

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

KAREN FRANCES ALLEN,
Petitioner,
vs.

WARDEN KIMBERELY HUGHES,
Respondent,

On Petition for Certiorari to the United States Court
of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ms. Karen Frances Allen, #W-18127
CIW – EA-435
16756 Chino-Corona Road
Corona, CA 92880

Petitioner in pro se

QUESTIONS PRESENTED FOR REVIEW

I.

Whether a state prisoner who offers prima facie evidence via a forensic psychologist thirty years after her murder conviction that her mental state at the time of the crime negated the essential element of malice required for First-Degree murder under the doctrine of imperfect self-defense, triggers the Equitable Exception for Innocence (“Miscarriage of Justice”) exception under the rationale of McQuiggin v. Perkins, 133 S.Ct. 1924, 1928, 1933 (2013)?

II.

Whether the holding in McQuiggin v. Perkins, 133 S.Ct. 1924 (2013) should be extended to include cases, such as the case sub judice, where the Petitioner shot and killed a person, but was not mentally able to form the element of malice at the time of the crime, required to sustain her conviction of First-Degree murder, thereby making her innocent of First-Degree murder, as a *matter of law*.

III.

Whether the Ninth Circuit erred in failing to grant a COA or order an evidentiary hearing in the district court on the issue of whether or not Petitioner could offer evidence supporting her claim that she met the Equitable Tolling Exception (“Miscarriage of Justice” for actual innocence under the rationale of McQuiggin v. Perkins, 133 S.Ct. 1924, 1928, 1933 (2013), that would have allowed the court to proceed in reaching the merits of her habeas claim?

LIST OF PARTIES

- 1) KAREN FRANCES ALLEN, Petitioner (California state Prisoner proceeding in pro se);
- 2) KIMBERELY HUGHES, Warden of California Institute for Women (CIW)

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OPINIONS BELOW

Petitioner's application for a Certificate of Appealability (COA) was summarily denied by the Ninth Circuit Court of Appeals on November 28, 2017 in Case No. 17-15848, Docket Entry #5. See, (copy of 11-28-17 order in the Appendix hereto, EXHIBIT "A.")

The order of the United States District Court for the Eastern District of California adopting the Magistrate's Findings and Recommendations granting the Respondent's motion to dismiss Petitioner's writ, entered on March 30, 2017 in Case No. 2:16-cv-0560-GEB-EFB P. See, (copy of 3-30-17 order in the Appendix hereto, EXHIBIT "B.")

The Findings and Recommendations of the Magistrate Judge for the United States District Court for the Eastern District of California granting the Respondent's motion to dismiss was entered on February 7, 2017 in Case No. 2:16-cv-0560-GEB-EFB P. See, (copy of 2-7-17 Findings & Recommendations in the Appendix hereto, EXHITIT "C.")

JURISDICTION

On July 6, 2015, Petitioner filed a state writ of habeas corpus in the San Joaquin County Superior Court challenging her 1982 First-Degree murder conviction on the issue of ineffective assistance of counsel based on newly discovered evidence pertaining to her mental status at the time of the crime. The court denied the petition as untimely on July 29, 2015.

On September 4, 2015, Petitioner filed her second habeas petition in the California Court of Appeal, which was denied on September 18, 2015.

On October 9, 2015, Petitioner filed her final state habeas petition in the California Supreme Court which was summarily denied on February 3, 2016.

On February 28, 2016, Petitioner filed her habeas writ in the federal district court for the Eastern District of California. The Magistrate judge issued his Findings and Recommendations granting the Respondent's motion to dismiss on February 7, 2017.

On March 30, 2017, the United States District Court for the Eastern District of California adopted the Magistrate's Findings and Recommendations granting the Respondent's motion to dismiss Petitioner's writ.

On May 2, 2017, Petitioner filed her pro se petition for a Certificate of Appealability in the Ninth Circuit Court of Appeals, which was summarily denied on November 28, 2017.

The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

- 1) Fourteenth Amendment to the United States Constitution**
- 2) Sixth Amendment to the United States Constitution**
- 3) 28 U.S.C. §2244 (d)**
- 4) 28 U.S.C. §2254**

STATEMENT OF THE CASE

Petitioner, KAREN FRANCES ALLEN, CDCR #W-18127, is currently incarcerated at California Institution for Women (CIW.) at Corona, California. Ms. Allen was arrested on March 25, 1982, in Stockton, California in San Joaquin County. She was charged with murder with special circumstances and (3) counts of attempted murder, resisting arrest, and possession of cocaine in Case No. 333211. Ms. Allen received a jury trial and was found guilty of the charges on December 23, 1982. She received a life sentence without the possibility of parole.

Petitioner's trial counsel Marvin Marks was privately retained. Petitioner's counsel did not raise a mental defense at trial despite the fact that Petitioner was under the influence of heroin at the time of the crime and was suffering from paranoia and fear for her personal safety and life which supported an imperfect self-defense defense.

Petitioner had no prior knowledge until her case was evaluated by Dr. Marlin S. Griffith in 2015, that she did not have the mental state of mind to commit first-degree murder in 1982. When she discovered this via Dr. Griffith's declaration, she immediately filed a pro se writ of habeas corpus in the San Joaquin Superior Court on July 6, 2015, challenging her conviction. When the writ was denied on July 29, 2015, Petitioner timely filed her writ in the California Court of Appeal, Third District, on September 4, 2015. When it was denied on September 18, 2015, Petitioner timely filed her writ in the California Supreme Court on October 9, 2015. Review was denied on February 3, 2016.

Petitioner did not previously know (prior to 2015) that due to her state of mind at the time of the crime in 1982; she was not able to form the requisite mental elements to commit first-degree murder. She discovered this fact after Dr. Griffith evaluated her case in 2015, and submitted a declaration to that effect. Consequently, Petitioner argues that this medical evidence is "new evidence." After Petitioner exhausted her state court remedies on her "new evidence" constitutional claim on February 3, 2016, she immediately filed her instant federal writ in the district court on February 28, 2017. The Magistrate judge issued his Findings and Recommendations granting the Respondent's motion to dismiss on February 7, 2017. On March 30, 2017, the United States District Court for the Eastern District of California adopted the Magistrate's Findings and Recommendations granting the Respondent's motion to dismiss

Petitioner's writ. On May 2, 2017, Petitioner filed her pro se petition for a Certificate of Appealability in the Ninth Circuit Court of Appeals, which was summarily denied on November 28, 2017.

A. FACTS GIVING RISE TO THIS CASE

1. Summary of Relevant Facts in the Declaration of Dr. Marlin S. Griffith

The following is a summary of relevant facts contained in Dr. Marlin S. Griffith's Declaration ¹

1. I have recently reviewed confidential case documents and statements of the prisoner Ms. KAREN FRANCES ALLEN, #-18127W7 that were provided to me. (Dr. Griffith's Decl. p.1, ¶2).

2. As a result of my review of the documentation provided to me...it has become evident to me that she believed that she was in imminent danger of death or great bodily harm when she committed her offenses over three decades ago. (Decl. p.1, ¶4).

3. I am aware that Ms. Allen was convicted of shooting and killing undercover Stockton Police officer Michael Coleman, on March 25, 1982 at her residence, during the serving of a search warrant for her ex-boyfriend...who was alleged to be in possession of illegal drugs. The attempted murder charges arose from the fact that she fired several shots in the general direction of the "undercover" police officers at the scene. (Decl. p.1, ¶5).

4. The records indicate that on March 25, 1982, when Ms. Allen was 32 years old, she was inside her residence in Stockton, California with her ex-boyfriend...The Stockton Police Department had obtained a search warrant for the person and vehicle of Mr. Black. The police did not know that Ms. Allen was inside the residence. (Decl. p.1, ¶6).

5. The records indicate that undercover police officers had followed Mr. Black's vehicle to Ms. Allen's house on this date. She heard her two Chihuahuas (dogs) barking.

¹ See Dr. Griffith's May 30, 2015 Declaration submitted as in EXHIBIT "B" in Petitioner's writ of habeas corpus filed in the district court on March 17, 2016. This declaration is also attached in the Appendix herein as **EXHIBIT "D."**

Several men dressed in plainclothes, some with long hair, beards and mustaches, jumped the side fence to her house. One of her dogs attacked them. The "undercover" police officers kicked her dog in the stomach and made him cry out in pain. She heard the commotion and her dog screaming...while she was sitting at her bedroom dresser. (Decl. p.2, ¶7).

6. The records indicate that Ms. Allen grabbed her registered hand gun for protection and went to the front door. She did not know that the intruders were undercover police officers. She could hear the men kicking hard on her front door...When she reached the door, the police officers saw the gun in her hand and they opened fire on her. She returned fire ... She thought the men were intruders who had come to kill Jose Reynaldo Black and her.... Because of her dog yelping...and barking..., she did not hear the undercover police officers announce that they were police officers, as they claimed. (Decl. p.2, ¶8).

7. My review of the records provided to me indicates that during this scene of pandemonium and confusion there was an exchange of gunfire between Ms. Allen and the undercover police officers. She was shouting, "Who are you? Why are you shooting at me?" She was shot seven times by the police officers. She fell back and to the floor gravely wounded. At this point one of the police officers pointed his gun at her face and said, "Don't move." She kept pleading with him, "Who are you; why are you trying to kill me?" During the exchange of gunfire one of the police officers, Michael Coleman, who was standing out in the front yard was shot in the heart and died. (Decl. p.2, ¶9).

8. Ms. Allen was subsequently charged with First-Degree Murder and three counts of Attempted Murder, and possession of contraband. She was convicted of these charges by a jury on December 23, 1982 in Case #SJ-33321. She was sentenced to life without parole and has been incarcerated for 33 years. (Decl. p.2, ¶10).

9. I have thoroughly reviewed the confidential files...provided to me regarding Ms. Karen F. Allen. The statements from Ms. Allen indicate that she was under the influence of heroin at the time of the offense in 1982. She has shot heroin into her arm approximately 30 minutes before the undercover police officers arrived at her residence. She was also worried and paranoid that men were coming to kill her... (Decl. p.3, ¶11).

10. Had I conducted a psychological evaluation of Ms. Allen subsequent to her 1982 offense in this case, I would have testified that Ms. Allen genuinely believed that she was in imminent danger of death or great bodily harm when she shot at and killed an undercover police officer at her residence on March 25, 1982. (Decl. p.3, ¶12).

11. Based on my review of this case, it is my opinion to a reasonable medical certainty that Ms. Allen felt an immediate and imminent danger of death at the hands of the undercover police officers...on March 25, 1982. (Decl. p.3, ¶13).

12. I am of the opinion that the psychological effects on Ms. Allen from her use of heroin 30 minutes before the undercover police officers arrived, and her fear and paranoia that men were coming to kill her ex-boyfriend Ron Black and possibly her, put her in fear of imminent harm or death from the undercover officers who broke down her door... Ms. Allen's mental state at the time which included being under the influence of heroin combined with acute paranoia, panic, fear, and confusion resulted in her fear of immediate physical harm or death. I would have so testified at a trial in her case. (Decl. p.3, ¶14).

13. As a result of my diagnosis...I would have testified at Ms. Allen's trial that a person in her specific state of mind at the time of the crime under the circumstances...would have been incapable of forming "*the intention unlawfully to take away the life of a fellow creature*" or could have done so "*with awareness of the danger and a conscious disregard for human life,*" as required to sustain a murder conviction. (Decl. p.3, ¶15).

14. In my professional opinion, had Ms. Allen been evaluated by an experienced forensic psychologist... prior to her trial in December of 1982, and had such psychologist testified as an expert witness that Ms. Allen's mental state at the time which included being under the influence of heroin combined with acute paranoia, panic, fear, and confusion resulted in her fear of immediate physical harm or death when the undercover police officers forcibly entered her residence on March 25, 1982, it is likely and reasonably probable there would have been a more favorable outcome...at trial. (Decl. p.4, ¶16).

15. In my professional opinion had the jury received this evidence, it is reasonably probable that Ms. Allen would have been acquitted or convicted of the lesser charge voluntary manslaughter. (Decl. p.4, ¶17).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review is Warranted to Determine if the Equitable Tolling Provision for Clams of “Actual Innocence” Enunciated in McQuiggin v. Perkins, 133 S. Ct. 1924 (2013) Applies to Convicted Defendants who Lacked the Requisite Mental Elements to Commit Specific Intent Crimes such as First-Degree Murder

A. THE DISTRICT COURT’S FINDINGS AND RECOMMENDATIONS

The federal district Magistrate Judge held in pertinent part on p. 7 of his Findings and Recommendations on February 7, 2017:²

Lastly, petitioner argues that the court should apply the equitable exception to AEDPA’s limitations period for actual innocence. Petitioner’s showing falls short of the high bar needed to apply the exception. As noted above, the *Schulp* exception may be applied only where the petitioner makes a showing sufficient to convince the court that it is more likely than not that no reasonable juror would have convicted her in light of new evidence. *McQuiggin v. Perkins*, ___ U.S. ___, 133 S.Ct. at 1935. Petitioner argues that the psychologist’s declaration shows that she is actually innocent of first-degree murder. The undersigned agrees with respondent, however, that the declaration offers, at best, competing evidence regarding her mental state to that presented at trial. It does not call the conviction fundamentally into question. Additionally, the lengthy delay between the trial and the psychologist’s declaration (which is based on unidentified documentary material rather than any examination of petitioner near the time of the crime) decreases its value to the court in determining whether petitioner has made the requisite showing of innocence. *McQuiggin*, 133 S. Ct. at 1936 (holding that delay in the presentation of evidence of innocence may undermine the credibility of the innocence claim). In sum, petitioner has not shown that the declaration is evidence such that, if it were considered with all the other evidence presented at trial, it is probable that no reasonable jury would have found her guilty. (Citation omitted.)

ARGUMENT

The district court dismissed Petitioner’s writ on her claim of “Actual Innocence” for the reasons stated above. Petitioner argued that the court should have applied the equitable exception to the AEDPA’s limitations period for her claim of actual innocence. The district

² See, (copy of 2-7-17 Magistrate’s Findings & Recommendations attached as **EXHIBIT “C”** in the Appendix.

court held that Dr. Marlin Griffith's declaration on Petitioner's behalf was not sufficient on its face to rise to the level of an actual innocence claim. However, in so concluding, the court did not order an evidentiary hearing to give Petitioner an opportunity to elicit Dr. Griffith's testimony in the matter, and offer other evidence to buttress her claim of "Actual Innocence."

Secondly, the district court denied an equitable tolling exception based upon Petitioner's "Actual Innocence" claim because of "the lengthy delay between the trial and the psychologist's declaration." However, in ruling that Petitioner did not justify the lengthy delay in filing her habeas petition based upon the new evidence contained in Dr. Griffith's declaration, the court discounted several facts put forth in Petitioner's declaration.³

1) Reasons Justifying the Delay in Filing this Habeas Claim

Petitioner Allen states in her declaration in pertinent part:

1. I am not trained in the law and have no legal knowledge. I have not been previously told ...that I may have a viable issue that could be raised...on habeas corpus...*In fact, when my direct appeal was denied my appellate lawyer told me that there were no other legal remedies that I could pursue other than a petition for executive clemency. I believed him and have not been told differently by anyone until now.* (Emphasis added.) (Pet's Decl. p.3, ¶14).

2. My family retained legal assistance in 2014 for the purpose of reviewing my case files, records and transcripts and to conduct an investigation into my case, to determine if there were any viable issues that could be raised in a writ of habeas corpus on my behalf. (Decl. p.3, ¶15).

3. As part of this investigation, a forensic psychologist reviewed my files, records and statements regarding the facts and circumstances surrounding my crimes in 1982. (Decl. p.3, ¶16).

³ See Petitioner's 7-2-15 declaration submitted in the Appendix herein as **EXHIBIT "E,"** which was attached to Petitioner's habeas petition filed in the district court on March 17, 2016.

4. Pursuant to this recent investigation into my case and psychological evaluation, I was informed in May of 2015, that there is a viable claim that could be made in my behalf via a writ of habeas corpus. This claim involves my "state of mind" at the time of my crime in 1982, that I actually, but unreasonably, believed that I was in imminent danger of death or great bodily injury at the time I shot and killed my victim. I have been previously unaware of this issue... (Decl. pp.3-4, ¶17).

5. Until I recently obtained...legal assistance, I did not know that I needed to have my case evaluated by a forensic psychologist. I did not previously know that the facts of my case and my mental state at the time of my crimes in 1982, presents a viable issue that can be raised on habeas corpus. I have been unaware of this issue and knowledge until now. (Decl. p.4, ¶18).

6. No psychological expert has indicated until now that my "state of mind" at the time of my crimes in 1982 presented a viable defense that should have been raised by my trial attorney...in 1982. If I had been previously told this by a psychological expert I would have previously filed a petition for writ of habeas corpus immediately and without delay. (Decl. p.4, ¶19).

The above facts set forth in Petitioner's attached declaration, demonstrates that the delay in raising her instant habeas corpus issue was justified under the circumstances in this case. Petitioner did [not] become aware of the psychological evidence supporting her habeas petition until a forensic psychologist reviewed her case in 2015. Dr. Marlin Griffith determined on May 30, 2015, *inter alia*, that the psychological effects on Ms. Allen from her use of heroin 30 minutes before the undercover police officers arrived, and her fear and paranoia that men were coming to kill her ex-boyfriend Ron Black and possibly her, put her in fear of imminent harm or death from the undercover officers who broke down her door and entered her residence.

As Dr. Griffith concluded in his May 30, 2015 declaration in pertinent part:

“As a result of my diagnosis in this case set forth above, I would have testified at Ms. Allen’s trial that a person in her specific state of mind at the time of the crime under the circumstances elucidated above, would have been incapable of forming “*the intention unlawfully to take away the life of a fellow creature*” or could have done so “*with awareness of the danger and a conscious disregard for human life,*” as required to sustain a murder conviction.”

(Griffith’s Decl. p.3, ¶15).

B. PETITIONER IS “ACTUALLY INNOCENT” OF FIRST-DEGREE MURDER BECAUSE AT THE TIME OF THE CRIME IN 1982, SHE WAS MENTALLY INCAPABLE OF FORMING THE REQUIRED ELEMENT OF MALICE

1. Applicable California Law Regarding Intent and Malice Required to Sustain a Murder Conviction

Diminished capacity was eliminated by the California Legislature in 1981 and by voter initiative in 1982. However, “diminished actuality” remains a viable concept. While the Legislature, in eliminating the diminished capacity defense, “precluded jury consideration of mental disease, defect, or disorder as evidence of a defendant’s capacity to form a requisite criminal intent, ...it did not preclude jury consideration of mental condition in deciding whether a defendant *actually* formed the requisite criminal intent.” People v. Williams (1997) 16 Cal. 4th 635, 677; People v. Mejia-Lenares (2006) 135 Cal. App. 1437, 1450.

California statutes have long separated criminal homicide into two classes, the greater offense of murder and the lesser included offense of manslaughter. The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice. [People v. Mejia-Lenares, *supra*, 135 Cal. App. at 1446]. Malice exists, if at all, only when an unlawful homicide was committed with the “intention unlawfully to take away the life of a fellow creature,” or with awareness of the danger and a conscious disregard for life.” [*Id.* at 1446]. Accord, People v. Rios (2000) 23 Cal. 4th 450, 460.

Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.” [People v. Mejia-Lenares, *supra*, 135 Cal. App. at 1446]. Accord, In re Christian S. (1994) 7 Cal. 4th 768, 771. In such a situation, unreasonable or imperfect self-defense is not a true defense, but instead is shorthand description of one form of voluntary manslaughter, a lesser included offense of murder. People v. Barton (1995) 12 Cal. 4th 186, 200-201; [People v. Mejia-Lenares, *supra*, 135 Cal. App. at 1446]. “Accordingly, when a defendant is charged with murder the trial court’s duty to instruct sua sponte...on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense.” [*Id.* 135 Cal. App. at 1446]. Likewise, “[t]he trial court need not give such instructions on request absent substantial evidence to support them.” People v. Stitely, (2005) 35 Cal. 4th 514, 551; [People v. Mejia-Lenares, *supra*, 135 Cal. App. at 1446].

As the Supreme Court stated in People v. Mills (2012) 55 Cal. 4th 663, 671-672: “At a trial on the issue of guilt, ‘[evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged].” Accord, People v. DeHoyos (2013) 57 Cal. 4th 79, 118.

ARGUMENT

Petitioner argues that if this Court holds that she has untimely filed her habeas claim and has not offered “good cause” to justify the late filing, than she would argue that she is “actually innocent” of First-Degree Murder. Demonstrating actual innocence allows the court to reach the merits of Petitioner’s claims despite any failure to present the claims timely or offer “good cause” as to why they were not presented timely. See, [McQuiggin v. Perkins, *supra*, 133 S. Ct. at 1928] (actual innocence serves as a gateway which a petitioner may pass whether the impediment is a procedural bar or expiration of the statute of limitations.)

Petitioner contends that she is “actually innocent” of the crime of first-degree murder for the reasons argued above. Petitioner argues that under the circumstances in this case coupled with Dr. Griffith’s declaration concluding that she did not have the required mental state to commit first-degree murder, that she is actually innocent of first-degree murder.

McQuiggin v. Perkins, *supra*, is controlling in this case, where this Court held that “Actual Innocence,” if proved, is held to be a gateway through which a state prisoner petitioning for federal habeas corpus relief might pass, regardless of whether impeded by a procedural bar or expiration of 28 U.S.C.S. §2244(d)(1)’s limitations period.

This case is analogous to McQuiggin in several respects. First, Petitioner Allen is also a state prisoner challenging her first-degree murder conviction claiming that she was denied the effective assistance of trial counsel in violation of U.S. Const. Amends. 6, 14, like the defendant in McQuiggin. Secondly, Petitioner also submitted a recent declaration from forensic psychologist, Dr. Marlin Griffith, stating that because of her specific state of mind at the time of the crime, she was not capable of forming “*the intention unlawfully to take away the life of a fellow creature*” or could have done so “*with awareness of the danger and a*

conscious disregard for human life,” as required to sustain a murder conviction.” Petitioner argues she was not mentally able to form the requisite requirement of malice required for First-Degree murder at the time of the crime in 1982. Consequently, she was not guilty of First-Degree murder and “actually innocent” of the charge. Thus, Petitioner asserts that she qualifies for an equitable tolling exception under McQuiggin, *supra*.

Petitioner contends that she is “actually innocent” of the crime of first-degree murder for the reasons argued above. Petitioner argues that under the circumstances in this case coupled with Dr. Griffith’s declaration concluding that she did not have the required mental state to commit first-degree murder, that she is actually innocent of first-degree murder.

When this Court in McQuiggin carved out an “actual innocence” exception to the expiration of 28 U.S.C.S. §2244(d)(1)’s limitations period it did so based on the requirement that defendants make a substantial showing that they did not commit the crime in question. Petitioner urges this Court to expand the holding in McQuiggin to include cases, such as the case sub judice, where the defendant committed a specific intent crime such as first-degree murder, but was not mentally able to form a required element such as malice, which negates guilt of such a crime, as a *matter of law*.

Petitioner argues that in light of the “new evidence” presented in Dr. Marlin Griffith’s declaration on May 30, 2015, exculpating Petitioner of First-Degree murder, had such evidence been presented by her trial counsel, “no juror, acting reasonably, would have voted to find her guilty beyond a reasonable doubt.” Schlup v. Delo, 513 U.S. 298, 329 (1995). Thus, Petitioner has met this threshold requirement which qualifies her for the McQuiggin equitable tolling exception to the expiration of 28 U.S.C.S. §2244(d)(1)’s limitations period.

Under the above circumstances, Petitioner submits that she has presented “extraordinary circumstances” that justify any equitable tolling of any statute of limitations in this case. Therefore, she asserts that the district court erred, as a *matter of law*, in granting the Respondent’s motion to dismiss her habeas petition on an alleged late filing of her petition.

C. QUESTION OF A FUNDAMENTALLY UNFAIR TRIAL

Petitioner argues that she was denied the effective assistance of counsel and was prejudiced by counsel’s ineffectiveness. She submits that without the effective assistance of counsel she was denied a fundamentally trial. The right to the effective assistance of counsel is so basic and fundamental to a fair trial under the 6th and 14th Amendments to the Constitution that it cannot be seriously argued that absent effective assistance of counsel it is still possible to receive a fair trial. See, e.g. U.S. v. Cronin, 104 S. Ct. 2039, 2046 (1984) (“The right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.”) Accord, Kimmelman v. Morrison, 106 S.Ct. 2574, 2584 (1986) (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair), citing [Strickland, *supra*, 466 U.S. at 685]. And of course the right to counsel is the right to effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 395-396 (1985); Strickland v. Washington, 466 U.S. 668, 686 (1984).

The Sixth Amendment right to counsel exists “in order to protect the fundamental right to a fair trial.” Lockhart v. Fretwell, 113 S.Ct. 838, 842 (1993); [Strickland, *supra*, 466 U.S. at

684]; Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the “benchmark” of the right to counsel is the “fairness of the adversary proceeding”).

In this case, it is clear that counsel did not investigate, develop and present a mental defense on Petitioner’s behalf to demonstrate to the jury that Petitioner was incapable of forming “*the intention unlawfully to take away the life of a fellow creature*” or could have done so “*with awareness of the danger and a conscious disregard for human life,*” as required to sustain a murder conviction. Petitioner argues that had the jury heard the testimony of an expert witness in this regard it is reasonably probable that the jury would have returned a different verdict such as voluntary manslaughter. Thus, Petitioner was denied a fundamentally fair trial in violation of the 6th and 14th Amendments to the U.S. Constitution which entitles her to a ruling on the merits of her habeas claims notwithstanding an ostensible failure to timely file her claim or offer good cause for the delay.

II.

Review is Warranted to Determine if a Forensic Psychologist’s Declaration that a Convicted Defendant Did Not Have the Mental Culpability to Commit First-Degree Murder is Sufficient to Demonstrate Trial Counsel’s Ineffective Assistance in not Raising such a Defense at Trial Meets the Standard for a Certificate of Appealability

The federal district court and Ninth Circuit Court of Appeals erred by denying Petitioner a Certificate of Appealability for the reasons stated above. It is clear by the facts and law in this case, that Petitioner has demonstrated that “jurists of reason would find it debatable whether her habeas 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. See, Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accord, 28 U.S.C. §2253(c)(2); Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012).

A. APPLICABLE LAW REGARDING A CERTIFICATE OF APPEALABILITY

A COA will not be granted unless the petitioner makes a substantial showing of the denial of a federal right. See, Barefoot v. Estelle, 463 U.S. 880, 893 (1983). *"the petitioner need not show that he should prevail on the merits...Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are "adequate to deserve encouragement to proceed further."'*" [*Id.* 463 U.S. at 893 n. 4]. Accord, [Slack v. McDaniel, *supra*, 529 U.S. at 484.] A petitioner need not show that she will prevail on the merits to be granted a COA [*Id.* at 485], nor that ultimate relief is certain, nor even that jurists of reason would agree, after consideration of the claim on its merits, that petitioner cannot prevail. Miller-El v. Cockrell, 537 U.S. 322, 337-38 (2003).

ARGUMENT

Petitioner Allen asserts that the facts and arguments she presented to the federal district court and Ninth Circuit Court of Appeals, demonstrate: (1) that her issues are debatable among jurists of reason; (2) that a court could resolve the issues in a different manner; and (3) that the questions are "adequate to deserve encouragement to proceed further. [Barefoot v. Estelle, *supra*, 463 U.S. at 893].

The Ninth Circuit Court of Appeals summarily denied a COA in this case notwithstanding the fact that Petitioner had submitted a sworn declaration from Dr. Marlin Griffith stating, inter alia, that she was incapable of forming *"the intention unlawfully to take away the life of a fellow creature"* or could have done so *"with awareness of the danger and a*

conscious disregard for human life," as required to sustain a murder conviction.⁴ Dr. Griffith

also stated in his declaration in pertinent part:

In my professional opinion, had Ms. Allen been evaluated by an experienced forensic psychologist... prior to her trial in December of 1982, and had such psychologist testified as an expert witness that Ms. Allen's mental state at the time which included being under the influence of heroin combined with acute paranoia, panic, fear, and confusion resulted in her fear of immediate physical harm or death when the undercover police officers forcibly entered her residence on March 25, 1982, it is likely and reasonably probable there would have been a more favorable outcome...at trial. [P] In my professional opinion had the jury received this evidence, it is reasonably probable that Ms. Allen would have been acquitted or convicted of the lesser charge voluntary manslaughter.

(Dr. Griffith's Decl. p.4, ¶¶14-15).

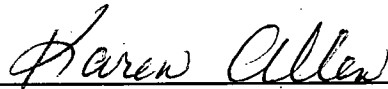
Petitioner submits that under the facts of her case, she had met the standard for the granting of a COA under controlling Supreme Court precedent cited above, contrary to the Ninth Circuit's summary denial of a COA. Moreover, in denying a COA the Ninth Circuit Court of Appeals did not order an evidentiary hearing to give Petitioner an opportunity to elicit Dr. Griffith's testimony in the matter, and offer other evidence to buttress her claim of "Actual Innocence." It was error for the Ninth Circuit Court of Appeals to deny a COA in this case without remanding the case back to the district court for an evidentiary hearing.

Petitioner's trial counsel was ineffective for failing to have her mental state evaluated prior to trial, thus foregoing a valid defense to murder. This failure deprived her of a fundamentally fair trial under federal due process standards. Consequently, she has stated a valid claim of the denial of a constitutional right. Therefore, the Ninth Circuit Court of Appeals erred in denying her a COA. [*Slack v. McDaniel*, *supra*, 529 U.S. at 484.]

⁴ See, footnote #1. *ante*.

CONCLUSION

PREMISES CONSIDERED, and for the reasons and law argued above, Petitioner submits that the Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Ninth Circuit Court of Appeal's denial of Petitioner's request for a COA.

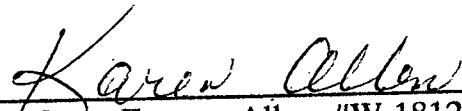


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