

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUN 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MILORAD TEODOR OLIC, AKA Milorad
Olic,

Petitioner-Appellant,

v.

M. ELIOT SPEARMAN, HDSP,

Respondent-Appellee.

No. 18-55472

D.C. No.

8:16-cv-02234-MWF-SP
Central District of California,
Santa Ana

ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

The request for a certificate of appealability is denied because appellant's 28 U.S.C. § 2254 petition fails to state any cognizable habeas claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Nettles v. Grounds*, 830 F.3d 922, 934-35 (9th Cir. 2016) (en banc) (holding that claims fall outside "the core of habeas corpus" if success will not necessarily lead to immediate or earlier release from confinement), *cert. denied*, 137 S. Ct. 645 (2017); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The denial of appellant's request for a certificate of appealability does not preclude him from pursuing conditions of confinement claims in a properly filed civil action brought pursuant to 42 U.S.C. § 1983.

Any pending motions are denied as moot.

DENIED.

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MILORAD OLIC, } Case No. SA CV 16-2234-MWF (SP)
Petitioner, }
v. }
HDSP Warden, }
Respondent. }
JUDGMENT

Pursuant to the Order Accepting Findings and Recommendation of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

Dated: March 29, 2018


MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

1 Rule 3005(d)(1), Assault on a Peace Officer Not Likely to Cause Serious Bodily
2 Injury. MTD, Ex. 2.

3 A disciplinary hearing was held on June 3, 2015, which petitioner did not
4 attend. *Id.* The Senior Hearing Officer found petitioner guilty of the charge. *Id.*
5 He was sentenced to forfeiture of 90 days credit. *Id.* Petitioner did not appeal.

6 **III.**

7 **DISCUSSION**

8 Respondent raises several grounds for dismissing the First Amended
9 Petition, but did not raise the argument that this court lacks jurisdiction to hear this
10 matter. Nonetheless, pursuant to Rule 12(h)(3) of the Federal Rules of Civil
11 Procedure, lack of jurisdiction cannot be waived and a federal court may dismiss
12 an action pending before it for lack of jurisdiction at any time.

13 A district court may entertain a petition for writ of habeas corpus filed by a
14 person in state custody “only on the ground that he is in custody in violation of the
15 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). “[T]he
16 essence of habeas corpus is an attack by a person in state custody upon the legality
17 of that custody, and . . . the traditional function of the writ is to secure release from
18 illegal custody.” *Preiser v. Rodriguez*, 411 U.S. 475, 484, 93 S. Ct. 1827, 36 L.
19 Ed. 2d 439 (1973). Thus, the “core of habeas corpus” is an attack on “the very
20 duration of [a prisoner’s] physical confinement.” *Id.* at 487-88. “[I]f a state
21 prisoner’s claim does not lie at ‘the core of habeas corpus,’ *Preiser*, 411 U.S. at
22 487 [], it may not be brought in habeas corpus but must be brought, ‘if at all,’
23 under [42 U.S.C.] § 1983.” *Nettles v. Grounds*, 830 F.3d 922, 934 (9th Cir. 2016)
24 (en banc) (additional citation omitted).

25 *Preiser* involved state prisoners who challenged their loss of good conduct
26 time credits as a result of disciplinary proceedings. Restoration of such credits
27 would have resulted in their “immediate release from physical custody.” *Preiser*,
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1 411 U.S. at 487. The Supreme Court held habeas corpus is the appropriate remedy
2 where restoration of the credits would shorten their length of confinement in
3 prison, thus bringing them within the “core of habeas corpus.” *Id.* By contrast, in
4 a different case in which a prisoner challenged disciplinary action, but which
5 action resulted in no loss of good time credits, the Supreme Court found the
6 prisoner “raised no claim on which habeas relief could have been granted.”

7 *Muhammad v. Close*, 540 U.S. 749, 755, 124 S. Ct. 1303, 158 L. Ed. 2d 32 (2004).

8 Petitioner here is challenging a loss of good conduct credits and the actions
9 of prison officials, not the fact or duration of his confinement. The loss of good
10 conduct credits, in and of itself, does not bring this case within the core of habeas
11 corpus. In *Nettles*, an en banc panel of the Ninth Circuit considered the case of a
12 prisoner serving a life term with the possibility of parole who filed a habeas
13 petition challenging a disciplinary conviction that resulted in a loss of good time
14 credits. *Nettles*, 830 F.3d at 925-27. The court noted that “[u]nder California law,
15 prisoners with life terms like Nettles may not be released before their minimum
16 eligible parole date (MEPD),” and will be released then only if found “suitable for
17 parole.” *Id.* at 925 (citing Cal. Penal Code § 3041(a)). The petitioner argued he
18 would be more likely to obtain an earlier and favorable parole hearing if his
19 disciplinary conviction were expunged, but the Ninth Circuit rejected his argument
20 that this brought his case within the core of habeas corpus. *Id.* at 934. “Success on
21 the merits of Nettle’s claim would not necessarily lead to immediate or speedier
22 release because the expungement of the challenged disciplinary violation would
23 not necessarily lead to a grant of parole.” *Id.* at 934-35. Indeed, “the presence of a
24 disciplinary infraction does not compel the denial of parole, nor does an absence of
25 an infraction compel the grant of parole.” *Id.* at 935. Accordingly, because the
26 Ninth Circuit found “success on Nettle’s claims would not necessarily lead to his
27 immediate or earlier release from confinement,” it found his “claim does not fall

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1 within ‘the core of habeas corpus,’ and he must instead bring his claim under
2 § 1983.” *Id.* (internal citation omitted).

3 The same is true of petitioner’s claims here. Like the petitioner in *Nettles*,
4 petitioner here is serving an indeterminate life sentence and challenges his loss of
5 good conduct credits after a disciplinary hearing. Petitioner’s minimum eligible
6 parole date, the earliest parole eligibility date, was calculated to be February 19,
7 2023, and there is no indication it was affected by his loss of good conduct credits.
8 *See* MTD, Ex. 1. Moreover, even if petitioner’s parole eligibility date were
9 affected, it remains speculation as to whether petitioner will be granted parole
10 when he becomes eligible. The parole board reviews many factors, not just an
11 inmate’s disciplinary record, prior to making a parole suitability determination.
12 *See* Cal. Code Regs. tit. 15, § 2281(b). Thus, any change in petitioner’s
13 disciplinary record prior to his eligibility date, including loss of good time credits,
14 does not necessarily affect the duration of his confinement.

15 That petitioner also alleges an Eighth Amendment violation does not alter
16 this analysis. *See* FAP at 11-12. Petitioner is not alleging his sentence violates the
17 Eighth Amendment; such claim would lie within the core of habeas corpus.
18 Instead, petitioner here alleges a correctional officer used excessive force against
19 him in violation of his Eighth Amendment rights. Such claim should be brought as
20 a § 1983 civil rights case rather than a habeas case. *See Ramirez v. Galaza*, 334
21 F.3d 850, 856 (9th Cir. 2003) (“[A] § 1983 action is a proper remedy for a state
22 prisoner who is making a constitutional challenge to the conditions of his prison
23 life.”) (quoting *Preiser*, 411 U.S. at 498-99). Although such a civil rights claim
24 may be barred unless petitioner’s disciplinary conviction is first overturned, that
25 possibility does not bring this case within the core of habeas corpus. *See Edwards*
26 *v. Balisok*, 520 U.S. 641, 648, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997) (§ 1983
27 claim for declaratory relief and money damages for the loss of good time credits
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1 implied the invalidity of the punishment imposed and was therefore barred).

2 Consequently, petitioner's claims are not cognizable in a federal habeas
3 corpus proceeding. A federal court has the discretion to construe a mislabeled
4 habeas corpus petition that seeks relief from the conditions of confinement as a
5 civil rights action and permit the action to proceed. *See Wilwording v. Swenson*,
6 404 U.S. 249, 251, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971) (per curiam) (where a
7 habeas corpus petition presents § 1983 claims challenging conditions of
8 confinement, the petition should be construed as a civil rights action), *superseded*
9 *by statute on other grounds as recognized in Woodford v. Ngo*, 548 U.S. 81, 84,
10 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006). But as the Ninth Circuit has noted,
11 *Wilwording* was decided before the enactment of the Prison Litigation Reform Act
12 (“PLRA”) in 1996. “After the PLRA became effective, ‘a habeas corpus action and
13 a prisoner civil rights suit differ in a variety of respects – such as the proper
14 defendant, filing fees, the means of collecting them, and restrictions on future
15 filings – that may make recharacterization impossible or, if possible,
16 disadvantageous to the prisoner compared to a dismissal without prejudice of his
17 petition for habeas corpus.’” *Nettles*, 830 F.3d at 935-36 (citation omitted). Thus,
18 if the petition is “‘amenable to conversion on its face, meaning that it names the
19 correct defendants and seeks the correct relief, the court may recharacterize the
20 petition so long as it warns the *pro se* litigant of the consequences of the
21 conversion and provides an opportunity’” to withdraw or amend the petition. *Id.* at
22 936 (citation omitted).

23 Here, the First Amended Petition is not amenable on its face to conversion to
24 a civil rights complaint. It names the High Desert State Prison warden as
25 respondent, but it is not at all clear that petitioner would (or even could) name the
26 warden as a defendant in a civil rights action. Nor is the relief sought necessarily
27 what petitioner might seek in a civil rights case. Accordingly, the court does not
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1 find it appropriate to construe the instant First Amended Petition as a civil rights
2 complaint.

3 **IV.**

4 **RECOMMENDATION**

5 IT IS THEREFORE RECOMMENDED that the District Court issue an
6 Order: (1) approving and accepting this Report and Recommendation; (2) granting
7 the Motion to Dismiss (docket no. 25); and (3) directing that Judgment be entered
8 denying the First Amended Petition and dismissing this action without prejudice.

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10 DATED: March 1, 2018

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SHERI PYM
United States Magistrate Judge