

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 GENO GOMEZ,

12 Petitioner,

13 v.

14 W.L. MONTGOMERY, Warden,

15 Respondent.
16

Case No.: 18-CV-2607-CAB(WVG)

REPORT AND RECOMMENDATION
FOR ORDER GRANTING MOTION
TO DISMISS PETITION FOR WRIT
OF HABEAS CORPUS

[ECF No. 9.]

17
18 **I. INTRODUCTION**

19 Currently before the Court is Respondent W.L. Montgomery's ("Respondent")
20 Motion to Dismiss ("Motion") Petitioner Geno Gomez's ("Petitioner") Petition for Writ of
21 Habeas Corpus ("Petition") on the basis that the Petition does not attack the legality or
22 duration of Petitioner's confinement to confer habeas jurisdiction and, in the alternative,
23 that the Petition fails to state a cognizable federal question to invoke subject matter
24 jurisdiction. (ECF No. 9.)

25 The Court, having reviewed the Petition, the Motion to Dismiss, and all supporting
26 documents submitted by both parties, **RECOMMENDS** the Motion be **GRANTED** and
27 the Petition be **DISMISSED** without prejudice to Petitioner pursuing his claim under
28 § 1983.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. State Court Trial**

3 Petitioner was found guilty of second-degree murder, arising from a conviction in
4 Orange County Superior Court case number 99CF3023. (Motion, Doc. No. 8-2 at 64.)¹ In
5 that case, Petitioner struck his victim with a bat, bound him with a wire, and strangled him
6 to death. (*Id.* at 67.) Petitioner then wrapped the body in plastic and dumped it in Oceanside.
7 (*Id.*) Petitioner was sentenced 15 years-to-life with a minimum eligible parole date of
8 November 23, 2014. (*Id.* at 64.)

9 **B. Initial Parole Consideration Hearing**

10 Petitioner was deemed unsuitable for parole during his initial parole consideration
11 hearing on July 1, 2015. (Doc. No. 8-2 at 64.) The panel denied parole for seven years
12 based on Petitioner’s heinous crime, twelve rules violations, prior criminal record, unstable
13 social history, inadequate signs of remorse, unreasonable parole plans, lack of anger
14 management, and an unfavorable Comprehensive Risk Assessment. (*Id.* at 64-77.)

15 **C. State Prison Rules Violation Proceeding**

16 On March 7, 2017, a letter addressed to Petitioner was scanned by Ms. H. Duarte, a
17 mailroom supervisor at Calipatria State Prison. (Doc. No. 8-2 at 58.) Ms. Duarte observed
18 anomalies in a manila envelope and upon further inspection found ten other envelopes,
19 each containing one hypodermic needle. (*Id.* at 59.) Rules violation proceedings were
20 initiated against Petitioner for violating California Code of Regulations, Title 15, Section
21 3016(c).² (*Id.*)

22
23
24 ¹ All citations to documents filed on the CM/EMF docket refer to the electronic pages
25 numbers generated by the CM/ECF system, not to the document’s original pagination.

26 ² The Petition refers to the violated subdivision as subdivision (b). However, the Petition
27 quotes the language in subdivision (c). This report and recommendation will refer to
28 subdivision (c), which states: “Inmates shall not possess, exchange, manufacture, or have
under their control any drug paraphernalia . . . or device related to the use, injection, or
manufacture of any controlled substance”

1 During the rules violation proceedings on March 23, 2017, Petitioner argued that he
2 should not be disciplined because he could not control what someone sent him in the mail.
3 (*Id.*) Moreover, Petitioner argued he was never in control of the envelope. (*Id.*)

4 However, one can be guilty of violating § 3016(c) through a conspiracy because
5 under California Code of Regulations, Title 15, Section 3323(e)(8), possession of drug
6 paraphernalia is a Division “C” offense, and subsection 3323(e)(12) provides that
7 “conspiracy to commit any Division ‘C’ offenses” is a Division “C” offense. (*Id.*)

8 The Senior Hearing Officer (SHO) found that Petitioner violated § 3016(c) due to
9 the complex manner in which the hypodermic needles were hidden. (*Id.* at 40.) The SHO
10 reasoned that Petitioner must have communicated with the sender. (*Id.*) Sanctions
11 consisting of the following issued against Petitioner: (1) 91 days credit loss; (2) 10 days
12 confinement to quarters; (3) 90 days loss of canteen privileges; (4) 90 days loss of day
13 room privileges; and (5) four months of mandatory drug testing. (*Id.* at 39-40.)

14 On April 18, 2017, Petitioner filed an administrative appeal of the above decision.
15 (Doc. No. 8-2 at 45.) Petitioner was permitted to bypass the first level of review in the
16 three-level review system. (*Id.*) The second level appeal was denied on May 30, 2017. (*Id.*
17 at 49.) Petitioner then submitted another appeal to the third and last level of review on June
18 20, 2017. (*Id.* at 46.) On August 24, 2017, the third level appeal was denied, thereby
19 exhausting Petitioner’s administrative remedies. (*Id.* at 52.)

20 **D. Habeas Petition in State Court**

21 Following the completion of the administrative review process, Petitioner filed a
22 habeas corpus petition in the Superior Court of California, County of Imperial, on
23 November 3, 2017. (*Id.* at 58.) Petitioner alleged due process violations with respect to the
24 March 23, 2017, rules violation proceeding. (Petition, Doc. No. 1 at 9.) On December 4,
25 2017, the superior court denied the Petition because there was sufficient evidentiary
26 support to sustain the disciplinary finding. (Doc. No. 8-2 at 59.) Petitioner thereafter filed
27 a habeas petition in the California Court of Appeal and raised the same claim. (Doc. No.
28 8-2 at 17-23.) The Court of Appeal denied the petition on February 22, 2018. (Doc. No. 1

1 at 42-44.) On September 19, 2018, the California Supreme Court summarily denied the
2 habeas petition Petitioner subsequently filed before that court. (*Id.* at 46.)

3 **E. Habeas Petition in Federal Court**

4 On November 13, 2018, Petitioner filed the instant Petition in federal court. (Doc.
5 No. 1 at 1.) On February 22, 2019, Respondent filed a motion to dismiss the Petition on
6 the basis that it does not confer habeas jurisdiction, as it does not attack the legality or
7 duration of Petitioner’s confinement. (Doc. No. 8-1 at 1.) Respondent alternatively argues
8 that the Petition fails to state a cognizable federal question to invoke subject matter
9 jurisdiction. (*Id.*)

10 **III. DISCUSSION**

11 **A. Federal Habeas Corpus Jurisdiction**

12 Petitioner seeks habeas relief for alleged violations of due process rights stemming
13 from the rules violation proceedings described above. (Doc. No. 1 at 9.) Petitioner demands
14 the rules violation true finding be expunged from his record and all lost days of credit
15 restored. (*Id.* at 17.) The issue raised by the Motion is whether federal habeas jurisdiction
16 exists to consider the Petition on the merits. (Doc. No. 8-1 at 1.) Petitioner alleges that the
17 disciplinary decision violated his due process rights on the basis that (1) the prison officials
18 misapplied California law and (2) there was no evidence to support the disciplinary
19 violation. (Doc. No. 1 at 12, 14.)

20 However, the arguments above are immaterial if federal habeas jurisdiction does not
21 exist in the first place. *See Nettles v. Grounds*, 830 F.3d 922, 935 (9th Cir. 2016) (en banc).
22 Respondent contends that there is no jurisdiction because the Petition does not challenge
23 the legality or duration of Petitioner’s confinement. (Doc. No. 8-1 at 2.) Alternatively,
24 Respondent argues that there is no jurisdiction because the Petition does not allege a
25 cognizable federal question. (*Id.* at 4.)

26 **1. Legality or Duration of Petitioner’s Confinement**

27 Generally, prisoners’ claims under federal law fall into two distinct categories: “a
28 petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act

1 of 1871 . . . 42 U.S.C. § 1983.” *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per
2 curiam). Habeas corpus actions involve “[c]hallenges to the validity of any confinement or
3 to particulars affecting its duration.” *Id.* Federal habeas jurisdiction only exists where the
4 relief sought would “necessarily lead to [Petitioner’s] immediate or earlier release from
5 confinement.” *Nettles*, 830 F.3d at 935; *see also Skinner v. Switzer*, 562 U.S. 521, 534
6 (2011).

7 The Ninth Circuit’s decision in *Nettles* controls whether the Petition here falls within
8 the core of habeas. There, the petitioner was a life inmate and past his minimum eligible
9 parole date when he filed a habeas petition. *Nettles*, 830 F.3d at 925-27. The habeas petition
10 challenged a disciplinary decision where the petitioner lost 30 days of credit. *Id.* at 927.
11 The court found that there was no federal habeas jurisdiction because “success on
12 [petitioner’s] claims would not necessarily lead to his immediate or earlier release from
13 confinement.” *Id.* at 935. The court reasoned that “because the parole board has the
14 authority to deny parole ‘on the basis of any grounds presently available to it,’ the presence
15 of a disciplinary infraction does not compel the denial of parole.” *Id.* (citation omitted)
16 (quoting *Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003)); *see also Sandin v. Conner*,
17 515 U.S. 472, 487 (1995) (holding that the “decision to release a prisoner rests on a myriad
18 of considerations.”).

19 Respondent argues, and the Court agrees, that the relief sought by Petitioner would
20 not necessarily result in a speedier release. (Doc. No. 8-1 at 2.) Like *Nettles*, in this case
21 Petitioner is serving an indeterminate term of 15 years-to-life and his minimum eligible
22 parole date has already passed. *See Nettles*, 830 F.3d at 935. Expungement of Petitioner’s
23 violation will not necessarily result in a speedier release because violations are “merely
24 one of the factors shedding light” on whether a prisoner is suitable for parole. *Id.* Therefore,
25 under California law, a panel of the Board of Parole Hearings could still deny parole to
26 Petitioner even if he succeeded in expunging the violation. *Id.*; *see also Ramirez v. Galaza*
27 334 F.3d 850, 859 (9th Cir. 2003) (reasoning that expunging violations does not
28 automatically accelerate eligibility for parole). This is especially true in Petitioner’s case

1 because he was already denied parole for multiple separate reasons, including 11 other
2 rules violations in addition to the one at issue here, Petitioner’s heinous crime, prior record,
3 unstable social history, inadequate signs of remorse, unreasonable parole plans, lack of
4 anger management, and an unfavorable Comprehensive Risk Assessment. (Doc. No. 8-2
5 at 64-77.)

6 Moreover, the credit loss suffered by Petitioner does not affect the length of his
7 confinement because “for convicted murderers . . . who are sentenced to an indeterminate
8 term . . . credits go towards advancing only their minimum eligible release date.” *In re*
9 *Jenkins*, 50 Cal. 4th 1167, 1179 (2010); *see also* Cal. Code Regs. Tit. 15, § 3043 (credits
10 only advance an indeterminately sentenced inmate’s initial parole hearing date).
11 Additionally, because Petitioner was convicted of second-degree murder, he cannot accrue
12 credits against his sentence. Cal. Penal Code § 2933.2. Consequently, “success on
13 [Petitioner’s] habeas claim would not necessarily lead to [his] immediate or earlier release
14 from confinement.” *Patkins v. Holland*, 691 Fed. Appx. 494, 494 (9th Cir. 2017).

15 In sum, neither expunging the rules violation nor restoring the lost credit would
16 necessarily lead to Petitioner’s speedier release from confinement. *See Nettles*, 830 F.3d at
17 935. Thus, Petitioner’s claim does “not fall within ‘the core of habeas corpus,’ and he must
18 instead bring his claim under § 1983.” *See id.* (quoting *Skinner*, 562 U.S. at 536).
19 Accordingly, the Court **RECOMMENDS** Respondent’s motion be **GRANTED** and the
20 Petition be **DISMISSED** without prejudice to Petitioner pursuing his claim under § 1983.

21 **2. Cognizable Federal Claim**

22 Alternatively, Respondent asks the Court to dismiss the Petition because it does not
23 raise a cognizable federal claim. (Doc. No. 8-1 at 4.) Respondent argues both that Petitioner
24 does not have a federally protected liberty interest and that Petitioner does not raise a
25 federal question. (*Id.* at 4-7.) The Court agrees.

26 **a. Liberty Interest**

27 The Supreme Court has held that when a state statute gives rights to good-time
28 credits, the prisoner has a sufficient liberty interest of “real substance.” *Wolff v. McDonnell*,

1 418 U.S. 539, 557 (1974). The liberty interest entitles prisoners to certain procedural
2 protections under the Due Process Clause. *Id.* These procedural protections include:
3 (1) advance written notice of charges; (2) a written statement as to the evidence relied on
4 in determining the disciplinary action; (3) ability to call witnesses and present evidence;
5 and (4) an impartial fact finder. *Id.* at 540-41.

6 Petitioner does not allege that any procedural protections were violated under *Wolff*.
7 (Doc. No. 1.) Moreover, the liberty interest identified in *Wolff* is not present here because
8 Petitioner’s loss of credits cannot extend his minimum sentence, as his minimum eligible
9 parole date already has passed. (Doc. No. 8-2 at 64.) Similarly, Petitioner’s maximum
10 sentence is not extended because his sentence is potentially for life. (*Id.*) Consequently,
11 Petitioner does not allege a liberty interest that has been violated under *Wolff*. *See* 418 U.S.
12 at 540-41.

13 Furthermore, the Supreme Court has narrowed the holding in *Wolff* by defining what
14 constitutes a liberty interest of “real substance.” *Sandin v. Conner*, 515 U.S. 472, 484, 487
15 (1995). Generally, a liberty interest of “real substance” is limited to freedom from restraint
16 that either (1) imposes an “atypical and significant hardship on the inmate in relation to the
17 ordinary incidents of prison life” or (2) “will inevitably affect the duration of [the inmate’s]
18 sentence.” *Id.* *Sandin*’s first prong is not satisfied because Petitioner does not allege that
19 the disciplinary violation imposed an “atypical and significant hardship.” Moreover, no
20 facts in the petition indicate that loss of credits imposed such a hardship.

21 Similarly, the second prong of *Sandin* is not met because, as discussed above, the
22 success of Petitioner’s claims will not inevitably affect the duration of his sentence. *See*
23 *Sandin*, 515 U.S. at 487. *Sandin* rejected the argument that a liberty interest exists based
24 on the possibility of denied parole. *Id.* Specifically, any effect a violation has on his
25 confinement is simply “too attenuated to invoke the procedural guarantees of the Due
26 Process Clause.” *Id.*

1 Ultimately, Petitioner does not allege a federally protected liberty interest that could
2 give rise to federal habeas jurisdiction. *See Wolff*, 418 U.S. at 557; *see also Sandin*, 515
3 U.S. at 484, 487.

4 **b. Federal Question**

5 Respondent argues, and the Court agrees, that Petitioner’s allegation of prison
6 officials misapplying California law does not raise a federal question. (Doc. No. 8-1 at 7.)

7 Federal habeas review is not available for allegations of state law violations. *See* 28
8 U.S.C. § 2254(a); *see also Engle v. Isaac*, 456 U.S. 107, 119 (1982). Specifically, a “mere
9 error of state law” does not invoke a federal question. *Engle*, 456 U.S. at 121 n.19.
10 Otherwise, “every erroneous decision by a state court on state law would come [to this
11 Court] as a federal constitutional question.” *Id.* Thus, federal habeas review is limited to
12 deciding whether a conviction violated the Constitution, laws, or treaties of the United
13 States. *Estelle v. McQuire*, 502 U.S. 62, 68 (1991).

14 Here, Petitioner alleges that prison officials violated his due process rights by
15 arbitrarily construing the California Code of Regulations and California case law. (Doc.
16 No. 1 at 12.) However, neither of these can be construed as the Constitution, a law of the
17 United States, or a treaty of the United States. *See Estelle*, 502 U.S. at 68. Thus, this
18 allegation fails to raise a cognizable basis for habeas review. *See id.*

19 **B. Conversion to Section 1983 Action**

20 A district court may construe an incorrectly filed habeas petition as a § 1983 action
21 “[i]f the complaint is amenable to conversion on its face, meaning it names the correct
22 defendants and seeks the correct relief.” *Nettles*, 830 F.3d at 936. To do so, the court must
23 notify and obtain “informed consent from the prisoner.” *Id.* In this context, “informed
24 consent” requires warning the “pro se litigant of the consequences of the conversion and
25 provid[ing] an opportunity for the litigant to withdraw or amend his or her complaint.” *Id.*

26 Although the Court may construe a wrongly filed habeas petition as a § 1983 action,
27 the Court recommends declining to do so in this case. *See id.* The Petition is not “amenable
28 to conversion on its face” because there are no factual allegations against the only named

1 Respondent, Warden Montgomery. Moreover, it is unclear who Petitioner seeks to hold
2 responsible for the alleged denial of his due process rights, other than an unnamed “Senior
3 Hearing Officer.” *See Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

4 Accordingly, the Court **RECOMMENDS** declining to construe this action as a civil
5 rights complaint because it is not amenable to “conversion on its face.” *See Nettles*, 830
6 F.3d at 936.

7 **IV. CONCLUSION**

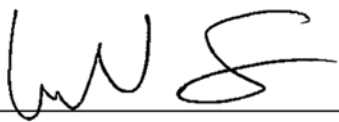
8 For the reasons set forth above, the Court **RECOMMENDS** that Respondent’s
9 Motion to Dismiss Petition for Writ of Habeas Corpus be **GRANTED** and the Petition be
10 **DISMISSED** without prejudice to Petitioner pursuing his claim under § 1983.

11 **IT IS ORDERED** that no later than August 16, 2019 any party to this action may
12 file written objections with the Court and serve a copy on all parties. The document should
13 be captioned “Objections to Report and Recommendation.”

14 **IT IS FURTHER ORDERED** that any reply to objections shall be filed with the
15 Court and served on all parties no later than August 23, 2019. The parties are advised that
16 failure to file objections within the specified time may waive the right to raise those
17 objections on appeal. *Martinez v. Ylst*, 951 F2d 1153 (9th Cir. 1991).

18 **IT IS SO ORDERED.**

19 Dated: July 11, 2019

20
21 
22 _____
23 Hon. William V. Gallo
24 United States Magistrate Judge
25
26
27
28