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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

8 ALBERTO R. BELTRAN, 1:10-cv-01771 MJS (HC)

9 Petitioner, ORDER DISMISSING PETITION FOR
10 v. WRIT OF HABEAS CORPUS FOR FAILING
TO STATE COGNIZABLE CLAIM

11 [Doc. 1]

12 WRIT OF HABEAS CORPUS,

13 Respondent.
14 /15 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas
16 corpus under the authority of 28 U.S.C. § 2254. Petitioner has consented to the jurisdiction
17 of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c)(1) and Local Rule
18 305(b).19 Petitioner filed the instant petition for writ of habeas corpus on September 29, 2010
20 (Pet., ECF No. 1.) Petitioner alleges that his medical condition requires a gluten free diet
21 which the Department of Corrections refuses to provide. (Id.).22 **I. DISCUSSION**23 **A. Procedural Grounds for Summary Dismissal**

24 Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

25 If it plainly appears from the petition and any attached exhibits that the
26 petitioner is not entitled to relief in the district court, the judge must dismiss
the petition and direct the clerk to notify the petitioner.27 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a
28 petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the

1 respondent's motion to dismiss, or after an answer to the petition has been filed. A petition
2 for habeas corpus should not be dismissed without leave to amend unless it appears that
3 no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440
4 F.2d 13, 14 (9th Cir. 1971).

5 **B. Failure to State Cognizable Claim**

6 The instant petition must be dismissed because it does not challenge the fact or
7 duration of Petitioner's confinement.

8 A federal court may only grant a petition for writ of habeas corpus if the petitioner
9 can show that "he is in custody in violation of the Constitution . . ." 28 U.S.C. § 2254(a).
10 A habeas corpus petition is the correct method for a prisoner to challenge the "legality or
11 duration" of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991), *quoting*,
12 Preiser v. Rodriguez, 411 U.S. 475, 485 (1973); Advisory Committee Notes to Rule 1 of
13 the Rules Governing Section 2254 Cases.

14 In contrast, a civil rights action pursuant to 42 U.S.C. § 1983 is the proper method
15 for a prisoner to challenge the conditions of that confinement. McCarthy v. Bronson, 500
16 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499; Badea, 931 F.2d at 574; Advisory
17 Committee Notes to Rule 1 of the Rules Governing Section 2254 Cases. "Habeas
18 jurisdiction is absent, and a § 1983 action proper, where a successful challenge to a prison
19 condition will not necessarily shorten the prisoner's sentence." Ramirez v. Galaza, 334
20 F.3d 850, 859 (9th Cir. 2003).

21 Petitioner here seeks provision of a proper diet. He does not seek relief from the
22 duration or fact of his confinement. He does not challenge his conviction or sentence.
23 Accordingly, his claims are not cognizable grounds for federal habeas corpus relief and
24 must be dismissed. Should Petitioner wish to pursue his claims, he may do so by way of
25 a civil rights complaint.

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28 **C. Certificate of Appealability**

1 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to
2 appeal a district court's denial of his petition, and an appeal is only allowed in certain
3 circumstances. *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1039 (2003). The controlling statute
4 in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which
5 provides as follows:

6 (a) In a habeas corpus proceeding or a proceeding under section
7 2255 before a district judge, the final order shall be subject to review, on
8 appeal, by the court of appeals for the circuit in which the proceeding is
held.

9 (b) There shall be no right of appeal from a final order in a
10 proceeding to test the validity of a warrant to remove to another district or
11 place for commitment or trial a person charged with a criminal offense
12 against the United States, or to test the validity of such person's detention
13 pending removal proceedings.

14 (c) (1) Unless a circuit justice or judge issues a certificate of
15 appealability, an appeal may not be taken to the court of
16 appeals from—

17 (A) the final order in a habeas corpus proceeding in
18 which the detention complained of arises out of process
19 issued by a State court; or

20 (B) the final order in a proceeding under section 2255.

21 (2) A certificate of appealability may issue under paragraph
22 (1) only if the applicant has made a substantial showing of the
23 denial of a constitutional right.

24 (3) The certificate of appealability under paragraph (1) shall
25 indicate which specific issue or issues satisfy the showing
26 required by paragraph (2).

27 If a court denies a petitioner's petition, the court may only issue a certificate of
28 appealability "if jurists of reason could disagree with the district court's resolution of his
constitutional claims or that jurists could conclude the issues presented are adequate to
deserve encouragement to proceed further." *Miller-El*, 123 S.Ct. at 1034; *Slack v.
McDaniel*, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the
merits of his case, he must demonstrate "something more than the absence of frivolity or
the existence of mere good faith on his . . . part." *Miller-El*, 123 S.Ct. at 1040.

29 In the present case, the Court finds that reasonable jurists would not find debatable

1 or wrong the Court's determination that Petitioner is not entitled to federal habeas corpus
2 relief, nor would they find him deserving of encouragement to proceed further. Petitioner
3 has not made the required substantial showing of the denial of a constitutional right.
4 Accordingly, the Court hereby DECLINES to issue a certificate of appealability.

5 **ORDER**

6 Accordingly, IT IS HEREBY ORDERED that:

7 1. The Petition for Writ of Habeas Corpus is DISMISSED;
8 2. The Clerk of Court is DIRECTED to enter judgment; and
9 3. The Court DECLINES to issue a certificate of appealability.

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11 IT IS SO ORDERED.

12 Dated: November 16, 2010

13 /s/ *Michael J. Seng*
14 UNITED STATES MAGISTRATE JUDGE

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