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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ALVINO MARTINEZ,
Petitioner,

No. CIV S-10-1723-LKK-CMK-P

vs.

FINDINGS AND RECOMMENDATIONS

ARNOLD SCHWARZENEGGER,
Respondent.

_____ /

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner’s petition for a writ of habeas corpus (Doc. 1).

Rule 4 of the Federal Rules Governing Section 2254 Cases provides for summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” In the instant case, it is plain that petitioner is not entitled to federal habeas relief. Specifically, petitioner states that he is challenging the conditions of his confinement. On page 2 of the petition, petitioner states that the action concerns “inadequate medical care under color of law, continued irreparable injury, violation of U.S. Constitution’s 8th Amendment, cruel and unusual

1 punishment, to a serious medical need.” Where a prisoner challenges the conditions of
2 confinement, as opposed to the fact or duration of confinement, his remedy lies in a civil rights
3 action under 42 U.S.C. § 1983. See Rizzo v. Dawson, 778 F.2d 527, 531-32 (9th Cir. 1985).
4 Thus, 28 U.S.C. § 2254 cannot be used to challenge the conditions of confinement, and 42
5 U.S.C. § 1983 cannot be used to challenge the fact or duration of confinement.

6 Based on the foregoing, the undersigned recommends that petitioner’s petition for
7 a writ of habeas corpus (Doc. 1) be summarily dismissed without prejudice to re-filing his claims
8 as a separate civil rights action, and that all pending motions be denied as moot.

9 These findings and recommendations are submitted to the United States District
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
11 after being served with these findings and recommendations, any party may file written
12 objections with the court. Responses to objections shall be filed within 14 days after service of
13 objections. Failure to file objections within the specified time may waive the right to appeal.
14 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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16 DATED: August 12, 2010

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18 **CRAIG M. KELLISON**
19 UNITED STATES MAGISTRATE JUDGE
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