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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PEDRO RODRIGUEZ,
Petitioner,
v.
KATHLEEN ALLISON, Warden,
Respondent.

Case No. 21-cv-1443-MMA (WVG)

**ORDER OVERRULING
PETITIONER’S OBJECTION;**

[Doc. No. 54]

**ADOPTING REPORT AND
RECOMMENDATION;**

[Doc. No. 51]

GRANTING MOTION TO DISMISS;

[Doc. No. 20]

**DENYING AS MOOT MOTION FOR
APPOINTMENT OF COUNSEL;**

[Doc. No. 47]

**AND DECLINING TO ISSUE A
CERTIFICATE OF
APPEALABILITY**

On August 9, 2021, Pedro Rodriguez (“Petitioner”), a San Diego County prisoner proceeding *pro se*, filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 (the

1 “Petition”). *See* Doc. No. 1. On October 28, 2021, Respondent filed a motion to dismiss
 2 the Petition. *See* Doc. No. 20. On August 9, 2022, Magistrate Judge William V. Gallo
 3 issued a detailed and well-reasoned Report and Recommendation (“R&R”),
 4 recommending that the Court grant Respondent’s motion and dismiss the Petition without
 5 leave to amend. *See* Doc. No. 51 at 12.¹ Petitioner filed an objection to the R&R. *See*
 6 Doc. No. 54. Respondent has not filed a reply. Upon due consideration and for the
 7 reasons set forth below, the Court **OVERRULES** Petitioner’s objection, **ADOPTS** the
 8 R&R, **GRANTS** Respondent’s motion to dismiss, and **DISMISSES** the Petition without
 9 leave to amend.

10 **I. REQUESTS FOR JUDICIAL NOTICE**

11 As a preliminary matter, the Court addresses Petitioner’s requests for judicial
 12 notice contained within his objection to Judge Gallo’s R&R. Judicial notice under
 13 Federal Rule of Evidence 201 permits a court to take notice of undisputed facts in matters
 14 of public record. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir.
 15 2018). A judicially noticed fact must be one not subject to reasonable dispute in that it is
 16 either (1) generally known within the territorial jurisdiction of the trial court or (2)
 17 capable of accurate and ready determination by resort to sources whose accuracy cannot
 18 reasonably be questioned. Fed. R. Evid. 201(b).

19 Petitioner seeks judicial notice of the Second Amended Civil Class Action
 20 Complaint in *Dunsmore, et al. v. State of California, et al.*, No. 20-cv-406-AJB-DDL,
 21 another case pending in this District. *See* Doc. No. 54 at 4, 13. Petitioner further
 22 requests judicial notice of the complaint and docket in a case he filed in the Central
 23 District of California, *Rodriguez v. Anderson, et al.*, 18-cv-1181-JGB-AGR. *See* Doc. No.
 24 54-1 at 24–83. The Court finds the referenced complaints and docket are proper for
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28 ¹ All citations to electronically filed documents refer to the pagination assigned by the CM/ECF system.

1 judicial notice, as they are matters of public record and their authenticity is not subject to
2 reasonable dispute. Accordingly, the Court **GRANTS** Petitioner’s requests.

3 However, the Court only judicially notices the existence of these records. *See In re*
4 *Bare Escentuals, Inc. Sec. Litig.*, 745 F. Supp. 2d 1052, 1067 (N.D. Cal. 2010) (“The
5 court may take judicial notice of the existence of unrelated court documents, although it
6 will not take judicial notice of such documents for the truth of the matter asserted
7 therein.”). Consequently, the Court **DENIES** Petitioner’s requests to the extent he asks
8 the Court to accept as true any potentially disputed facts contained within those records,
9 such as the allegation within the *Dunsmore* complaint that the “Sheriff’s Department
10 Interferes with People’s Access to the Courts.” *See* Doc. No. 54 at 4, 13.

11 **II. LEGAL STANDARD**

12 A district court has jurisdiction to review a magistrate judge’s report and
13 recommendation on dispositive matters. *See* Fed. R. Civ. P. 72(b). Pursuant to Rule 72
14 and 28 U.S.C. § 636(b)(1), the Court must make a *de novo* determination of any part of
15 the magistrate judge’s disposition to which a party has properly objected. *See id.*; *see*
16 *also United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The
17 Court “may accept, reject, or modify, in whole or in part, the findings or
18 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1); *see also United*
19 *States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989).

20 **III. DISCUSSION**²

21 Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus to
22 a state prisoner if his custody status violates the Constitution or the laws or treaties of the
23 United States. *See* 28 U.S.C. § 2254. Rule Four of the Rules Governing § 2254 states:
24 “If it plainly appears from the petition and any attached exhibits that the petitioner is not
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27 ² Judge Gallo includes a thorough and accurate report of the relevant background and proceedings,
28 which the Court adopts and incorporates by reference herein. Petitioner does not object to Judge Gallo’s
account of the facts of the case and procedural background.

1 entitled to relief in the district court, the judge must dismiss the petition.” Rule 4, 28
2 U.S.C. foll. § 2254.

3 Petitioner claims his current imprisonment violates the U.S. Constitution because
4 he has not been considered for early parole despite his alleged eligibility under California
5 Proposition 57.³ *See generally* Doc. No. 1. Judge Gallo concluded that Petitioner fails to
6 assert any violation of federal law. *See* Doc. No. 51 at 5–7. Judge Gallo further
7 determined that Petitioner’s claim is moot because he is no longer in custody of the
8 California Department of Corrections and Rehabilitation, and that Petitioner’s claim falls
9 outside habeas corpus review. *See id.* at 7–9. Accordingly, Judge Gallo recommends the
10 Court decline to construe the Petition as a section 1983 action and grant Respondent’s
11 motion to dismiss. *See id.* at 9–12. Petitioner objects to the R&R. *See* Doc. No. 54.

12 **A. Petitioner’s Claim Cannot Be Pursued in a Habeas Corpus Action**

13 *1. Petitioner Does Not State a Constitutional Claim*

14 Petitioner must state that his custody status violates a federal right in order to be
15 entitled to federal habeas review. *See Wilson v. Corcoran*, 562 U.S. 1, 5 (2010). If the
16 petition fails to present a federal claim, the court may dismiss the petition for failure to
17 state a claim. *See O’Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 2001). A petitioner
18 fails to state a federal claim if they only raise state law errors which do not lie within
19 federal habeas corpus review. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).

20 Here, Petitioner claims his due process rights have been violated through his
21 improper exclusion from nonviolent parole consideration under California Proposition
22 57. *See* Doc. No. 1 at 16–21. Proposition 57 is a piece of state legislation, and thus its
23 applicability to Petitioner is solely a state law issue. Therefore, Judge Gallo correctly
24 concluded that because Petitioner’s claim rests solely in state law, it does not fall within
25 federal habeas review. *See* Doc. No. 51 at 5; *see also Swarthout*, 562 U.S. at 219.

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28 ³ As Judge Gallo notes, Proposition 57 is codified in California law, Cal. Const, Art. I § 32. *See* Doc. No. 51 at 5.

1 In his objection, Petitioner again argues that his due process rights were violated
2 and that he has been “denied a liberty interest, parole, regardless of Proposition 57”
3 because of his “excessive draconian [prison] sentence.” Doc. No. 54 at 7. However, a
4 petitioner fails to state a federal claim if they simply allege a violation of the general
5 notion of fairness or a federal procedural right. *See Middleton v. Cupp*, 768 F.2d 1083,
6 1085 (9th Cir. 1985). A petitioner has the burden of alleging specific facts that show the
7 involvement of a federal right. *See O’Bremski*, 915F.2d at 420. Here, Petitioner cannot
8 maintain a constitutional violation based on denial of early parole consideration, because
9 Petitioner has no protected liberty interest in parole. There is no right under the U.S.
10 Constitution to be conditionally released before the expiration of a valid sentence.
11 *Swarthout*, 562 U.S. at 220; *see also Greenholtz v. Inmates of Neb. Penal & Corr.*
12 *Complex*, 442 U.S. 1, 7 (1979) (stating that there is no federal constitutional right to
13 parole). It follows that there is no constitutional right to parole consideration. As stated
14 above, Proposition 57 is purely a creature of state law, and deprivation of any rights that
15 it creates therefore cannot be vindicated here. *See Langford v. Day*, 110 F.3d 1380, 1389
16 (9th Cir. 1996) (holding that a state law issue cannot be transformed into federal law
17 issue by merely invoking due process).

18 Accordingly, Judge Gallo correctly concluded that Petitioner’s habeas claim fails
19 due to his reliance on state law and failure to state a cognizable federal claim. *See R&R*
20 at 5. Thus, the Court **OVERRULES** Petitioner’s objection on this basis.

21 2. *Petitioner’s Claim Falls Outside the Core of Habeas Corpus*

22 Further, a state prisoner’s sole avenue to “[c]hallenge the validity of any
23 confinement or . . . its duration” is a habeas corpus petition. *Nettles v. Grounds*, 830 F.3d
24 922, 927 (9th Cir. 2016). If the habeas petition’s success would not “necessarily lead to
25 his immediate or earlier release from confinement, [the] claim does not fall within ‘the
26 core of habeas corpus.’” *Id.* at 935.

27 As noted above, Petitioner asserts that under Proposition 57, he is eligible for early
28 parole consideration because his underlying convictions are nonviolent. *See* Doc. No. 1

1 at 16–21. However, even if Petitioner’s contention is valid, he would only be entitled to
 2 a parole consideration hearing, not an immediate release from prison. *See Woods v.*
 3 *Pollard*, No. 21-cv-111-MMA (WVG), 2021 WL 4947641, at *3 (S.D. Cal. Oct. 25,
 4 2021) (finding that because success of petitioner’s claim would not necessarily lead to
 5 immediate or speedier release from custody, it falls outside the core of habeas corpus),
 6 *see also* Cal. Penal Code § 3051. Thus, as Judge Gallo correctly concluded, Petitioner’s
 7 claim is not within the core of habeas corpus. *See R&R* at 7–9. In his objection,
 8 Petitioner does not present any new arguments—instead, he repeats arguments found in
 9 the Petition. *See* Doc. Nos. 1, 54. Accordingly, the Court **OVERRULES** Petitioner’s
 10 objection on this basis as well and concludes that his claim falls outside the core of
 11 habeas corpus, providing an alternative reason to dismiss the petition.⁴

12 **B. Potential Conversion to Section 1983**

13 Petitioner did not specifically object to Judge Gallo’s recommendation that this
 14 proceeding should not be converted to a section 1983 claim. *See* Doc. No. 54 at 12–15.
 15 As Judge Gallo noted, the Court has the discretion to convert a habeas case like
 16 Petitioner’s to a civil rights case. *See Wilwording v. Swenson*, 404 U.S. 249, 251 (1971),
 17 overruled on other grounds by *Woodford v. Ngo*, 548 U.S. 81 (2006). However, the
 18 Court declines to do so in this case. “[A] habeas corpus action and a prisoner civil rights
 19 suit differ in a variety of respects—such as the proper defendant, filing fees, the means of
 20 collecting them, and restrictions on future filings—that may make recharacterization
 21 impossible or, if possible, disadvantageous to the prisoner compared to a dismissal
 22 without prejudice of his petition for habeas corpus.” *Nettles*, 830 F.3d at 935–36
 23 (citations and internal quotations omitted); *see also Jorgenson v. Spearman*, 2016 WL
 24 2996942, at *1 (C.D. Cal. May 22, 2016) (declining to convert a flawed habeas petition
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 27 ⁴ Respondent also argues, and Judge Gallo agrees, that Petitioner’s claim is moot. *See* Doc. Nos. 20 at
 28 4, 51 at 5. Petitioner objects to this portion of Judge Gallo’s R&R. Doc. No. 54 at 8. Having conducted
 a *de novo* review, the Court finds that it need not reach this issue because as discussed above, the claim
 is not cognizable and cannot be brought in a federal habeas proceeding.

1 into a civil rights complaint “in light of the considerable procedural and substantive
2 differences between habeas corpus and civil rights matters”). As the R&R notes, and the
3 Court agrees, there are many signs demonstrating that construing the Petition as a civil
4 rights claim is not appropriate. *See* Doc. No. 51 at 9–12. Therefore, the Court declines to
5 construe this Petition as a section 1983 claim.

6 Accordingly, upon due consideration and after conducting a *de novo* review of the
7 pertinent portions of the record, the Court **ADOPTS** the R&R and **GRANTS**
8 Respondent’s motion to dismiss.

9 **C. Leave to Amend Would be Futile**

10 Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend
11 pleadings “shall be freely given when justice so requires.” Fed. R. Civ. P. 15.
12 “However, the district court may exercise its discretion to deny leave to amend due to
13 undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure
14 deficiencies by amendments previously allowed, undue prejudice to the opposing party. .
15 . , [and] futility of amendment.” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876,
16 892 (9th Cir. 2010) (citations and internal quotation marks and brackets omitted); *see*
17 *also Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (“[I]n dismissing for failure to
18 state a claim under Rule 12(b)(6), a district court should grant leave to amend even if no
19 request to amend the pleading was made, unless it determines that the pleading could not
20 possibly be cured by the allegation of other facts.” (citation and internal quotation marks
21 omitted)).

22 The Court has determined that Petitioner’s claim is barred as a matter of law.
23 Because Petitioner cannot plead any additional facts to cure the defects outlined above, it
24 would be futile to grant Petitioner leave to amend. *See Platt Elec. Supply, Inc. v. EOFF*
25 *Elec., Inc.*, 522 F.3d 1049, 1060 (9th Cir. 2008).

26 **IV. MOTION FOR APPOINTMENT OF COUNSEL**

27 On April 20, 2022, Petitioner filed a second motion for appointment of counsel.
28 Doc. No. 47. A district court may appoint counsel to represent a habeas petitioner

1 whenever “the court determines that the interests of justice so require” and such person is
 2 financially unable to obtain representation. 18 U.S.C. § 3006A(a)(2)(B). The decision to
 3 appoint counsel is within the discretion of the district court. *See Chaney v. Lewis*, 801
 4 F.2d 1191, 1196 (9th Cir. 1986). Appointment is mandatory only when the
 5 circumstances of a particular case indicate that appointed counsel is necessary to prevent
 6 due process violations. *See id.* Because the Court is dismissing the Petition without
 7 leave to amend, and therefore, the interests of justice do not require appointment of
 8 counsel, the Court **DENIES AS MOOT** Petitioner’s second motion for appointment of
 9 counsel.

10 **V. CERTIFICATE OF APPEALABILITY**

11 The federal rules governing habeas cases brought by state prisoners require a
 12 district court that dismisses or denies a habeas petition to grant or deny a certificate of
 13 appealability in its ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll.
 14 § 2254. A certificate of appealability is not issued unless there is “a substantial showing
 15 of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Under this standard, a
 16 petitioner must show that reasonable jurists could debate whether the petition should have
 17 been resolved in a different manner or that the issues presented were adequate to deserve
 18 encouragement to proceed further. *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003)
 19 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). For the reasons set forth in the
 20 R&R and incorporated herein, the Court finds that this standard has not been met and
 21 therefore **DECLINES** to issue a certificate of appealability.

22 **VI. CONCLUSION**

23 For the foregoing reasons, the Court **OVERRULES** Petitioner’s objection,
 24 **ADOPTS** Judge Gallo’s R&R, **GRANTS** Respondent’s motion to dismiss, and
 25 **DISMISSES** the Petition without leave to amend.⁵ The Court further **DENIES AS**
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 28 ⁵ The Court only decides today that a habeas petition is the wrong vehicle for Petitioner to pursue enforcement of any federal rights he has as a result of Proposition 57. Although it is premature in this

1 **MOOT** Petitioner’s motion for appointment of counsel, **DECLINES** to issue a certificate
2 of appealability, and **DIRECTS** the Clerk of Court to enter judgment in favor of
3 Respondent and terminate this case.

4 **IT IS SO ORDERED.**

5 Dated: September 21, 2022



7 HON. MICHAEL M. ANELLO
8 United States District Judge

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habeas action to decide whether Petitioner’s claim could be stated under section 1983, this dismissal is nonetheless without prejudice to Petitioner filing an entirely new civil rights action asserting his challenges to the implementation of Proposition 57.