



1 **I. Successive Habeas Petition**

2 Petitioner's challenge to Case No. BF134705A is successive and should be  
3 dismissed.

4 A court must dismiss a second or successive petition that raises the same  
5 grounds as a prior petition. 28 U.S.C. § 2244(b)(1). A court must also dismiss a second  
6 or successive petition raising a new ground unless the petitioner can show that 1) the  
7 claim rests on a new constitutional right, made retroactive by the United States Supreme  
8 Court or 2) the factual basis of the claim was not previously discoverable through due  
9 diligence, and these new facts establish by clear and convincing evidence that but for  
10 the constitutional error, no reasonable factfinder would have found the applicant guilty of  
11 the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court  
12 that decides whether a second or successive petition meets these requirements; the  
13 Petitioner must first file a motion with the appropriate court of appeals to be authorized to  
14 file a second or successive petition with the district court.

15 Section 2244 (b)(3)(A) provides: "Before a second or successive application  
16 permitted by this section is filed in the district court, the applicant shall move in the  
17 appropriate court of appeals for an order authorizing the district court to consider the  
18 application." In other words, Petitioner must obtain leave from the Ninth Circuit before he  
19 can file a second or successive petition in the district court. See Felker v. Turpin, 518  
20 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive petition  
21 unless the Court of Appeals has given Petitioner leave to file the petition because a  
22 district court lacks subject matter jurisdiction over a second or successive petition.  
23 Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997).

24 Because the current petition was filed after April 24, 1996, the provisions of the  
25 Antiterrorism and Effective Death Penalty Act of 1996 apply to Petitioner's current  
26 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). A review of the Court's dockets and  
27 files shows Petitioner previously sought habeas relief with respect to this conviction.

1 Barger v. Rackley, Case No. 1:14-cv-00946-LJO-MJS (HC). On November 26, 2014, his  
2 petition was dismissed as untimely.<sup>2</sup> See Barger v. Rackley, No. 1:14-cv-00946-LJO-  
3 MJS, 2014 WL 4976084 (E.D. Cal. Sept. 29, 2014). Subsequent attacks on this  
4 conviction have been dismissed as successive. Fisher v. Sacramento County Superior  
5 Courts, No. 1:17-cv-00650-LJO-MJS (E.D. Cal. June 22, 2017). Petitioner makes no  
6 showing that he has obtained prior leave from the Ninth Circuit to file his successive  
7 petition attacking the conviction. That being so, this Court has no jurisdiction to consider  
8 Petitioner's renewed application for relief under Section 2254 and must dismiss the  
9 petition. See Greenawalt, 105 F.3d at 1277. If Petitioner desires to proceed in bringing  
10 this petition for writ of habeas corpus, he must file for leave to do so with the Ninth  
11 Circuit. See 28 U.S.C. § 2244(b)(3).

## 12 **II. Non-Cognizable Claims**

13 Petitioner's claims regarding law library access and access to the courts may not  
14 be brought in a habeas petition and should be dismissed, without prejudice to Plaintiff  
15 bringing these claims in a civil rights action pursuant to 42 U.S.C. § 1983.

16 A federal court may only grant a petition for writ of habeas corpus if the federal  
17 petitioner can demonstrate that he "is in custody in violation of the Constitution or laws or  
18 treaties of the United States." 28 U.S.C. § 2241(a), (c)(3). A habeas corpus petition is  
19 the correct method for a prisoner to challenge "the very fact or duration of his  
20 confinement," and where "the relief he seeks is a determination that he is entitled to  
21 immediate release or a speedier release from that imprisonment." Preiser v. Rodriguez,  
22 411 U.S. 475, 489 (1973). In contrast, a civil rights action pursuant to 42 U.S.C. § 1983  
23 is the proper method for a prisoner to challenge the conditions of that confinement.  
24 McCarthy v. Bronson, 500 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499. In other  
25 words, if a successful conditions of confinement challenge would not necessarily shorten

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27 <sup>2</sup> Dismissal of a habeas petition for failure to comply with the AEDPA statute of limitations renders  
28 subsequent petitions challenging the same conviction successive. McNabb v. Yates, 576 F.3d 1028, 1030  
(9th Cir. 2009).

1 the prisoner's sentence, then § 1983 is the appropriate vehicle. See Wilkinson v. Dotson,  
2 544 U.S. 74 (2005).

3 Petitioner's law library claims do not implicate the fact or duration of his  
4 confinement. They are not cognizable grounds for federal habeas corpus relief and must  
5 be dismissed. Should Petitioner wish to pursue his claims, he must do so by way of a  
6 civil rights complaint. The Court expresses no opinion as to the merits of such a civil  
7 rights complaint. As it does not appear possible that the deficiencies identified herein  
8 can be cured by amending the complaint, Petitioner is not entitled to leave to amend  
9 prior to dismissal of the entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131  
10 (9th Cir. 2000) (en banc).

11 In an appropriate case a habeas petition may be construed as a Section 1983  
12 complaint. Wilwording v. Swenson, 404 U.S. 249, 251, 92 S. Ct. 407, 30 L. Ed. 2d 418  
13 (1971). Although the Court may construe a habeas petition as a civil rights action, it is  
14 not required to do so. Since the time when the Wilwording case was decided there have  
15 been significant changes in the law. For instance, the filing fee for a habeas petition is  
16 five dollars, and if leave to proceed in forma pauperis is granted, the fee is forgiven. For  
17 civil rights cases, however, the fee is now \$400 and under the Prisoner Litigation Reform  
18 Act the prisoner is required to pay it, even if granted in forma pauperis status, by way of  
19 deductions from income to the prisoner's trust account. See 28 U.S.C. 1915(b)(1). A  
20 prisoner who might be willing to file a habeas petition for which he or she would not have  
21 to pay a filing fee might feel otherwise about a civil rights complaint for which the \$350  
22 fee would be deducted from income to his or her prisoner account. Also, a civil rights  
23 complaint which is dismissed as malicious, frivolous, or for failure to state a claim would  
24 count as a "strike" under 28 U.S.C. § 1915(g), which is not true for habeas cases.

25 In view of these potential pitfalls for Petitioner if the petition were construed as a  
26 civil rights complaint, the Court will recommend the case be dismissed without prejudice  
27 to Petitioner presenting the claims in a civil rights complaint pursuant to 42 U.S.C.  
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1 § 1983, rather than a habeas petition, which will be assigned a separate civil number.  
2 The Clerk of Court shall send Petitioner a blank civil rights complaint form along with a  
3 copy of this Order.

4 **III. Conclusion and Recommendation**

5 Based on the foregoing, it is HEREBY RECOMMENDED that the petition for writ  
6 of habeas corpus be DISMISSED.

7 The findings and recommendation are submitted to the assigned United States  
8 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and  
9 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern  
10 District of California. Within thirty (30) days after being served with a copy, the parties  
11 may file written objections with the Court. Such a document should be captioned  
12 "Objections to Magistrate Judge's Findings and Recommendation." Any reply to the  
13 objections shall be served and filed within fourteen (14) days after service of the  
14 objections. The parties are advised that failure to file objections within the specified time  
15 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839  
16 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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18 IT IS SO ORDERED.

19 Dated: August 18, 2017

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE

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