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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

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6 ELIZABETH CARLEY,

7 Plaintiff,

Case No. 2:17-cv-02670-MMD-VCF

8 v.

ORDER

9 WARDEN JO GENTRY, et al.,

10 Defendants.

11 **I. SUMMARY**

12 Pro se Plaintiff Elizabeth Carley, who is incarcerated and in the custody of the  
13 Nevada Department of Corrections (“NDOC”), sued various prison officials under 42  
14 U.S.C. § 1983 for allegedly impeding her access to the courts. (ECF No. 27.) Before the  
15 Court are two motions: Plaintiff’s motion for leave to file a second amended complaint  
16 (“SAC”) (ECF No. 53 (“Motion to Amend”)); and Defendants’ motion to dismiss Plaintiff’s  
17 first amended complaint (“FAC”) (ECF No. 32 (“Motion to Dismiss”)).<sup>1</sup> Both because  
18 motions seeking leave to amend should be liberally granted, and Plaintiff’s proposed  
19 amendments in her SAC are not necessarily futile, the Court will grant Plaintiff’s Motion  
20 to Amend. The Court will therefore deny Defendants’ Motion to Dismiss as moot.

21 **II. BACKGROUND**

22 The Court construes Plaintiff’s case as comprising a single claim for denial of her  
23 constitutional right of access to the courts. (ECF No. 27.) Her primary factual allegations  
24 supporting this claim relate to NDOC’s denial for over a year of her requests to correspond  
25 with her co-defendant in her underlying criminal case without NDOC officials opening their  
26 mail. (Id. at 4-9.) She refers to this as ‘inmate-to-inmate correspondence’ (“I2I

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28 <sup>1</sup>The Court reviewed the parties’ responses and replies to both motions, as well as  
the corresponding joinders. (ECF Nos. 35, 36, 38, 40, 41, 55, 58.)

1 Correspondence").<sup>2</sup> (Id. at 3.) She alleges the NDOC's denial of her requests for I2I  
2 Correspondence inhibited her ability to gather confidential materials from her co-  
3 defendant that she intended to—and eventually did—use to file habeas corpus petitions.  
4 (Id. at 5-9.) During the time period her requests for I2I Correspondence were denied, she  
5 filed an unsuccessful state habeas corpus petition. (Id. at 5-9.) Once her request for I2I  
6 Correspondence was granted in 2016, she was able to get materials from her co-  
7 defendant in her underlying criminal case. She used those materials to file a federal  
8 habeas corpus petition that has not yet been adjudicated.<sup>3</sup> (Id. at 9.) She explains how  
9 the materials she was eventually able to gather from her co-defendant in her underlying  
10 criminal case support her claims that the Nevada Supreme Court rejected in her state  
11 habeas petition. (Id. at 9-12.) Thus, Plaintiff alleges that her state habeas petition would  
12 have succeeded if she had been able to get those materials from her co-defendant during  
13 the time period her requests for I2I Correspondence were denied. (Id. at 12.)

14 Plaintiff also alleges that NDOC officials at the Florence McClure Women's  
15 Correctional Center ("FMWCC"), where she is housed, do not allow her sufficient access  
16 to the prison law library. (ECF No. 27 at 5-7.) She adds many allegations to this effect in  
17 her proposed SAC. (ECF Nos. 53-1, 53-2, 53-3.) She more specifically alleges that  
18 supervisor Ruiz and other personnel deter her from using the library and filing documents  
19 in her cases, there are no books, the assistants who work there are untrained, and there  
20 is inadequate information available about how to prepare petitions for post-conviction  
21 relief. (ECF No. 27 at 5.)

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24 <sup>2</sup>When she first applied for I2I Correspondence on January 4, 2013, her request  
25 was granted. (ECF No. 27 at 4.) But then she was told she had to re-apply when her co-  
26 defendant was moved to a different prison. (Id.) She did, but her request was denied on  
27 January 6, 2015. (Id.) Her requests and related grievances were continually denied for  
some time. (Id. at 4-9.) On March 31, 2016, one of her requests for I2I Correspondence  
was granted, and she was allowed to correspond with her co-defendant in her underlying  
criminal case without her mail being opened by prison officials. (Id. at 9.)

28 <sup>3</sup>Carley v. Nevens, Case No. 2:16-cv-02227-JAD-BNW (D. Nev. Filed Sept. 21,  
2016).

1 Plaintiff was previously granted leave to amend her complaint (ECF No. 26), which  
2 made her FAC the operative complaint (ECF No. 27). Judge Ferenbach granted her leave  
3 to file her FAC both because she was entitled to as of right, and she added factual  
4 allegations to her original complaint that previously had passed screening. (ECF No. 26  
5 at 2.) She also added that she was suing the named defendants in their personal  
6 capacities. (Id.) Thus, Judge Ferenbach found she stated colorable claims and directed  
7 the Clerk of Court to file her FAC. (Id.)

8 In her Motion to Amend, Plaintiff seeks to amend her FAC to: (1) make it more  
9 clear that the underlying claim in her access to the courts claim is her unsuccessful state  
10 habeas petition, which would have been successful if she was able to get the documents  
11 she has now, and had unrestricted access to the law library; (2) to name additional  
12 defendants who supervise the law library; (3) to add more factual details about her alleged  
13 restricted access to the law library. (ECF No. 53 at 1-3.)

### 14 **III. LEGAL STANDARD**

15 Fed. R. Civ. P. 15 (“Rule 15”) allows amendment only by leave of the court once  
16 responsive pleadings have been filed and in the absence of the adverse party’s written  
17 consent. See Fed. R. Civ. P. 15(a). The Court has discretion to grant leave and should  
18 freely do so when justice so requires. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373  
19 (9th Cir. 1990) (quoting Fed. R. Civ. P. 15(a)). “In exercising its discretion, ‘a court must  
20 be guided by the underlying purpose of Rule 15—to facilitate a decision on the merits  
21 rather than on the pleadings or technicalities. *DCD Programs, Ltd. v. Leighton*, 833 F.2d  
22 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.  
23 1981)). Nonetheless, the Court may deny leave to amend if: (1) it will cause undue delay;  
24 (2) it will cause undue prejudice to the opposing party; (3) the request is made in bad  
25 faith; (4) the party has repeatedly failed to cure deficiencies; or (5) the amendment would  
26 be futile. See *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008).

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1           **IV. DISCUSSION**

2           Plaintiff argues the Court should grant her Motion to Amend because she filed it in  
3 good faith as soon as she was able, before the deadline specified in the scheduling order,  
4 and because she adds factual allegations and defendants in response to the deficiencies  
5 that Defendants pointed out in their Motion to Dismiss her FAC. (ECF No. 53.) Defendants  
6 respond that her proposed amendments are futile, arguing that the SAC does not cure  
7 the deficiencies forming the basis of their Motion to Dismiss—that Plaintiff’s access to the  
8 courts claim is noncognizable because she has not alleged the loss of a nonfrivolous  
9 claim, and NDOC officials are entitled to qualified immunity in any event because Plaintiff  
10 has no clearly-established right to correspond with other prisoners under these  
11 circumstances. (ECF No. 55.) But “[a]mendment is futile only if no set of facts can be  
12 proven under the amendment that would constitute a valid and sufficient claim.” *Stebbins*  
13 *v. Geico Ins. Agency*, Case No. 2:18-cv-00590-APG-GWF, 2019 WL 281281, at \*4 (D.  
14 Nev. Jan. 22, 2019) (citation omitted). The Court thus agrees with Plaintiff that the Court  
15 should grant her leave to amend here, especially given Rule 15’s edict that leave should  
16 be freely given. The Court first addresses below Defendants’ argument that Plaintiff fails  
17 to state a claim, and then their qualified immunity argument.

18                           **a. Access to the Courts Claim**

19           The Court is not persuaded that Plaintiff’s proposed SAC fails to state an access  
20 to the courts claim because she does not allege the loss of a nonfrivolous claim. (ECF  
21 No. 55 at 3-4.) Defendants more specifically argue that—despite Plaintiff’s claim that her  
22 state habeas cases were dismissed because her requests for I2I Correspondence were  
23 denied for some time—she was successful in raising her underlying claim in her federal  
24 habeas petition. (*Id.* at 3-4.)

25           To state an access to the courts claim, a plaintiff must allege that she: (1) was, or  
26 is suffering “actual injury” by being “frustrated” or “impeded;” (2) in bringing a non-frivolous  
27 claim; (3) about her criminal conviction or sentence, or the conditions of her confinement.  
28 See *Lewis v. Casey*, 518 U.S. 343, 351-53 (1996).

1           The Court cannot find that it would be futile to permit Plaintiff to proceed on her  
2 SAC, because the allegations in her proposed SAC are consistent with these  
3 requirements. See *id.* While the Court cannot say at this stage whether Plaintiff's state  
4 habeas case was non-frivolous, the Court can certainly say that she has alleged it was.  
5 (ECF No. 53-1 at 14-17.) And that is sufficient at this stage. Further, Plaintiff alleges the  
6 denial of her request for I2I Correspondence at least impeded her state habeas claims,  
7 which are claims about the validity of her criminal conviction. The Court is further  
8 unpersuaded by Defendants' argument that Plaintiff was successful in raising her  
9 underlying claim in her federal habeas petition, because she may have lost the ability to  
10 raise certain claims as a result of their dismissal during the state-court habeas process.<sup>4</sup>  
11 In addition, accepting Plaintiff's factual allegations regarding restrictions on access to the  
12 law library as true, they buttress Plaintiff's claim that restrictions on her access to the  
13 courts resulted in the dismissal of her state habeas claims. Thus, the Court does find  
14 Plaintiff's proposed amendments in her SAC futile, because facts consistent with her  
15 allegations could state a cognizable access to the courts claim.

16                           **b. Qualified Immunity**

17           The Court disagrees with Defendants that the qualified immunity doctrine renders  
18 Plaintiff's proposed SAC futile. Defendants' argument is that the administrative regulation  
19 governing I2I Correspondence has never been declared unconstitutional, so even if  
20 Defendants applied the policy incorrectly, they are entitled to qualified immunity. (ECF  
21 Nos. 55 at 4-5, 32 at 5-9.) However, Plaintiff's allegation is not merely that they applied  
22 the policy incorrectly—it is that Defendants relied on the policy to deny her requests for  
23 I2I Correspondence even though they knew she was entitled to it, or, said otherwise, that  
24 they intentionally misapplied the policy to inhibit her correspondence with her co-  
25 defendant in her underlying criminal case. (ECF No. 53-1 at 5-12.) Defendants' argument  
26 therefore does not really address Plaintiff's allegations. Thus, the Court does not find

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28 <sup>4</sup>While Defendants rely on *Harris v. Velo-Lopez*, Case No. 115CV01629MJSPC, 2016 WL 5943899, at \*3 (E.D. Cal. Oct. 12, 2016), *aff'd*, 691 F. App'x 846 (9th Cir. 2017), that decision does not bind this Court. (ECF No. 55 at 4 n. 1.)

1 Defendants' qualified immunity argument presents a sufficient reason to deny Plaintiff's  
2 Motion to Amend.

3 In sum, in light of Rule 15's presumption favoring amendment, and having rejected  
4 Defendants' arguments against amendment, the Court will grant Plaintiff's motion for  
5 leave to file her proposed SAC. Because Defendants' Motion to Dismiss attacked the  
6 FAC, the Court will deny the Motion to Dismiss as moot.

7 **V. CONCLUSION**

8 The Court notes that the parties made several arguments and cited to several  
9 cases not discussed above. The Court has reviewed these arguments and cases and  
10 determines that they do not warrant discussion as they do not affect the outcome of the  
11 motions before the Court.

12 It is therefore ordered that Plaintiff's motion for leave to file her proposed SAC  
13 (ECF No. 53) is granted. Plaintiff may proceed with her single access to the courts claim  
14 alleged in her proposed SAC.

15 It is further ordered that Defendants' motion to dismiss (ECF No. 32) is denied as  
16 moot.

17 The Clerk of Court is directed to file the SAC (ECF Nos. 53-1, 53-2, 53-3).

18 DATED THIS 4<sup>th</sup> day of December 2019.

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MIRANDA M. DU  
21 CHIEF UNITED STATES DISTRICT JUDGE