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

**NICHOLAS J. QUEEN,**  
Petitioner,  
  
v.  
  
**ANDRE MATEVOUSIAN,**  
Respondent.

Case No. 1:16-cv-01441 MJS (HC)  
**FINDING AND RECCOMENDATION  
REGARDING PETITION FOR WRIT OF  
HABEAS CORPUS**  
  
**ORDER DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT COURT JUDGE TO  
THIS MATTER**

Petitioner is a federal prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Petitioner filed the instant habeas petition in this Court on September 28, 2016. He is currently incarcerated at United States Penitentiary Atwater in Atwater, California. In 1994, Petitioner was convicted of two counts of bank robbery in the District of Maryland. See United States v. Queen, D. Nev., Case No. 93-0366-WMN. Petitioner was

1 sentenced to a term of 562 months in federal prison.

2 Despite several prior attempts to challenge his conviction or reduce his sentence,  
3 Petitioner now claims that he is entitled to relief based on recently discovered evidence  
4 that demonstrates that he is actually innocent of bank robbery. He contends the bank he  
5 robbed was not federally insured, and thus not within the ambit of the criminal statute  
6 under which he was convicted. (See Pet.)

7 **I. Screening the Petition**

8 Because the petition was filed after April 24, 1996, the effective date of the  
9 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), AEDPA applies to this  
10 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,  
11 1499 (9th Cir. 1997).

12 The Rules Governing Section 2254 Cases in the United States District Courts  
13 (Habeas Rules) are appropriately applied to proceedings undertaken pursuant to 28  
14 U.S.C. § 2241. Habeas Rule 1(b). Habeas Rule 4 requires the Court to make a  
15 preliminary review of each petition for writ of habeas corpus. The Court must summarily  
16 dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that  
17 the petitioner is not entitled to relief in the district court...." Habeas Rule 4; O'Bremski v.  
18 Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also Hendricks v. Vasquez, 908 F.2d 490  
19 (9th Cir. 1990). Habeas Rule 2(c) requires that a petition 1) specify all grounds of relief  
20 available to the Petitioner; 2) state the facts supporting each ground; and 3) state the  
21 relief requested. Notice of pleading is not sufficient; rather, the petition must state facts  
22 that point to a real possibility of constitutional error. Rule 4, Advisory Committee Notes,  
23 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v. Allison, 431  
24 U.S. 63, 75 n.7 (1977)). Allegations in a petition that are vague, conclusory, or palpably  
25 incredible are subject to summary dismissal. Hendricks v. Vasquez, 908 F.2d at 491.

26 Further, the Court may dismiss a petition for writ of habeas corpus either on its  
27 own motion under Habeas Rule 4, pursuant to the respondent's motion to dismiss, or  
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1 after an answer to the petition has been filed. Advisory Committee Notes to Habeas Rule  
2 8, 1976 Adoption; see Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

## 3 **II. Jurisdiction**

### 4 **A. Subject Matter Jurisdiction**

5 Relief by way of a writ of habeas corpus extends to a prisoner in custody under  
6 the authority of the United States who shows that the custody violates the Constitution,  
7 laws, or treaties of the United States. 28 U.S.C. § 2241(c)(3). Although a federal prisoner  
8 who challenges the validity or constitutionality of his conviction must file a petition for writ  
9 of habeas corpus under 28 U.S.C. § 2255, a federal prisoner challenging the  
10 manner, location, or conditions of the execution of a sentence must bring a petition for  
11 writ of habeas corpus under 28 U.S.C. § 2241. Hernandez v. Campbell, 204 F.3d 861,  
12 864-65 (9th Cir. 2000).

13 Petitioner challenges the validity of his conviction. Such a claim is properly  
14 brought under a petition for writ of habeas corpus under 28 U.S.C. § 2255. However,  
15 Petitioner alleges that he did not have an unobscured procedural opportunity to bring  
16 such a petition. Accordingly, the Court will determine whether Petitioner's claims can be  
17 brought under the escape hatch under 28 U.S.C. § 2241.

18 The Court concludes that it has subject matter jurisdiction over the petition.

### 19 **B. Jurisdiction over the Person**

20 28 U.S.C. § 2241(a) provides that writs of habeas corpus may be granted by  
21 the district courts "within their respective jurisdictions." A writ of habeas corpus  
22 operates not upon the prisoner, but upon the prisoner's custodian. Braden v. 30th  
23 Judicial Circuit Court of Kentucky, 410 U.S. 484, 494-495 (1973). A petitioner filing a  
24 petition for writ of habeas corpus under § 2241 must file the petition in the judicial  
25 district of the Petitioner's custodian. Brown v. United States, 610 F.2d 672, 677 (9th Cir.  
26 1990). The warden of the penitentiary where a prisoner is confined constitutes the  
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1 custodian who must be named in the petition, and the petition must be filed in the  
2 district of confinement. Id.; Rumsfeld v. Padilla, 542 U.S. 426, 446-47 (2004). It is  
3 sufficient if the custodian is in the territorial jurisdiction of the court at the time the  
4 petition is filed; transfer of the petitioner thereafter does not defeat personal jurisdiction  
5 that has once been properly established. Ahrens v. Clark, 335 U.S. 188, 193 (1948);  
6 Francis v. Rison, 894 F.2d 353, 354 (9th Cir. 1990).

7 Petitioner was incarcerated at the United States Penitentiary in Atwater, California  
8 (USP Atwater) at the time of filing this petition. USP Atwater is located within the Eastern  
9 District of California. Andre Matevousian, Warden at USP Atwater, is Petitioner's  
10 custodian and the proper respondent to this habeas action. The Court has proper  
11 jurisdiction over Petitioner.

### 12 **III. Abuse of the Writ**

13 A district court need not consider claims that were previously raised or could have  
14 been raised in previous petitions unless declining to consider the claim "would result in a  
15 fundamental miscarriage of justice." The abuse of the writ doctrine forbids  
16 reconsideration of claims that were or could have been raised in a prior habeas petition,  
17 "unless a petitioner can show (1) cause for bringing a successive petition and that  
18 prejudice would result or (2) that a fundamental miscarriage of justice would result from  
19 failure to consider the claim." Alaimalo v. U.S., 645 F.3d 1042, 1049 (9th Cir. 2011)  
20 (quoting Calderon v. United States Dist. Ct., 163 F.3d 530, 538 (9th Cir. 1998)).

21 Petitioner has previously raised this issue in a prior petition for writ of habeas  
22 corpus in this Court and has not demonstrated cause for re-raising the issue here. On  
23 March 16, 2015, Petitioner filed a petition for habeas corpus with this court. See Queen  
24 v. Matevousian, E.D. Cal. Case No. 1:15-cv-00413 JLT. On November 13, 2015, the  
25 Court dismissed the petition. See Case No. 1:15-cv-00413 JLT at ECF No. 24.

26 The Court addressed Petitioner's arguments that he was innocent based on the  
27 bank not being FDIC insured and found that the claims lacked merit. The Court  
28 explained:

1 First, as Respondent observes, the Federal Deposit Insurance  
2 Corporation letter Petitioner attached to his petition, categorically states  
3 that the entirety of Provident Bank in Baltimore, Maryland—regardless of  
4 the location of the Bank’s individual branches—was FDIC-insured on the  
5 date Petitioner committed the robbery. Also, as Respondent notes,  
6 Petitioner has never denied robbing a branch of Provident Bank on that  
7 date. Rather, Petitioner apparently argues that the prosecution used the  
8 wrong address, i.e., 5426 Harford Road, rather than 8200 Harford Road,  
9 and thus he is “actually innocent;” Petitioner is mistaken.

10 The jury convicted Petitioner of robbing a Provident Bank branch on  
11 the date specified, a fact Petitioner has not denied. Because FDIC  
12 insurance was an element of the offense under § 2213, the jury’s guilty  
13 verdict necessarily implied a finding that the branch Petitioner robbed was  
14 federally insured on the date of the crime. While Petitioner may believe  
15 that the proper address of the bank was 5426 Harford Road, the FDIC  
16 disagrees. Since the letter establishes that Provident Bank—no matter the  
17 location of any particular branch of the Bank—in Baltimore was FDIC-  
18 insured on the date Petitioner robbed it, Petitioner necessarily robbed an  
19 FDIC-insured “institution” within the meaning of § 2113. The fact that a  
20 discrepancy may now exist between the original charging document and  
21 the proof at trial does not make Petitioner actually innocent within the  
22 meaning of the escape hatch. It only means that there is a technical proof  
23 issue, or perhaps even a jury instruction issue, that could have been  
24 raised and addressed in Petitioner’s direct appeal.

25 See Case No. 1:15-cv-00413 JLT at ECF No. 24.

26 Petitioner presents the exact same claims in the present petition. Petitioner has  
27 presented no evidence that the claims presented here differ from those previously  
28 raised. He provides no justification for allowing him to file a second petition alleging the  
exact same arguments. Based on the doctrine of abuse of the writ, Petitioner is not  
entitled to habeas relief. The petition must be dismissed.

29 **IV. Recommendation**

30 Accordingly, it is hereby recommended that the petition be dismissed with  
31 prejudice in violation of the abuse of the writ doctrine.

32 This Findings and Recommendation is submitted to the assigned District Judge,  
33 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after  
34 being served with the Findings and Recommendation, any party may file written  
35 objections with the Court and serve a copy on all parties. Such a document should be  
36 captioned "Objections to Magistrate Judge's Findings and Recommendation." Any reply  
37 to the objections shall be served and filed within fourteen (14) days after service of the

1 objections. The parties are advised that failure to file objections within the specified time  
2 may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d  
3 834, 839 (9th Cir. 2014).

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5 IT IS SO ORDERED.

6 Dated: January 11, 2017

7 /s/ Michael J. Seng  
8 UNITED STATES MAGISTRATE JUDGE  
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