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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
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11 NICKOLAS J. ANDRADE,

No. CIV S-11-3055-JAM-CMK-P

12 Petitioner,

13 vs.

FINDINGS AND RECOMMENDATIONS

14 WARDEN, DVI,

15 Respondent.  
16 \_\_\_\_\_/

17 Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of  
18 habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner's petition for  
19 a writ of habeas corpus (Doc. 1).

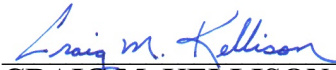
20 Rule 4 of the Federal Rules Governing Section 2254 Cases provides for summary  
21 dismissal of a habeas petition "[i]f it plainly appears from the face of the petition and any  
22 exhibits annexed to it that the petitioner is not entitled to relief in the district court." In the  
23 instant case, it is plain that petitioner is not entitled to federal habeas relief. Here, petitioner is  
24 not entitled to habeas relief because he challenges the conditions of confinement and not the fact  
25 or duration of his confinement. When a state prisoner challenges the legality of his custody –  
26 either the fact of confinement or the duration of confinement – and the relief he seeks is a

1 determination that he is entitled to an earlier or immediate release, such a challenge is cognizable  
2 in a petition for a writ of habeas corpus under 28 U.S.C. § 2254. See Preiser v. Rodriguez, 411  
3 U.S. 475, 500 (1973); see also Neal v. Shimoda, 131 F.3d 818, 824 (9th Cir. 1997); Trimble v.  
4 City of Santa Rosa, 49 F.3d 583, 586 (9th Cir. 1995) (per curiam). Where a prisoner challenges  
5 the conditions of confinement, as opposed to the fact or duration of confinement, his remedy lies  
6 in a civil rights action under 42 U.S.C. § 1983. See Rizzo v. Dawson, 778 F.2d 527, 531-32 (9th  
7 Cir. 1985). Thus, 28 U.S.C. § 2254 cannot be used to challenge the conditions of confinement,  
8 and 42 U.S.C. § 1983 cannot be used to challenge the fact or duration of confinement.

9           Based on the foregoing, the undersigned recommends that petitioner's petition for  
10 a writ of habeas corpus (Doc. 1) be summarily dismissed.

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

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18 DATED: December 9, 2011

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20 **CRAIG M. KELLISON**  
21 UNITED STATES MAGISTRATE JUDGE  
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