

1 correctional programs” which required application of mandatory credit under Nevada Revised
2 Statutes (NRS) § 209.449(1). He sought credit for an additional 540 days. *Id.*

3 The state district court reviewed the petition and denied relief finding that petitioner’s
4 interpretation of state law was in error and that he had received the proper credit for the types of
5 classes he had completed. Exhibit 2. The Nevada Supreme Court affirmed the lower court’s
6 determination. Exhibit 3.

7 Petitioner’s federal petition was filed on May 11, 2011 after the issue of the filing fee
8 was resolved (ECF No. 3). Petitioner claims a Fourteenth Amendment Due Process violation where

9 The Nevada Dept. of Corrections (NDOC) has not and does not
10 apply the mandated 60 days to be deducted from my maximum
11 sentence, pursuant to NRS 209.449, for the successful completion of
12 any other programs approved by the Director.

13 * * *

14 NRS 209.449(1)(b) creates a protected liberty interest and the
15 NDOC fails to apply these required credit days that I am entitled to
16 under the United States Constitution’s Fourteenth Amendment.

17 The statute provides specifically that the credits “must be
18 allowed” under particular circumstances which I have met and clearly
19 provided for the State Court review....

20 Petition, p. 3.

21 Respondents move to dismiss the petition on the basis that it alleges an improper
22 application of state law not subject to federal review.

23 **II. Discussion**

24 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act
25 (AEDPA), provides the legal standards for this Court’s consideration of the petition in this case:

26 An application for a writ of habeas corpus on behalf of a person
in custody pursuant to the judgment of a State court shall not be
granted with respect to any claim that was adjudicated on the merits in
State court proceedings unless the adjudication of the claim --

1 (1) resulted in a decision that was contrary to, or involved
2 an unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

3 (2) resulted in a decision that was based on an unreasonable
4 determination of the facts in light of the evidence presented in the State
court proceeding.

5 28 U.S.C. § 2254(d). These standards of review “reflect the ... general requirement that federal
6 courts not disturb state court determinations unless the state court has failed to follow the law as
7 explicated by the Supreme Court.” *Davis v. Kramer*, 167 F.3d 494, 500 (9th Cir. 1999).

8 Respondents argue that this petition must be dismissed because the claim and the state
9 court’s review thereof, are founded on state law without a federal statutory or constitutional
10 component. Petitioner contends that he only received credit for the meritorious completion of
11 various classes - the discretionary award, while being denied the mandatory credits available under
12 Nevada Revised Statutes § 209.449. He refers to the various exhibits attached to his petition to
13 support his argument.

14 The statute cited by petitioner reads:

15 **Credits for completion of vocational education and training or
16 other program.**

17 1. An offender who has no serious infraction of the regulations
of the Department, the terms and conditions of his or her residential
18 confinement, or the laws of the State recorded against the offender
must be allowed, in addition to the credits provided pursuant to NRS
19 209.433, 209.443, 209.446 or 209.4465, a deduction of 60 days from
the maximum term of the offender’s sentence for the successful
completion of:

- 20 (a) A program of vocational education and training; or
21 (b) Any other program approved by the Director.

22 2. If the offender completes such a program with meritorious or
exceptional achievement, the Director may allow not more than 60
23 days of credit in addition to the 60 days allowed for completion of
the program.

24 NRS 209.449 (emphasis added).

1 However, in reviewing the claims, the state courts properly noted that the classes he
2 identifies in his exhibits for which did not receive the mandatory credits are actually classes subject
3 to credits under NRS 209.448 - Credits for completion of program of treatment for abuse of alcohol
4 or drugs- and NRS 209.4465 - Credits for educational achievements such as completion of general
5 education classes or associates degree or other collegiate level classes. These determination are
6 founded solely on state statutes and their application. Petitioner's arguments are misplaced and
7 erroneous.

8 Unless an issue of federal constitutional or statutory law is implicated by the facts
9 presented, the claim is not cognizable under federal habeas corpus. *Estelle v. McGuire*, 502 U.S. 62,
10 68 (1991). A state law issue cannot be mutated into one of federal constitutional law merely by
11 invoking the specter of a due process violation. *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir.
12 1996), *cert. denied*, 522 U.S. 881 (1997). Only if the state law creates a liberty interest protected by
13 the United States Constitution would violation of that law invoke federal habeas protection. For that
14 to occur, the law must set forth substantive predicates to govern official decision-making and it must
15 contain explicitly mandatory language requiring a certain outcome if the substantive predicate has
16 been met. *See Kentucky Dept. Of Corrections v. Thompson*, 490 U.S. 454, 462-63, 109 S. Ct. 1904
17 (1989). In this instance, petitioner's argument is a misapplication or interpretation of state statutes
18 and this Court cannot intercede.

19 The motion for judgment on the pleading filed by petitioner shall also be denied, as it
20 is founded on a purported failure by respondents to file a timely response to the petition. However,
21 as noted in the opposition to this motion, respondents filed a timely motion for additional time,
22 which was granted.

23 **IV. Conclusion**

24 The motion to dismiss must be granted, as petitioner presents a question of state law
25 which cannot be decided by this federal court. In order to proceed with an appeal from this court,
26

1 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner
2 must make “a substantial showing of the denial of a constitutional right” to warrant a certificate of
3 appealability. *Id.* The Supreme Court has held that a petitioner “must demonstrate that reasonable
4 jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”
5 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

6 The Supreme Court further illuminated the standard for issuance of a certificate of
7 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

8 We do not require petitioner to prove, before the issuance of a COA, that
9 some jurists would grant the petition for habeas corpus. Indeed, a claim
10 can be debatable even though every jurist of reason might agree, after the
11 COA has been granted and the case has received full consideration, that
12 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court
has rejected the constitutional claims on the merits, the showing required
to satisfy § 2253(c) is straightforward: The petitioner must demonstrate
that reasonable jurists would find the district court’s assessment of the
constitutional claims debatable or wrong.”

13 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

14 The Court has considered the issues raised by petitioner, with respect to whether they
15 satisfy the standard for issuance of a certificate of appeal, and the Court determines that none meet
16 that standard. Accordingly, the Court will deny petitioner a certificate of appealability.

17 **IT IS THEREFORE ORDERED** that the motion for judgment on the pleadings
18 (ECF No. 9) is **DENIED**.

19 **IT IS FURTHER ORDERED** that the motion to dismiss (ECF No. 11) is
20 **GRANTED**.

21 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
22 **APPEALABILITY**. The Clerk shall enter judgment accordingly.

23 Dated this 6 day of December, 2011.

24 

25 _____
26 UNITED STATES DISTRICT JUDGE