

1 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). “[T]he
2 essence of habeas corpus is an attack by a person in custody on the legality of that custody, and the
3 traditional function of the writ is to secure release from illegal custody. *Preiser v Rodriguez*, 411 U.S.
4 475, 484 (1973). “[H]abeas corpus is not an appropriate or available federal remedy” when a petitioner
5 is not “challeng[ing] the very fact or duration of confinement itself” or unconstitutional restraints that
6 render the petitioner’s otherwise lawful custody, unlawful. *Id.* at 494, 499.

7 As petitioner is not challenging a state detainer, this petition is dismissed without prejudice. If
8 petitioner seeks to pursue a writ of habeas corpus, he shall file a new petition, on the correct form, in a
9 new case with a new case number. He shall either include the full filing fee or file an application to
10 proceed *in forma pauperis*, with all the required financial information.

11 It does not appear from the papers presented that a dismissal without prejudice will materially
12 affect a later analysis of any timeliness issue with regard to a promptly filed new action.²

13 **IT IS THEREFORE ORDERED** that this petitioner’s application to proceed *in forma pauperis*
14 (ECF #1) is **DENIED** as moot.

15 **IT IS FURTHER ORDERED** that the Clerk shall **DETACH** and **FILE** the petition for a writ
16 of habeas corpus by a person attacking a state detainer (ECF #1-1).

17 **IT IS FURTHER ORDERED** that this action is **DISMISSED** without prejudice to the filing
18 of a new petition in a new action with a properly completed application form to proceed *in forma*
19 *pauperis*.

20 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**, as jurists of reason
21 would not find the court’s dismissal of this improperly commenced action without prejudice to be
22 debatable or incorrect.

23 **IT IS FURTHER ORDERED** that the Clerk shall send petitioner two copies each of an
24 application form to proceed *in forma pauperis* for incarcerated persons and a noncapital Section 2254
25 habeas petition form, one copy of the instructions for each form, and a copy of the papers that he
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27 ² Petitioner appears to refer to a state case in which, according to its online docket, the Nevada
Supreme Court dismissed his appeal on September 14, 2012 (Case No. 61444, remittitur issued October
11, 2012).

1 submitted in this action.

2 IT IS FURTHER ORDERED that the Clerk shall **ENTER JUDGMENT** accordingly and
3 close this case.

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5 DATED this 23rd day of January, 2013.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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