

1 **DISCUSSION**

2 **A. Preliminary Review of Petition**

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
4 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the
5 petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing Section
6 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a
7 petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the
8 respondent’s motion to dismiss, or after an answer to the petition has been filed. Herbst v. Cook,
9 260 F.3d 1039 (9th Cir.2001).

10 **B. The Instant Petition Fails To Allege Cognizable Habeas Claims.**

11 Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary
12 review of each petition for writ of habeas corpus. The Court must dismiss a petition “[i]f it
13 plainly appears from the face of the petition . . . that the petitioner is not entitled to relief.” Rule
14 4 of the Rules Governing 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490
15 (9th Cir.1990). A federal court may only grant a petition for writ of habeas corpus if the
16 petitioner can show that “he is in custody in violation of the Constitution” 28 U.S.C. §
17 2254(a). A habeas corpus petition is the correct method for a prisoner to challenge the “legality
18 or duration” of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991), *quoting*,
19 Preiser v. Rodriguez, 411 U.S. 475, 485 (1973); Advisory Committee Notes to Rule 1 of the
20 Rules Governing Section 2254 Cases. In contrast, a civil rights action pursuant to 42 U.S.C. §
21 1983 is the proper method for a prisoner to challenge the conditions of that confinement.
22 McCarthy v. Bronson, 500 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499; Badea, 931 F.2d at
23 574; Advisory Committee Notes to Rule 1 of the Rules Governing Section 2254 Cases.

24 In this case, Petitioner contends that Respondent violated Petitioner’s federal
25 constitutional rights by making an adverse “gang validation” based upon Petitioner’s possession
26 of lawful materials that resulted in Petitioner’s confinement in the SHU. Petitioner does not
27 challenge either his underlying conviction or sentence. Indeed, Petitioner expressly alleges that
28 he “does not challenge the basis of his criminal conviction in these proceedings.” (Doc. 1, p. 1).

1 As such, Petitioner is challenging the conditions of his confinement, rather than the fact or
2 duration of that confinement. Accordingly, Petitioner is not entitled to habeas corpus relief, and
3 this petition should be dismissed. Should Petitioner wish to pursue his claims, Petitioner must do
4 so by way of a civil rights complaint pursuant to 42 U.S.C. § 1983.

5 **ORDER**

6 Accordingly, the Court HEREBY ORDERS as follows:

- 7 1. The Clerk of the Court is DIRECTED to assign this case to a United States District
8 Judge.

9 **RECOMMENDATIONS**

10 For the foregoing reasons, the Court HEREBY RECOMMENDS that the petition for writ
11 of habeas corpus be dismissed for failure to state a claim upon which habeas relief can be granted.

12 This Findings and Recommendation is submitted to the United States District Judge
13 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
14 Local Rules of Practice for the United States District Court, Eastern District of California.

15 Within twenty days after being served with a copy, any party may file written objections with the
16 court and serve a copy on all parties. Such a document should be captioned “Objections to
17 Magistrate Judge’s Findings and Recommendation.” The Court will then review the Magistrate
18 Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file
19 objections within the specified time may waive the right to appeal the District Court’s order.

20 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21
22
23
24 IT IS SO ORDERED.

25 Dated: May 20, 2011

26 /s/ Jennifer L. Thurston
27 UNITED STATES MAGISTRATE JUDGE
28