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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

HERIBERTO CONTRERAS,

1:11-cv-01904 MJS (HC)

Petitioner,

FINDINGS AND RECOMMENDATION TO  
DISMISS PETITION FOR WRIT OF  
HABEAS CORPUS FOR FAILING TO  
STATE COGNIZABLE CLAIM

v.

ON HABEAS CORPUS,

ORDER DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT COURT JUDGE TO  
THE PRESENT MATTER

Respondent.

/ [Doc. 1]

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus under the authority of 28 U.S.C. § 2254.

Petitioner filed the instant petition for writ of habeas corpus on November 16, 2011. (Pet., ECF No. 1.) In the petition, Petitioner challenges the failure of the correctional officers to give him vegetarian meals. (Pet. at 16, ECF No. 1.) Further Petitioner contends that California Department of Corrections obstructed the filing of his complaints and denied his access to the courts. (See generally, Pet.)

**I. DISCUSSION**

**A. Procedural Grounds for Summary Dismissal**

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

If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a 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.

18 Petitioner's claims do not implicate the fact or duration of his confinement. Petitioner  
19 seeks relief based on the failure to receive vegetarian meals and for being hindered in  
20 filing and processing complaints. (Pet.) The claims do not challenge his conviction or  
21 sentence or entitle Petitioner to earlier release. Petitioner's claims are not cognizable  
22 grounds for federal habeas corpus relief and must be dismissed. Should Petitioner wish  
23 to pursue his claims, he must do so by way of a civil rights complaint. The Court expresses  
24 no opinion as to the merits of such a civil rights complaint.

25 As it does not appear possible that the deficiencies identified herein can be cured  
26 by amending the complaint, Petitioner is not entitled to leave to amend prior to dismissal  
27 of the entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en  
28 banc).

1 In an appropriate case a habeas petition may be construed as a Section 1983  
2 complaint. Wilwording v. Swenson, 404 U.S. 249, 251, 92 S. Ct. 407, 30 L. Ed. 2d 418  
3 (1971). Although the Court may construe a habeas petition as a civil rights action, it is not  
4 required to do so. Since the time when the Wilwording case was decided there have been  
5 significant changes in the law. For instance, the filing fee for a habeas petition is five  
6 dollars, and if leave to proceed in forma pauperis is granted, the fee is forgiven. For civil  
7 rights cases, however, the fee is now \$350 and under the Prisoner Litigation Reform Act  
8 the prisoner is required to pay it, even if granted in forma pauperis status, by way of  
9 deductions from income to the prisoner's trust account. See 28 U.S.C. 1915(b)(1). A  
10 prisoner who might be willing to file a habeas petition for which he or she would not have  
11 to pay a filing fee might feel otherwise about a civil rights complaint for which the \$350 fee  
12 would be deducted from income to his or her prisoner account. Also, a civil rights complaint  
13 which is dismissed as malicious, frivolous, or for failure to state a claim would count as a  
14 "strike" under 28 U.S.C. § 1915(g), which is not true for habeas cases.

15 In view of these potential pitfalls for Petitioner if the petition were construed as a civil  
16 rights complaint, the case is DISMISSED without prejudice to Petitioner to present the  
17 claims in a civil rights complaint pursuant to 42 U.S.C. § 1983, rather than a habeas  
18 petition, which will be assigned a separate civil number. The Clerk of Court shall send  
19 Petitioner a blank civil rights complaint form along with a copy of this Order.

20 **II. ORDER AND RECOMMENDATION**

- 21 1. It is ORDERED that the Clerk of Court assign a District Court Judge to the  
22 present matter;
- 23 2. It is further ORDERED that the Clerk of Court shall send Petitioner a blank  
24 civil rights complaint form; and
- 25 3. It is RECOMMENDED that the petition for writ of habeas corpus be  
26 DISMISSED without prejudice to Petitioner's right to file a civil rights action  
27 pursuant to 42 U.S.C. § 1983.

28 These findings and recommendations are submitted to the United States District

1 Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B)  
2 and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern  
3 District of California. Within thirty (30) days after being served with a copy, any party may  
4 file written objections with the Court and serve a copy on all parties. Such a document  
5 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."  
6 Replies to the objections shall be served and filed within fourteen (14) days (plus three  
7 days if served by mail) after service of the objections. The Court will then review the  
8 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The parties are advised  
9 that failure to file objections within the specified time may waive the right to appeal the  
10 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11  
12 IT IS SO ORDERED.

13 Dated: November 28, 2011

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE