

APPENDIX

A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 26 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL E. ALLEN,

No. 22-56072

Petitioner-Appellant,

D.C. No. 2:20-cv-06241-SVW-MAA
Central District of California,
Los Angeles

v.

RAYMOND MADDEN, Warden,

ORDER

Respondent-Appellee.

Before: CANBY and DESAI, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability (Docket Entry Nos. 3, 4, and 5) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Martinez v. Shinn*, 33 F.4th 1254, 1261 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 584 (2023).

Any pending motions are denied as moot.

DENIED.

APPENDIX

B

MAR 11 2020

Jorge Navarrete Clerk

S259491

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MICHAEL ERIC ALLEN on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX

C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ALLEN, v. RALPH M. DIAZ,	PLAINTIFF(S) DEFENDANT(S)	CASE NUMBER CV20-6241 SVW (MAA) ORDER RE REQUEST TO PROCEED <i>IN FORMA PAUPERIS</i>
------------------------------------------------	----------------------------------	-------------------------------------------------------------------------------------------------------

IT IS ORDERED that the Request to Proceed *In Forma Pauperis* is hereby GRANTED.

July 20, 2020

Date


United States Magistrate Judge

IT IS RECOMMENDED that the Request to Proceed *In Forma Pauperis* be DENIED for the following reason(s):

<input type="checkbox"/> Inadequate showing of indigency	<input type="checkbox"/> District Court lacks jurisdiction
<input type="checkbox"/> Legally and/or factually patently frivolous	<input type="checkbox"/> Immunity as to _____
<input type="checkbox"/> Other: _____	

Comments:

Date

United States Magistrate Judge

IT IS ORDERED that the Request to Proceed *In Forma Pauperis* is hereby:

GRANTED

DENIED (see comments above). IT IS FURTHER ORDERED that:

Plaintiff SHALL PAY THE FILING FEES IN FULL within 30 days or this case will be dismissed.

This case is hereby DISMISSED immediately.

This case is hereby REMANDED to state court.

Date

United States District Judge

APPENDIX

D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ALLEN.

Case No. 2:20-cv-06241-SVW-MAA

Petitioner,

V.

RAYMOND MADDEN, Warden.

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Respondent.

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge.

20 The time for filing objections has expired, and no objections have been made.

21 **IT THEREFORE IS ORDERED** that (1) the Report and Recommendation
22 of the Magistrate Judge is accepted; and (2) Respondent's Motion to Dismiss the
23 Petition (ECF No. 13) is **DENIED**.

25 DATED: May 5, 2021

~~Stephen K. Sloan~~

**STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MICHAEL ALLEN.

Petitioner,

V.

RAYMOND MADDEN, Warden.

Respondent.

Case No. 2:20-cv-06241-SVW-MAA

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

On June 29, 2020, Petitioner Michael Allen (“Petitioner”), acting *pro se*, constructively filed the instant Petition for Writ of Habeas Corpus by a Person in

1 State Custody pursuant to 28 U.S.C. § 2254 (“Section 2254”) (“Petition”).¹ (Pet.,
2 ECF No. 1.) On January 19, 2021, Respondent Raymond Madden (“Respondent”)
3 filed a Motion to Dismiss the Petition, including a Memorandum of Points and
4 Authorities (“Motion”). (Mot., ECF No. 13.) Respondent also filed several
5 Lodged Documents (“LD”) in support of the Motion. (LDs 1–11, ECF Nos. 14-1–
6 14-12.) On February 22, 2021, the Court received and filed Petitioner’s Opposition
7 to the Motion (“Opposition”). (Opp’n, ECF No. 21.) Accordingly, the Motion now
8 is ready for decision.

9 For the reasons discussed below, the undersigned Magistrate Judge
10 recommends that the Motion be **DENIED**.

11

12 II. BACKGROUND

13 A. Conviction and Direct Appeal

14 In 1992, Petitioner was convicted in the Los Angeles County Superior Court
15 for first-degree murder (Cal. Penal Code § 187(a)) (Count One), second-degree
16 robbery (Cal. Penal Code § 211) (Count Two), and attempted murder (Cal. Penal
17 Code §§ 664, 187(a)) (Count Three). (LD 2, ECF No. 14-2.) The jury found that
18 Petitioner committed the murder charged in Count One during the commission of a
19 robbery (Cal. Penal Code § 190.2(a)(17)), and that Petitioner personally used a
20 firearm in the commission of all three counts (Cal. Penal Code § 12022.5). (*Id.*)
21 Petitioner was sentenced to a state prison term of life in prison without the
22 possibility of parole on Count One, nine years on Count Two, and life with the
23 possibility of parole on Count Three. (LD 3.) In 1993, the California Court of
24 Appeal affirmed the judgment. (2 CT, ECF No. 14-5, at 163–79.²)

25

26 ¹ Pursuant to the prison mailbox rule, *see* Rule 3(d) of the Rules Governing Section
27 2254 Cases in the District Courts, the Petition is considered filed on the date
Petitioner deposited it with prison authorities for mailing (*see* Pet. 84).

28 ² Pinpoint citations in this Report and Recommendation refer to the page numbers
appearing in the ECF-generated headers of the parties’ briefs and Lodged

B. Resentencing Proceedings

2 In 2019, the California Legislature enacted Senate Bill 1437, which amended
3 California Penal Code sections 188 and 189 to limit murder liability under the
4 felony murder rule and the natural and probable consequences doctrine. *See People*
5 *v. Martinez*, 31 Cal. App. 5th 719, 723 (Cal. Ct. App. 2019) (“Senate Bill 1437 was
6 enacted to ‘amend the felony murder rule and the natural and probable
7 consequences doctrine, as it relates to murder, to ensure that murder liability is not
8 imposed on a person who is not the actual killer, did not act with the intent to kill,
9 or was not a major participant in the underlying felony who acted with reckless
10 indifference to human life.’” (quoting Stats. 2018, ch. 1015, § 1(f)), *as modified on
11 denial of reh’g* (Feb. 13, 2019), *review denied* (May 1, 2019). Senate Bill 1437
12 also created California Penal Code section 1170.95 (“Section 1170.95”), “which
13 allows those ‘convicted of felony murder or murder under a natural and probable
14 consequences theory . . . [to] file a petition with the court that sentenced the
15 petitioner to have the petitioner’s murder conviction vacated and to be resentenced
16 on any remaining counts’” *Id.* (quoting § 1170.95(a)).

17 An offender may file a petition under section 1170.95 where all three
18 of the following conditions are met: "(1) A complaint, information, or
19 indictment was filed against the petitioner that allowed the
20 prosecution to proceed under a theory of felony murder or murder
21 under the natural and probable consequences doctrine[;] (2) The
22 petitioner was convicted of first degree or second degree murder
23 following a trial or accepted a plea offer in lieu of a trial at which the
24 petitioner could be convicted for first degree or second degree

26 Documents. Pinpoint citations of the Clerk’s Transcript (“CT,” ECF Nos. 14-4 to
27 14-5), Supplemental Clerk’s Transcript (“Supp. CT,” ECF No. 14-6), and Reporter’s
28 Transcript (“RT,” ECF No. 14-7) refer to the transcripts’ own volume- and page-
numbering schemes.

1 murder[;] [and] (3) The petitioner could not be convicted of first or
2 second degree murder because of changes to [California Penal Code
3 sections] 188 or 189 made effective January 1, 2019.”

4 *Id.* (quoting § 1170.95(a)(1)–(3)). Senate Bill 1437 applies to offenders with both
5 final and nonfinal convictions. *See id.* at 726–27.

6 On February 3, 2019, Petitioner filed a petition for resentencing pursuant to
7 Section 1170.95 in the Los Angeles County Superior Court.³ (Supp. CT 1–50.)
8 Petitioner argued that he was entitled to resentencing because under 2019
9 amendments to California Penal Code sections 188 and 189, he could no longer be
10 convicted of first-degree murder pursuant to the felony murder rule. (*Id.* at 5, 8.)
11 On March 20, 2019, the Superior Court appointed counsel to represent Petitioner
12 for the resentencing petition. (2 CT 401.) The District Attorney’s Office filed an
13 opposition to resentencing (2 CT 406–28), and the Superior Court heard oral
14 argument on June 28, 2019 (RT 4–5). On August 14, 2019, the Superior Court
15 issued an order denying the petition on the ground that Petitioner was not eligible
16 for Section 1170.95 relief because he was the actual shooter. (2 CT 491–92.)

17 On March 19, 2020, the California Court of Appeal issued a reasoned
18 decision affirming the denial of resentencing, holding that Petitioner was ineligible
19 for relief because “[t]he jury’s finding that [Petitioner] personally used a firearm in
20 commission of first degree murder precludes the possibility that he was convicted
21 on a felony murder or natural and probable consequences theory.” (LD 9, ECF No.
22 14-10, at 5–6.) The Court of Appeal also rejected Petitioner’s equal protection
23 challenge to Section 1170.95, stating as follows:

24 | //

26 ³ Petitioner also filed several habeas corpus petitions in state court, all of which
27 were denied. (See LD 1 at 1–7, 30–47; 1 CT 1–12.) However, Petitioner’s state
28 habeas claims are not relevant to the instant Petition, which challenges only the
denial of resentencing.

1 [Petitioner] cites no authority for the premise of his equal
2 protection challenge to section 1170.95, to wit, that the Legislature
3 had no rational basis for not affording the actual shooter the same
4 ameliorative relief available to those convicted of murder based on a
5 natural and probable consequences or felony murder theory. Failing
6 to provide any such authority, his challenge is waived.

7 (*Id.* at 6 (internal citations omitted).)

8 On June 10, 2020, the California Supreme Court summarily denied
9 Petitioner's petition for review. (*See* LD 10, ECF No. 14-11; LD 11, ECF No. 14-
10 12.)

11

12 **C. Section 2254 Proceedings in this Court**

13 Petitioner then filed the instant Petition on June 29, 2020. Petitioner claims
14 that Section 1170.95 violates his state and federal constitutional rights to equal
15 protection by excluding the actual shooter from resentencing relief. (*See* Pet. 5, 12-
16 29.)

17 On August 11, 2020, the Court ordered Petitioner to show cause why the
18 Petition should not be dismissed based on the following grounds: (1) as an
19 unauthorized second or successive Section 2254 petition challenging Petitioner's
20 1992 criminal judgment, *see* 28 U.S.C. § 2244(b)(2)⁴; and (2) for lack of personal

21 ⁴ In 1998, Petitioner filed his first Section 2254 petition challenging his 1992
22 conviction and sentence. Pet., *Allen v. Fillon*, No. 2:98-cv-09703-LGB-RZ ("Allen
23 I") (C.D. Cal. Dec. 3, 1998), ECF No. 1. This petition was dismissed with
24 prejudice based on Petitioner's failure to comply with the one-year statute of
25 limitations for Section 2254 petitions. Report & Recommendation, *Allen I* (Oct. 15,
26 1999), ECF No. 25; Order, *Allen I* (Nov. 17, 1999), ECF No. 31. Both the District
27 Court and the United States Court of Appeals for the Ninth Circuit denied a
28 certificate of appealability. Order, *Allen I* (Jan. 4, 2000), ECF No. 38; 9th Cir.
Mandate, Allen I (May 23, 2001), ECF No. 58. A dismissal for untimeliness
operates as a disposition on the merits. *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th
Cir. 2009).

1 jurisdiction, as Petitioner had failed to name the warden of his institution of
2 confinement as a respondent, *see Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th
3 Cir. 1996) (“August 11 OSC”). (Aug. 11, 2020 OSC, ECF No. 5.)

4 On September 15, 2020, the Court received and filed Petitioner’s document
5 entitled “Order to Show Cause Why Habeas Corpus Should be Granted, With a
6 Change of Respondents Name and Memorandum of Points and Authorities in
7 Support,” which the Court construed as Petitioner’s Response to the August 11
8 OSC. (Response, ECF No. 6.) In his Response, Petitioner names Raymond
9 Madden, the Warden of Centinela State Prison, as the Respondent to this action.
10 (*Id.* at 1.) Petitioner also argues that the Petition is not successive because he is
11 challenging the state courts’ recent denial of resentencing pursuant to Section
12 1170.95 rather than his 1992 criminal judgment. (*Id.* at 2–5.)

13 On September 21, 2020, the Court received and filed Petitioner’s “Amended
14 Memorandum of Points and Authorities in Support [of] Federal Habeas Corpus”
15 (ECF No. 7.) In this document, Petitioner reiterates that his challenge to the state
16 courts’ denial of resentencing is not barred as successive and adds further citations
17 to legal authority in support of this argument. (*See id.*)

18 On November 23, 2020, the Court issued an Order discharging the August 11
19 OSC and ordering Respondent to file a Motion to Dismiss or Answer in response to
20 the Petition. (Nov. 23, 2020 Or., ECF No. 8.)

21 After receiving an extension of time (*see* ECF Nos. 11–12), Respondent filed
22 the instant Motion on January 19, 2021. In the Motion, Respondent argues that the
23 Petition does not raise any cognizable claims for federal habeas review because
24 Petitioner’s challenge to the denial of resentencing only presents a question of state
25 law, and federal habeas relief is not available for errors of state law. (Mot. 5–8.)

26 ///

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1 In his Opposition, Petitioner argues that he raises a cognizable federal equal
2 protection challenge to Section 1170.95. (Opp'n 5–6, 12–15.) According to
3 Petitioner, the statute violates equal protection because it excludes the actual
4 shooter from relief. (*Id.* at 5–17.)

5

6 **III. DISCUSSION**

7 As an initial matter, because Petitioner challenges only the state courts'
8 denial of resentencing, the Court finds that the Petition is not barred as a successive
9 Section 2254 petition and the Court thus has jurisdiction over the Petition. *See*
10 *Clayton v. Biter*, 868 F.3d 840, 843–45 (9th Cir. 2017).

11 A petitioner may seek federal habeas relief from a state-court conviction or
12 sentence “only on the ground that he is in custody in violation of the Constitution or
13 laws or treaties of the United States.” 28 U.S.C. § 2254(a). Federal habeas relief is
14 not available for errors of state law, and federal courts cannot “reexamine state-
15 court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67–
16 68 (1991). Accordingly, a challenge to the state courts’ interpretation of state
17 sentencing laws does not present a cognizable claim for federal habeas relief. *See*
18 *Miller v. Vasquez*, 868 F.2d 1116, 1118–19 (9th Cir. 1989) (declining to address
19 whether assault with a deadly weapon qualifies as a “serious felony” under
20 California’s sentence enhancement provisions because it is a question of state
21 sentencing law, for which habeas relief is unavailable). Moreover, a petitioner’s
22 conclusory assertion of a federal constitutional violation does not necessarily
23 transform a state-law question into a cognizable federal habeas claim. *See*
24 *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997). Under this standard, district
25 courts in this Circuit have dismissed habeas petitions challenging California courts’
26 denial of Section 1170.95 resentencing for failure to state a cognizable federal
27 claim. *See, e.g., Blacher v. Pollard*, Case No. 20-cv-07057-CRB (PR), 2020 U.S.
28 Dist. LEXIS 233594, at *6–8 (N.D. Cal. Dec. 11, 2020); *Cole v. Sullivan*, 480 F.

1 Supp. 3d 1089, 1097–98 (C.D. Cal. 2020); *Contreras v. Rackley*, Case No.: 17-cv-
2 0422-AJB-JMA, 2018 U.S. Dist. LEXIS 40315, at *4–5 (S.D. Cal. Mar. 9, 2018).

3 In this case, however, Petitioner does not simply challenge the state courts’
4 interpretation of Section 1170.95, but argues that the statute itself violates the
5 Fourteenth Amendment’s Equal Protection Clause by excluding the actual shooter
6 (or “actual killer”) from resentencing relief. (See Pet. at 5, 12–29; Opp’n at 5–17.)
7 This equal protection challenge to the state’s resentencing statute appears to be
8 cognizable on federal habeas review. *See, e.g., Rodewald v. Lizarraga*, Case No.
9 5:18-cv-02513-EJD, 2020 U.S. Dist. LEXIS 159169, at *14–21 (N.D. Cal. Sept. 1,
10 2020) (rejecting on the merits habeas petitioner’s equal protection challenge to
11 California Penal Code section 1170.18); *McKinley v. Madden*, No. EDCV 17-
12 01023-VBF (JDE), 2018 U.S. Dist. LEXIS 33932, at *3–11 (C.D. Cal. Jan. 19,
13 2018) (addressing merits of habeas petitioner’s claim that exclusion from relief
14 under California Penal Code sections 3051 and 1170(d)(2) violated his equal
15 protection rights), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS
16 33831 (C.D. Cal. Feb. 28, 2018); *Thomas v. Arnold*, Case No.: 3:16-cv-02986-
17 WQH-NLS, 2018 U.S. Dist. LEXIS 1159, at *8, 13–17 (S.D. Cal. Jan. 3, 2018)
18 (rejecting on the merits petitioner’s equal protection challenge to California Penal
19 Code section 3051), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS
20 47645 (S.D. Cal. Mar. 22, 2018).

21 Thus, the Court finds that Petitioner’s equal protection claim is
22 distinguishable from the above-cited cases dismissing claims based on Section
23 1170.95 and warrants further consideration. At this stage, the Court does not
24 comment on the merits of Petitioner’s equal protection claim or whether the claim
25 is procedurally defaulted based on the California Court of Appeal’s ruling that
26 Petitioner waived the equal protection claim because he did not cite any supporting
27 authority.

28 ///

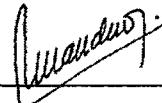
1 **III. CONCLUSION**

2 IT THEREFORE IS RECOMMENDED that the District Judge issue an
3 order: (1) approving and accepting this Report and Recommendation, and
4 (2) denying Respondent's Motion.

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6 DATED: 04/12/2021

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9 **MARIA A. AUDERO**
10 UNITED STATES MAGISTRATE JUDGE

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APPENDIX

E

1 FACTUAL SCENARIO AS SET FORTH IN THE APPELLATE OPINION THAT
2 WAS FILED ON NOVEMBER 30, 1993. IT APPEARS, AS THE COURT
3 INDICATED, THAT MR. ALLEN WAS INVOLVED IN A CARJACKING; HE RAN
4 UP ON THE VICTIM'S VEHICLE; HE HIMSELF PERSONALLY FIRED THREE
5 SHOTS AT THE VICTIM, JUAN NUNEZ, AND THOSE THREE SHOTS KILLED
6 MR. NUNEZ.

7 IF THOSE ARE THE FACTS OF THE CASE, I DON'T
8 SEE HOW HE WOULD BE ENTITLED TO ANY RELIEF UNDER 188 OR 189 OF
9 THE PENAL CODE. THERE'S NO ARGUMENT THAT HE DIDN'T ACT WITH
10 MALICE. AND UNDER THE FELONY MURDER RULE, WHICH WOULD BE THE
11 CARJACKING, HE'S THE ACTUAL KILLER, AND SO I SUBMIT ON THE
12 MOTION.

13 THE COURT: ALL RIGHT.

14 MS. BOUAS: PEOPLE SUBMIT.

15 THE COURT: SO, AS I SAID TENTATIVELY -- WELL, NOT
16 TENTATIVELY -- I WILL BE DENYING THE PETITION BECAUSE I DON'T
17 THINK HE IS ELIGIBLE FOR THE RELIEF REQUESTED AS IT RELATES TO
18 THE 1170.95. AND I WILL GET A WRITTEN ORDER REGARDING THAT
19 OUT, SO YOU DON'T NEED TO MAKE ANY MORE APPEARANCES WITH
20 REGARD TO THIS. PROBABLY NONE OF YOU DO BECAUSE I'M GOING TO
21 GET THE WRITTEN ORDER OUT ON THE OTHER MATTER, ON THE HABEAS
22 PETITION AS WELL.

23 IF YOU BOTH WANT TO GO, YOU ARE FREE TO GO.

24 MS. BOUAS: THANK YOU, YOUR HONOR.

25 THE COURT: ON THE HABEAS PETITION ITSELF, IT'S BEEN
26 BRIEFED IN A LOT MORE DETAIL, A LOT MORE EXHIBITS AND WHATNOT.
27 I'M READY TO PROCEED ON THAT. SINCE IT'S THE PETITIONER'S
28 PETITION, I WILL CERTAINLY LET DEFENSE COUNSEL GO FIRST, BUT

19

APPENDIX

F

Alan M. Goldberg SBN: 136988 (Limited Scope)
THE LAW OFFICE OF ALAN GOLDBERG
5660 Etiwanda Avenue, Suite 3
Torrance, CA 91356
818-921-2226
alan.goldberg.law@gmail.com

Attorney for Defendant Michael E. Allen

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA:

Plaintiff.

VS.

MICHAEL E. ALLEN,

Defendant.

Case No. BA016472

SUPPLEMENTAL DECLARATION OF
JANCI C. LINDSAY, PhD IN SUPPORT OF
REPLY TO OPPOSITION TO PETITION
FOR HABEAS CORPUS BY MICHAEL E.
ALLEN

Date: 7/23/18
Dept: 105

DECLARATION OF JANGI C. LINDSAY, PhD

Franci C. Lindsay, PhD, declare and say as follows:

I am a consulting toxicologist and full member of the Society of Toxicology. I have more than 25 years of scientific experience and hold a doctorate in Biochemistry and Molecular Biology from the University of Texas Health Science Center at Houston and M.D. Anderson Cancer Center. I have extensive experience in analyzing the complex dynamics of toxicity, such as chemical pharmacology, exposure route, host metabolism, the dose/response relationship, genetic susceptibility and subsequent cellular effects as they relate to the contribution of specific substances to injury, impairment, human disease and cancer. I have consulted as an expert witness since 2006 and have testified in both civil and criminal cases in state and federal jurisdictions. A true and correct copy of my curriculum vitae is attached to my first declaration.

Supplemental Declaration of Land C. Lindsay for Reply

1 called upon to testify as to these facts I could and would competently testify thereto. I submit this
2 declaration in support of the Reply to Opposition to the habeas corpus petition of Michael Allen.

3 2. While some side effects of Prednisone were known in the 1990s, the scientific literature
4 base has advanced exponentially since then. The difference between what was known then and
5 what is known now about the effects of Prednisone on human behavior is substantially different
6 with respect to what is known about the mechanisms of action of the gluco and cortico-steroids
7 on the central nervous system and the incidence and prevalence of the psychotic effects. While it
8 was once thought that these drugs merely enhanced the existing tendency towards hysteria or
9 mania and aggression, it is now understood that these drugs initiate behavior that is de-novo as
10 well as completely adverse to typical behavior. This is in complete contradiction to the long held
11 belief that these drugs merely enhanced tendencies that were already present in an individual or
12 group of individuals.

13 3. The manufacturer's warnings have also been updated to reflect the growing scientific and
14 medical knowledge about the variety of psychiatric conditions to which these drugs can
15 predispose as well as the incidence of these effects which are now estimated to be quite
16 prevalent. In a meta-analysis study of 2,555 patients from 13 studies on corticosteroid therapy,
17 the weighted average incidence of severe psychiatric disturbances was 5.7%. Yet, despite
18 numerous scientific and medical publications regarding the potential for severe psychotic
19 reactions in individuals on prednisone therapy, these psychiatric reactions were not listed on the
20 prescribing guide of the major manufacturer of the medication, until just recently and even so,
21 they are buried towards the end of the guide rather than listed up front as their severity and
22 prevalence warrants.

23 4. In another meta-analysis of 11 studies by the same authors, the incidence of mild to
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Supplemental Declaration of Janci C. Lindsay for Reply

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1 moderate psychiatric reactions was 27.6%, in 935 patients. These studies illustrate that rather
2 than varying psychoses being rare side effects of these drugs, they are quite common and could
3 be confused with innate behavior. Much of this was not known at the time of Michael's trial and
4 was not considered. It is my opinion that if the current scientific knowledge had been known
5 when Mr. Allen was tried and presented to the jury there is a reasonable probability that the
6 result of the trial would have been different outcome more favorable to Mr. Allen. The court
7 should have grave doubt about the correctness of the verdict because it was prejudicial to Mr.
8 Allen. Mr. Allen's conviction, without consideration of this new scientific evidence, has
9 undermined the confidence in the outcome of his case.

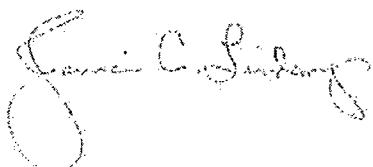
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11 5. As recently as last year, involuntary intoxication was successfully argued as a defense in
12 the case of a Minnesota mother charged with 2 counts of attempted homicide following her use
13 of an inhaled corticosteroid for her severe asthma. (*Jozetta R. Byrd* (2015), Ramsey County
14 District Court, case #: 62-JV-15-382 and 62-JV-16-237).

15
16 I reserve the right to amend and/or supplement my conclusions and opinions should
17 further information become available to me concerning this case.

18
19 I declare under penalty of perjury that the foregoing is true and correct and based on my
20 research and analysis.

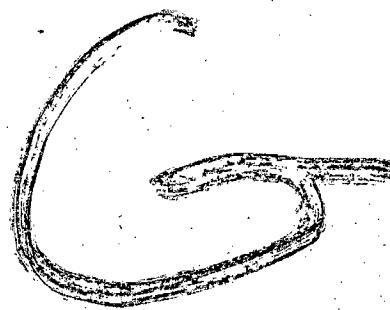
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22 Executed this 9th day of July, 2018 in Sealy, Texas.

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Janci Chunin Lindsay, Ph.D.,
Directing Toxicologist, Principal Consultant
Toxicology Support Services, LLC.

APPENDIX





Nina T. Rodd, Ph.D., Q.M.E.

CLINICAL / FORENSIC PSYCHOLOGY

Lic. # PSY10624

609 Deep Valley Drive, Suite 200, West Tower
Rolling Hills Estates, CA 90274
Tel: 310.378.7172
Fax: 310.541.0308

January 19, 2007

RE: Mr. Michael E. Allen H42389
Calipatria State Prison

Introduction

This report is prepared per a written request of Mr. Michael E. Allen- H42389, Calipatria State Prison.

This examiner has no knowledge of the reason in which Mr. Allen is incarcerated.

On September 4th, 2006, Mr. Allen requested in writing that this examiner review his medical records and two laboratory descriptions of the medication he reportedly had been taking (prednisone) prior to his incarceration.

Mr. Allen believes that he should have been evaluated for the possible side effect of prednisone that could have affected his mental status and that possibly he did not receive a fair trial.

This study is limited to the following phases:

1. Review of the records as described above.
2. Literature review of the Crohn's disease.
3. Common treatments of Crohn's disease
4. Side effect of the medication.
5. General opinions on the psychological effects of such medication on a person subjected to such medication in long-term and systematic treatment.

Review of Mr. Allen's Medical Records

- A. 1987-Diagnosed with Crohn's Disease-USC Medical Center.
Treatment: 40mg of prednisone,
- B. 6/16/1988 to 2/9/1989-West Covina Medical Clinic, Inc.- 7 visits followed with treatment of prednisone decreased to 15mg and then 20mg.

Michael E. Allen H42389

- C. 10/30/1989-Kaiser Permanente, West Los Angeles, Prednisone 40mg was prescribed.
11/30/1989-Follow up for Crohn's Disease-continued Prednisone therapy.
- C. 6/27/1990-Hospitalized-Treatment for abdominal cramps. Diagnosis: Exacerbation of Crohn's Disease. Cramps, vomiting, fever Treated with prednisone 40mg.
- D. 7/13/1990-UCS Gastro-Intestinal Clinic Record-Visit to doctor, was given prednisone, tapering it but recommended to taper the prednisone.

Review of current and most recent literature on common treatment of Crohn's Disease

A review of relevant scientific studies on conventional therapy for Crohn's Disease:

Crohn's Disease is multi-factorial disorder of unknown causes. It's inflammatory bowel disease (IBD).

Crohn's Disease symptoms include:

- Pain in the stomach area
- Rectal Bleeding
- Weight Loss
- Fever
- Painful swelling of the lining of the affected organs. (small intestine or anywhere in the digestive tract)
- Sores or ulcers in affected area

Medication used to treat Crohn's Disease:

The conventional treatment of Crohn's Disease has been Corticosteroids, which continues to play a central role in induction of remission in active Crohn's Disease. However, their use comes at a price of significant adverse effects when used repeatedly or for extended periods of time (Otley A, Steinbart AH, 2005).

Lemann M, Allez M.
Article 2005

Indicated that in active Crohn's disease, corticosteroids represents the main treatment.

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Review of recent and current literature on side effect of Prednisone/corticosteroids treatment/therapy

Side effect:

Roxane Laboratories, Inc.

The formal publication regarding the Prednisone. In description of prednisone under clinical pharmacology indicates that it causes "profound and varied mental effects" and warns that in patients on corticosteroid therapy subjected to "unusual stress," and that the drug-induced secondary adrenal cortical insufficiency could "persist for months after discontinuing medication therapy. It also indicates that psychic derangement ranging from euphoria, insomnia, mood swings, personality changes and severe depression to frank psychosis manifestation could occur. In addition, it's indicated that "existing emotional instability or psychotic tendencies may be aggravated by corticosteroids."

Prednisone and Violence

Mood Disorder was associated with prednisone. (By Behray H. and Pumariga AJ 1998) The uses of corticosteroids, particularly high-potency steroids for the treatment of various inflammatory conditions, has been frequently associated with mood disturbance and psychosis.

Studies indicated prednisone can cause dementia:

Sacks, O., Shulman, M. 2005

Which is also called "steroid dementia syndrome" (University of CA, San Francisco School of Medicine 2006)

Mood and cognitive disturbance associated with corticosteroid therapy (Penn Care Companies Journal of Clinical Psychology 2001)

Mood and Cognitive Change Due to Systemic corticosteroid therapy, appear to be common.

Psychosis in patients with the treatment 5% of a prospective cohort of 92 patients with treatment of corticosteroids (Psychosomatic 2003, May-June).

Summary and Conclusions

Per my review of the submitted medical records, Mr. Allen was treated with prednisone routinely and systematically for severe symptoms of Crohn's Disease from 1987 the 1990. The dosage was mostly at 40mg. According to scientific literature this is a common

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treatment for Crohn's Disease. In Mr. Allen's last doctor's visit on 7/13/1990 it was recommended that the prednisone be tapered and stopped.

- ★ Numerous studies on side effects of prednisone/corticosteroid treatment agree in that it could cause mood disorders, psychosis, cognition, behavioral disturbance and violence, as I reported in my literature review above.
- ★ Such side effects due to metabolic changes and causing secondary adrenocortical insufficiency. As reported by Roxanne Laboratories, Inc., the manufacturers of this medication, this condition may persist for months after discontinuation of therapy.
- ★ In general, any individual under the effect of this medication could be affected in cognition, judgment, perception and behavioral manifestation.
- ★ Therefore it is my opinion that Mr. Allen could have manifested the above deficits due to the side effects of prednisone for whatever conduct that caused him to be sentenced to prison.
- ★ Hopefully, such information would be helpful for an evaluation of whether Mr. Allen had received a fair trial at the time.

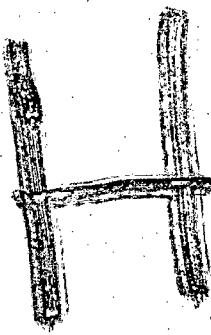
Sincerely,



Nina T. Rodd, Ph.D., QME, DABPS
Clinical/Forensic Psychologist
Qualified Medical Examiner
Diplomate, American Board of Psychological Specialties

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APPENDIX



FILED

Mar 19, 2020

DANIEL P. POTTER, Clerk

jzelaya

Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ERIC ALLEN,

Defendant and Appellant.

B301225

(Los Angeles County
Super. Ct. No. BA016472)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance by Plaintiff and Respondent.

PROCEDURAL BACKGROUND¹

On April 16, 1992 a jury convicted defendant Michael Allen of (1) the first degree murder of Juan Nunez during the commission of a robbery and in the course of which defendant personally used a firearm, (2) robbery in the course of which he personally used a firearm, and (3) willful, deliberate, and premeditated attempted murder in the course of which he personally used a firearm. The trial court sentenced defendant to life in state prison without the possibility of parole on the first degree murder count and with the possibility of parole on the attempted murder count. Defendant received a nine-year sentence on the robbery count and related enhancement. Defendant appealed his judgment of conviction, which was affirmed in 1993 in *People v. Allen*, No. B067989.)

On March 26, 2019, defendant filed a petition for resentencing pursuant to Penal Code section 1170.95.² The trial court appointed counsel to represent defendant on the petition and heard the petition on June 28, 2019.

During that hearing, the trial court found defendant ineligible for resentencing under section 1170.95 because "under the facts that are contained in the remitt[it]ur as determined by the Court of Appeal[], he was personally armed, and he personally shot a firearm in the course of the carjacking, so this was not a matter of an indirect aider or abettor under a natural

¹ This case has a lengthy procedural history. We summarize only those proceedings relevant to the instant appeal.

² All statutory references are to the Penal Code.

therefore, the trial court should have resentenced him under section 1170.95. He further argues that the trial court's failure to do so deprived him of the equal protection of the laws.

FACTUAL BACKGROUND

The record does not contain the charging document or a transcript of the trial.⁴ We thus rely on the summary of facts in our 1993 opinion.

On March 17, 1990, at approximately 9:00 p.m., brothers Juan and Jorge Nunez, traveling in Juan Nunez's car, stopped for a red light at the intersection of San Pedro Street and Gage Avenue when defendant and L. Green (Green)⁵ ran towards their car with guns drawn. Defendant approached the driver's side of the car and fired three shots at Juan Nunez from a semiautomatic handgun. As Juan Nunez fell to the side, his foot slipped from the brake pedal, and the car began to roll forward. Defendant reached into the car, grabbed the gearshift lever and put the car in park. Defendant ordered the brothers out of the car. As Jorge Nunez pulled Juan Nunez out of the car, defendant fired two more shots. Green ran toward the men, pointing a gun at them. Green and defendant then got into the car and drove away. Juan Nunez

⁴ In a letter dated May 3, 2016 from the Office of the Public Defender to defendant, counsel represented that according to the "Appellate court," there is no transcript of the "entire" trial because "the case was destroyed." He also represented that the Public Defender's office had at least some transcripts from the trial proceedings.

⁵ Apparently, Green was prosecuted in a separate trial and filed his own section 1170.95 petition. In ruling on defendant's petition, the trial court observed that Green "wasn't the actual shooter." Green's petition is not before us in the instant appeal.

and foreseeable consequence theory to a felony that resulted in murder under the felony murder rule.”

In response, defendant’s counsel observed from his reading of our prior opinion that defendant “ran up on the victim’s vehicle; he himself personally fired three shots at the victim, Juan Nunez, and those three shots killed Mr. Nunez.” Our prior opinion indicates defendant admitted to shooting Nunez. Defense counsel also observed “[t]here’s no argument that [defendant] didn’t act with malice. And under the felony murder rule, which would be the carjacking, he’s the actual killer.” On August 14, 2019, the trial court denied the petition basically on the same grounds discussed during the hearing on the petition. Defendant filed a timely notice of appeal.

Appointed appellate counsel filed an appellate brief requesting this court review the record for any error as required by *People v. Wende* (1979) 25 Cal.3d 436. This court permitted defendant the opportunity to file a supplemental brief. Defendant filed a supplemental brief on February 13, 2020 and a “Motion for Judicial Notice of Evidence on Appeal.”³ Briefly summarized, defendant argues that the documents attached to his motion for judicial notice demonstrated he did not have the requisite mens rea for a murder or robbery conviction and

³ Defendant asked us to take judicial notice of two declarations and brief excerpts from transcripts of unidentified hearings, one of which referring to a deadlocked jury. He asserts that these documents demonstrate he did not have the “mens rea, malice or criminal intent for robbery or murder.” We deny defendant’s motion because for the reasons discussed in this opinion, defendant was ineligible for relief under section 1170.95.

suffered three gunshot wounds, two to the left side of his chest, and one to the left portion of his back, resulting in Juan Nunez's death.

DISCUSSION

Section 1170.95 permits a person convicted of felony murder or murder under a natural and probable consequences theory to petition for vacatur of the conviction and resentencing on any remaining counts if all the conditions enumerated in section 1170.95, subdivision (a) apply. Among those conditions are that the charging document "allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine" (section 1170.95, subd. (a)(1)), and the petitioner "could not be convicted of first or second degree murder because of changes to Section 188 and 189 made effective January 1, 2019."⁶ (§ 1170.95, subd. (a)(3).) The referenced changes do not provide resentencing relief if the petitioner was the "actual killer." (§ 189, subd. (e)(1).)

Here, the jury's finding that defendant personally used a firearm in commission of first degree murder precludes the possibility that he was convicted on a felony murder or natural

⁶ These changes were enacted by Senate Bill 1437 (2017-2018 Reg. Sess.) chapter 1015, sections 1-4. In *People v. Martinez* (2019), 31 Cal.App.5th 719, Division 5 of our court held that Senate Bill 1437 "creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not." (*Id.* at p. 727.)

and probable consequences theory. This conclusion renders him ineligible for resentencing relief under section 1170.95.

Defendant cites no authority for the premise of his equal protection challenge to section 1170.95, to wit, that the Legislature had no rational basis for not affording the actual shooter the same ameliorative relief available to those convicted of murder based on a natural and probable consequences or felony murder theory. Failing to provide any such authority, his challenge is waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

We have reviewed the record and find no arguable issue. Appointed counsel has fully complied with her responsibilities. (*People v. Kelly* (2006) 40 Cal.4th 106, 126; *People v. Wende*, *supra*, 25 Cal.3d at pp. 441–442.)

DISPOSITION

The judgment is affirmed.

Bendix
BENDIX, J.

We concur:

Chaney
CHANAY, Acting P.J.

Weingart
WEINGART, J.*

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.