12.)

8 **II. DISCUSSION**

9 In the Petition, Del Rio seeks habeas relief for alleged violations of his due process
10 rights and prison staff’s failure to comply with prison rules and California law in
11 disciplining him for failing to provide a urine sample for drug testing. (Pet. at 1, 12-13.)
12 He demands the RVR be expunged from his file and seeks restoration of the credits lost
13 as a result of the RVR. (Pet. at 12.) The critical issue raised in the Motion to Dismiss is
14 whether Petitioner can challenge the disciplinary proceedings through federal habeas
15 review.⁴

16 Respondent argues that Petitioner’s challenges to his disciplinary decision cannot
17 invoke habeas jurisdiction because success on his Petition would not necessarily result in
18 his speedier release and he does not attack the legality or duration of his confinement.
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21 ³ The Board considered alternative time periods of fifteen and ten years. (Lodgment 9 at
22 10-11.)

23 ⁴ Respondent also challenges the merits of Petitioner’s claims even if they had been
24 brought under 42 U.S.C. § 1983. (Mot. at 5-7.) However, as discussed more fully below,
25 because the Court concludes the Petition should be dismissed and is not amendable to
26 conversion on its face to a § 1983 action, the Court does not address these arguments. If
27 Petitioner elects to file a § 1983 claim, he still may not be able to state a claim under
28 § 1983, but at this point, he has not even attempted to because he has presented his claims
in a federal habeas petition rather than as a § 1983 action. (*See infra* II. B.) Respondent’s
arguments concerning the deficiencies of the claims if brought under § 1983 are better
addressed if Petitioner files a § 1983 action and fails to state a cognizable claim under
§ 1983.

1 (Mot. at 3-4.) As to the RVR’s impact on future parole considerations, Respondent
2 emphasizes the “myriad of considerations” that Petitioner’s parole denial was based on
3 prior to the RVR. (*Id.* at 4.) As to the credit loss specifically, Respondent characterizes
4 the credit forfeiture as an “illusory” loss. Because Petitioner is well beyond his MEPD
5 with an indeterminate life sentence, the loss of credits does not lengthen his sentence.
6 (*Id.*)

7 In opposition, Petitioner contends that any kind of guilty infraction in a RVR is a
8 significant disadvantage when qualifying for parole. (Opp’n. at 2.) Petitioner believes he
9 has to challenge the disciplinary proceeding because an infraction against him will affect
10 his eligibility for parole when presented to the Board. (*Id.*) He argues granting his
11 Petition “may result in a speedier release once [the] Parole Board assess[es] his central
12 file (C-file) and there is no disciplinary infractions.” (*Id.*)

13 **A. Habeas Jurisdiction**

14 “Challenges to the validity of any confinement or to particulars affecting its
15 duration are the province of habeas corpus. An inmate’s challenge to the circumstances of
16 his confinement, however, may be brought under [42 U.S.C.] § 1983.” *Hill v.*
17 *McDonough*, 547 U.S. 573, 579 (2006) (citations omitted). “[I]f a state prisoner’s claim
18 does not lie at ‘the core of habeas corpus,’ it may not be brought in habeas corpus but
19 must be brought, ‘if at all,’ under § 1983.”⁵ *Nettles v. Grounds*, 830 F.3d at 934 (quoting
20 *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) and *Skinner v. Switzer*, 562 U.S. 521, 535
21 n. 13 (2011)). If Petitioner’s claim is not appropriately brought as a habeas claim, it must
22 be dismissed or converted to a § 1983 action. *See id.* at 935-36. A claim falls within the
23 core of habeas if is “challenges the fact or duration of the conviction or sentence.” *Id.* at
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26 ⁵ A state prisoner’s claim falls under “the core of habeas corpus” and is subject to the
27 provisions of the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), or the
28 claim “challenges any other aspect of prison life” and is subject to the provisions of the
Prison Litigation Reform Act (“PLRA”) under § 1983. *Nettles*, 830 F.3d at 934.

1 934. And, more specifically, success on the merits of the claim must “necessarily lead to
2 [a petitioner’s] immediate or earlier release for confinement.” *Id.* at 935.

3 Whether Del Rio’s Petition falls within the core of habeas is squarely controlled by
4 the Ninth Circuit’s decision in *Nettles v. Grounds*. Like Petitioner, Nettles was serving a
5 life term and beyond his MEPD. *Id.* at 924-25. He too was challenging a rules violation
6 on constitutional grounds, seeking habeas relief to expunge an RVR and restore lost
7 credits, and arguing that the Board would be more likely to grant parole without the RVR
8 in his file.⁶ *Id.* at 934. The court found his claim did “not fall within ‘the core of habeas
9 corpus’” “because success on [his] claims would not necessarily lead to his immediate or
10 earlier release from confinement.” *Id.* at 935 (quoting *Skinner*, 521 U.S. at 535 n.13).

11 The court explained that “expungement of the challenged disciplinary violation
12 would not necessarily lead to a grant of parole,” because [u]nder California law, the
13 parole board must consider ‘all relevant, reliable information’ in determining suitability
14 for parole.” *Id.* at 935 (quoting Cal. Code Regs. Tit. 15, § 2281(b)). The RVR in *Nettles*,
15 like the RVR at issue here, “is merely one of the factors shedding light on whether a
16 prisoner constitutes a current threat to public safety.” *Id.* (citation omitted). “Because the
17 parole board has the authority to deny parole ‘on the basis of any grounds presently
18 available to it,’ the presence of a disciplinary infraction does not compel the denial of
19 parole, nor does the absence of an infraction compel the grant of parole.” *Id.*

20 The record here reflects that just a few months before Petitioner incurred the RVR
21 at issue in this Petition, he was denied parole for a variety of reasons. Although the
22 Board did raise a prior rules violation in that hearing, they also discussed at length
23 Petitioner’s poor credibility, that he had continued to minimize and blame other for his
24 criminal background, that he had not meaningfully engaged in institutional programs,
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27 ⁶ Nettles additionally argued the Board would be more likely to set his next parole
28 hearing earlier without the RVR. *Nettles*, 830 F.3d at 934. The court found this claim
also did not fall within the core of habeas. *Id.* at 935.

1 lacked any insight into how he ended up being a criminal,⁷ lacked victim empathy, and
2 received a Comprehensive Risk Assessment finding he “presents [a] statistically high risk
3 to reoffend in the free community.” (Lodgment 9 at 3-8.) The Board also considered the
4 “the very cruel, brutal, callous manner” of Petitioner’s commitment offenses resulting “in
5 a very, very painful death” — stabbings of two people. (*Id.* at 3) In short, with or
6 without the RVR, Petitioner may or may not be granted parole. Because so many other
7 factors weigh into the decision, having the RVR expunged would not necessarily lead to
8 a grant of parole for Petitioner. As in *Nettles*, the presence of an RVR does not compel
9 the denial of parole, and the absence of it would not entitle Petitioner to a grant of parole.
10 *Nettles*, 830 F.3d at 935.

11 To the extent Petitioner is arguing restoration of the 30 days of behavioral credit
12 would necessarily result in an immediate or earlier release, the Court disagrees. As in
13 *Nettles*, Petitioner is well beyond his MEPD. *Id.* at 925. These credits will not get him to
14 his MEPD any faster because he reached it decades ago, and even if their restoration
15 would have any impact on the outcome of his next parole hearing, it would be one among
16 the many considerations before the Board noted above and not necessarily lead to an
17 earlier release.

18 Petitioner’s claims do not lie at “the core of habeas corpus” and “must be brought,
19 if at all, under § 1983,” because there is no showing that success on the merits would
20 “necessarily” have an effect on the duration of his confinement. *Id.* at 935.

21 **B. Conversion to § 1983**

22 When an action is improperly brought as a habeas petition, district courts “may
23 construe a petition for habeas corpus to plead a cause of action under § 1983 after
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26 ⁷ The Presiding Commissioner of Del Rio’s parole hearing commented as follows in
27 summarizing Petitioner’s lack of insight: “[y]ou were a very violent parasite in the
28 community, and you are not recognizing that and you are not understanding that.”
(Lodgment 9 at 6.)

1 notifying and obtaining informed consent from the prisoner.” *Id.* at 936. However, courts
2 should only convert the petition to a § 1983 claim if it “is amenable to conversion on its
3 face.” A petition is amenable to conversion on its face if “it names the correct defendants
4 and seeks the correct relief.” *Id.*

5 A “habeas corpus action and a prisoner civil rights suit differ in a variety of
6 respects . . . that may make recharacterization impossible or, if possible, disadvantageous
7 to the prisoner compared to a dismissal without prejudice of his petition for habeas
8 corpus.” *Id.* (quoting *Robinson v. Sherrod*, 631 F.3d 839, 841 (7th Cir. 2011) and citing
9 *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005)). The differences would include:
10 named defendant(s), filing fees, means of collecting the filing fees, and restrictions on
11 future filings. *Id.*; *see also Glaus*, 408 F.3d at 388 (noting that recharacterizing a
12 prisoner’s action as a civil rights action may make it subject to the PLRA’s three-strikes
13 rule and different exhaustion requirements, as well as requiring the complaint to name a
14 different defendant, such as the individual official responsible for the wrong rather than
15 the warden).

16 Here, the petition is not amenable on its face for conversion. First, Petitioner
17 names Warden Daniel Paramo as respondent. This may be appropriate for a habeas
18 petition, but it is generally not for a § 1983 claim. The Petition does not contain any
19 specific allegations against Warden Paramo as would be required to name him as a
20 defendant in a § 1983 action. *See e.g. Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988)
21 (“The inquiry into causation must be individualized and focus on the duties and
22 responsibilities of each individual defendant whose acts or omissions are alleged to have
23 caused a constitutional deprivation.”) (citing *Rizzo v. Goode*, 423 U.S. 362, 370–71
24 (1976))). Additionally, the allegations in the Petition suggest that other unnamed
25 individuals might be named as defendants if Petitioner had filed as a § 1983 claim.

26 Second, the Court’s conversion of Petitioner’s habeas petition could potentially
27 have negative consequences for Petitioner. Although Petitioner alleges he has exhausted
28 his claims in his habeas Petition, habeas and § 1983 claims are subject to different

1 exhaustion requirements and his failure to properly allege exhaustion for a § 1983 claim
2 could result in dismissal. *See Nettles*, 830 F.3d at 932 n. 8. (“The procedural
3 requirements imposed by AEDPA and the PLRA are distinct in substantial respects.”).
4 Additionally, § 1983 claims are also subject to the PLRA’s three strikes rule. *Coleman v.*
5 *Tollefson*, 135 S. Ct. 1759, 1761 (2015) (quoting 28 U.S.C. § 1915(g) and explain “a
6 special ‘three strikes’ provision prevents a court from affording in forma pauperis status
7 where the litigant is a prisoner and he or she ‘has on 3 or more occasions, while
8 incarcerated . . . , brought an action or appeal in a court of the United States that was
9 dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon
10 which relief may be granted.”). Petitioner should have the opportunity to attempt to state
11 a cognizable § 1983 claim and consider the possible consequences of the three strikes
12 provision.

13 Under these circumstances, the Court recommends the Petition be dismissed rather
14 than converted to a § 1983 action because it is not amenable to conversion on its face. *See*
15 *Nettles*, 830 F.3d at 936. The Court additionally recommends that Petitioner be advised of
16 the following if this Report and Recommendation is adopted and his Petition dismissed:
17 (1) “that the court is not making a decision on the ultimate merit of the case;” (2) that
18 Petitioner “may refile immediately under the proper legal label, subject to the normal
19 rules such as those prohibiting frivolous lawsuits; and (3) that refiling under the proper
20 legal label will probably have certain consequence,” including those noted above as to
21 exhaustion and the three strikes provision. *Glaus*, 408 F.3d at 389-90 (“If, as normally
22 will be the case, conversion is improper, the district court should include [this] short and
23 plain statement”).⁸

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26 ⁸ Although the court in *Nettles v. Grounds* did not specifically require this advisement to
27 the petitioner in that case, in finding courts could convert habeas claims to § 1983 claims
28 under appropriate circumstances, the court adopted the reasoning of *Glaus* and *Glaus*
requires this advisement when conversion is improper. 830 F.3d at 936.

1 **III. CONCLUSION & RECOMMENDATION**

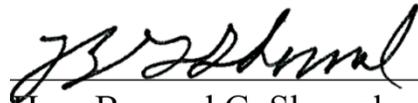
2 For all the foregoing reasons, **IT IS HEREBY RECOMMENDED** the Court
3 issue an Order: (1) approving and adopting this Report and Recommendation; and (2)
4 granting Respondent’s Motion to Dismiss the Petition.

5 **IT IS ORDERED** that no later than **January 26, 2018**, any party to his action may
6 file written objections with the Court and serve a copy on all parties. The document
7 should be captioned “Objections to Report and Recommendation.”

8 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
9 the Court and served on all parties by **February 2, 2018**.

10 The parties are advised that failure to file objections within the specified time may
11 waive the right to raise those objections on appeal of the Court’s order. *Turner v.*
12 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th
13 Cir. 1991).

14 Dated: January 8, 2018

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16 Hon. Bernard G. Skomal
17 United States Magistrate Judge
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