

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 15 2025

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

MICHAEL ALLEN,

Petitioner - Appellant,

v.

S. MOORE, Warden,

Respondent - Appellee.

No. 25-3359

D.C. No. 2:23-cv-10929-SVW-MAA
Central District of California,
Los Angeles

ORDER

Before: PAEZ and M. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant's 28 U.S.C. § 2254 petition fails to state a cognizable habeas claim debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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

MICHAEL ALLEN,

Petitioner,

v.

FIDENCIO N. GUZMAN,¹
Warden,

Respondent.

Case No. 2:23-cv-10929-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.

¹ In a motion filed with the Ninth Circuit Court of Appeals, Petitioner identified the Respondent Warden as Fidencio N. Guzman. (See ECF No. 1, at 1.) However, in the caption of the Petition itself, which was attached to that motion as Exhibit A, Petitioner listed the Respondent as “S. Moore, Warden.” (See ECF No. 1, at 6.) Accordingly, after the Ninth Circuit transferred the Petition to this District for filing, court staff identified “S. Moore, Warden” as the Respondent in the docket for this matter. However, Respondent notes that the correct Warden is Fidencio N. Guzman. (ECF No. 14, at 1 n.1.) Therefore, under Federal Rule of Civil Procedure 25(d), Fidencio N. Guzman is substituted for S. Moore as Respondent in this case.

I. INTRODUCTION

On November 27, 2022, Petitioner Michael Allen (“Petitioner”), acting *pro se*, signed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. That petition was received by this Court on December 13, 2022 and filed in the new case of *Michael Allen v. S. Moore*, No. 2:22-cv-09110-SVW-MAA (C.D. Cal.) (“*Allen I*”²), ECF No. 1.³ On May 8, 2023, Petitioner filed a first amended petition in that case. *Allen I*, ECF No. 8. The first amended petition challenged the denial of a habeas corpus petition previously filed in the Los Angeles County Superior Court seeking relief under the California Racial Justice Act (“CRJA”) (“Superior Court Petition”), which had been denied on September 29, 2021. *Allen I*, ECF No. 8, at 5, 10–14, 57, 59–64.⁴ In particular, Petitioner challenged the denial of his request for appointment of counsel in relation to his CRJA claims. *Id.* at 5, 10–14. On May 12, 2023, the Court ordered a response to the first amended petition. *Allen I*, ECF No. 9.

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² For purposes of this Report and Recommendation only, the Court will refer to Petitioner’s previous habeas case, *Michael Allen v. S. Moore*, No. 2:22-cv-09110-SVW-MAA (C.D. Cal.), as *Allen I*, and the instant case as *Allen II*, as those are the two cases most relevant to the matters currently pending before the Court. However, the habeas petition filed in *Allen I* was far from the first habeas petition filed by Petitioner, who has been filing such petitions in this District since at least 1998. *See Michael E. Allen v. Alfonso Fillon*, No. 2:98-cv-09703-LGB-RZ (C.D. Cal. Dec. 3, 1998), ECF No. 1.

³ The Court takes judicial notice of Petitioner’s prior proceedings in this Court and before the Ninth Circuit Court of Appeals. *See* Fed. R. Evid. 201(b)(2) (“The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”); *Harris v. County of Orange*, 682 F.3d 1126, 1131–32 (9th Cir. 2012) (court may take judicial notice of “documents on file in federal or state courts”).

⁴ Pinpoint citations in this Report and Recommendation refer to the page numbers appearing in the ECF-generated headers of the referenced documents.

1 On June 6, 2023, Respondent S. Moore (“Respondent”) filed a Motion to
2 Vacate Order Requiring Response to First Amended Petition (“*Allen I* Motion”) on
3 the ground that the Court lacked jurisdiction in the action because the first amended
4 petition was an unauthorized second or successive petition. *Allen I*, ECF No. 10.
5 After Petitioner filed his opposition on June 30, 2023, *Allen I*, ECF No. 16, the
6 Court issued a Report and Recommendation on August 17, 2023. *Allen I*, ECF No.
7 19. The Court later issued an Amended Report and Recommendation on November
8 13, 2024, recommending that the *Allen I* Motion be granted, the action be dismissed
9 without prejudice, and Petitioner’s Application for a Certificate of Appealability be
10 denied. *Allen I*, ECF No. 28. This recommendation was based on the finding that
11 the denial of Petitioner’s Superior Court Petition on September 29, 2021 did not
12 constitute a new, intervening judgment, making the *Allen I* first amended petition a
13 second or successive attack on Petitioner’s underlying conviction, which this Court
14 could not entertain unless the Petitioner first obtained authorization from the Ninth
15 Circuit Court of Appeals. *Allen I*, ECF No. 28, at 7–9.

16 Not surprisingly, Petitioner then turned to the Ninth Circuit to obtain the
17 authorization he had been told he needed. On December 4, 2023, while the *Allen I*
18 Amended Report and Recommendation was pending review before the presiding
19 District Judge, Petitioner signed a “Motion for Permission to File Writ on New
20 Judgment that Do Not Effect Conviction or Sentence or Duration of Confinement,”
21 to which he attached a proposed petition for writ of habeas corpus raising the same,
22 single claim raised in *Allen I*; he then mailed this document to the Ninth Circuit
23 Court of Appeals the next day. *See Michael Allen v. Raymond Madden*, No. 23-
24 4094 (9th Cir. Dec. 12, 2023), Dkt. No. 1. The Ninth Circuit treated this filing as
25 an application to file a second or successive petition (“Application to File”). *Id.*

26 While the Application to File was pending before the Ninth Circuit, judgment
27 was entered by the District Court in *Allen I* on February 1, 2024. *Allen I*, ECF No.
28 32. Petitioner filed a notice of appeal on February 22, 2024 and an application for a

1 certificate of appealability on March 4, 2024. *Allen I*, ECF Nos. 34, 36. On May
2 14, 2024, the Ninth Circuit denied the request for a certificate of appealability,
3 finding that “the underlying 28 U.S.C. § 2254 petition fail[ed] to state any federal
4 constitutional claims debatable among jurists of reason.” *Allen I*, ECF No. 37.

5 This would seem to have been a final determination regarding Petitioner’s
6 claim that he was entitled to federal habeas relief as a result of the denial of his
7 Superior Court Petition or any related issue regarding appointment of counsel.
8 However, two months after denying the certificate of appealability in *Allen I*, the
9 Ninth Circuit addressed Petitioner’s independently filed Application to File and
10 denied it as “unnecessary” because the petition at issue had raised a new claim that
11 did not become ripe until the state court denied relief under the CRJA. *Michael*
12 *Allen v. Raymond Madden*, No. 23-4094 (9th Cir. July 19, 2024), Dkt. No. 5.
13 While “express[ing] no opinion as to the merits” of Petitioner’s claims, the Ninth
14 Circuit directed that Petitioner’s Application to File be transferred to this District
15 and that the petition attached thereto would be “deemed filed in the district court on
16 December 4, 2023, the date on which it was signed.” *Id.* at 1–2.

17 Accordingly, on July 24, 2024, on receipt of the Ninth Circuit’s July 19,
18 2024 Order, this Court opened the instant action, *Michael E. Allen v. S. Moore*,
19 2:23-cv-10929-SVW-MAA (C.D. Cal.) (“*Allen II*”). Petitioner’s Application to
20 File, with proposed Petition for Writ of Habeas Corpus by a Person in State
21 Custody under 28 U.S.C. § 2254 (“Section 2254”) (“Petition”) attached as Exhibit
22 A, was filed in with an effective filing date of December 4, 2023. (ECF No. 1.) On
23 September 5, 2024, the Court received Petitioner’s \$5.00 filing fee (ECF No. 9),
24 and on September 18, 2024, issued an Order Requiring Response (ECF No. 10).
25 Respondent then moved to dismiss the Petition on October 18, 2024, arguing that
26 Petitioner’s sole claim for relief—under the CRJA—was not cognizable on federal
27 habeas review (“Motion to Dismiss”). (MTD, ECF No. 14.) Respondent filed
28 several Lodged Documents (“LD”) in support of the Motion to Dismiss. (LDs 1–

1 19, ECF Nos. 15-1–15-19.) Petitioner opposed the Motion to Dismiss on
2 November 7, 2024 (“Opposition”). (Opp., ECF No. 17.) Petitioner also filed a
3 Motion for Relief from Judgment, in which he sought to reopen *Allen I.* (ECF No.
4 12.)

5 For the reasons discussed below, the Court recommends that Respondent’s
6 Motion to Dismiss be granted, Petitioner’s Motion for Relief from Judgment be
7 denied, the Petition be denied, and this action be dismissed with prejudice.
8

9 II. BACKGROUND

10 In 1992, Petitioner was convicted in the Los Angeles County Superior Court
11 of first-degree murder (Cal. Penal Code § 187(a)) (“Count One”), second-degree
12 robbery (Cal. Penal Code § 211) (“Count Two”), and attempted murder (Cal. Penal
13 Code §§ 664, 187(a)) (“Count Three”). (LD 1, ECF No. 15-1.) The jury found that
14 Petitioner committed the murder charged in Count One during the commission of a
15 robbery (Cal. Penal Code § 190.2(a)(17)), and that Petitioner personally used a
16 firearm in the commission of all three counts (Cal. Penal Code § 12022.5). (*Id.*)
17 Petitioner was sentenced to a state prison term of life in prison without the
18 possibility of parole on Count One, nine years on Count Two, and life with the
19 possibility of parole on Count Three. (LD 2, ECF No. 15-2.) In 1993, the
20 California Court of Appeal affirmed the judgment. (LD 3, ECF No. 15-3, at 17.)

21 In 1998, Petitioner filed a habeas corpus petition pursuant to Section 2254
22 seeking relief from his conviction, which was denied as untimely and dismissed
23 with prejudice. (LD 4, ECF No. 15-4, at 1, 6.) In 2001, Petitioner filed another
24 habeas corpus petition pursuant to Section 2254 seeking relief from his conviction,
25 which was dismissed without prejudice as second or successive. (LD 5, ECF No.
26 15-5, at 3.) In 2020, Petitioner filed another habeas corpus petition pursuant to
27 Section 2254 challenging the state court denial of his petition for resentencing
28 ///

1 under California Penal Code section 1170.95, which was denied on the merits and
2 dismissed with prejudice. (LD 6, ECF No. 15-6, at 1, 7.)

3 On August 10, 2021, Petitioner filed the Superior Court Petition. *Allen I*,
4 ECF No. 8, at 5, 57, 59–64. On September 29, 2021, this petition was denied in a
5 reasoned decision. (LD 7, ECF No. 15-7, at 60–64.) Petitioner appealed the denial
6 of his Superior Court Petition, but the Court of Appeal dismissed the appeal and
7 denied Petitioner’s counsel’s request to treat the appeal as a habeas petition in the
8 first instance. (LD 8, ECF No. 15-8.) *See People v. Allen*, No. B315902, 2023 Cal.
9 App. Unpub. LEXIS 603, at *5 (Cal. Ct. App. Jan. 30, 2023). Petitioner filed a
10 petition for review of the dismissal of the appeal in the California Supreme Court
11 (LD 9, ECF No. 15-9), which was summarily denied on April 12, 2023 (LD 10,
12 ECF No. 15-10).

13 On October 14, 2021, Petitioner filed a habeas corpus petition in the
14 California Court of Appeal seeking relief under the CRJA. (LD 11, ECF No. 15-
15 11.) On October 28, 2021, the petition was summarily denied. (LD 12, ECF No.
16 15-12.) On November 29, 2021, Petitioner filed a petition for writ of mandate in
17 the California Court of Appeal. (LD 13, ECF No. 15-13.) On December 9, 2021,
18 the petition was summarily denied. (LD 14, ECF No. 15-14.) On December 3,
19 2021, Petitioner filed a habeas corpus petition in the California Supreme Court
20 seeking relief under the CRJA. (LD 15, ECF No. 15-15.) On April 20, 2022, the
21 petition was summarily denied. (LD 16, ECF No. 15-16.) Seven months later,
22 Petitioner filed the *Allen I* petition discussed above. *Allen I*, ECF No. 1.

23 24 **III. RESPONDENT’S MOTION TO DISMISS**

25 Petitioner raises one ground for relief in the Petition: that the state court’s
26 failure to appoint counsel under California Penal Code section 1473 before denying
27 his CRJA-based habeas petition amounted to the deprivation of a state-created
28 liberty interest and therefore violated the Due Process Clause of the Fourteenth

1 Amendment of the United States Constitution. (Pet. 8.) Respondent has moved to
2 dismiss this action on the ground that this claim is not cognizable on federal habeas
3 review. (MTD 5.)

4
5 **A. A State Court’s Rejection of a CRJA Claim Is Not Cognizable on**
6 **Federal Habeas Review**

7 The CRJA became effective on January 1, 2021. *See* Cal. Penal Code § 745
8 (“Section 745”). The CRJA prohibits state criminal convictions and sentences “on
9 the basis of race, ethnicity, or national origin.” Cal. Penal Code § 745(a). CRJA
10 claims may be raised by motion or in a petition for writ of habeas corpus. Cal.
11 Penal. § 745(b). Petitioners have the burden of proving a violation of Section
12 745(a) by a preponderance of the evidence. Cal. Penal Code § 745(a). The CRJA
13 sets forth various remedies available for successful prejudgment and post-judgment
14 claims, including vacating the conviction and sentence, or imposing a new sentence
15 not greater than that previously imposed. Cal. Penal Code §§ 745(e)(1), 745(e)(2).

16 Federal habeas corpus relief is available only when a petitioner has been
17 convicted or sentenced in violation of the Constitution, laws, or treaties of the
18 United States. 28 U.S.C. § 2254(a). It is well-established that alleged state law
19 errors are not cognizable on federal habeas review. *Estelle v. McGuire*, 502 U.S.
20 62, 67 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). “[I]t is not the province
21 of a federal habeas court to reexamine state-court determinations on state-law
22 questions.” *Estelle*, 502 U.S. at 67–68. Thus, multiple federal district courts in
23 California have held that a state court’s rejection of a CRJA claim is not cognizable
24 on federal habeas review. *See, e.g., Stephens v. Matterson*, No. 2:24-cv-02386-
25 WDK-AJR, 2024 U.S. Dist. LEXIS 236658, at *7 (C.D. Cal. Aug. 22, 2024), *report*
26 *and recommendation adopted*, 2025 U.S. Dist. LEXIS 4006 (C.D. Cal. Jan. 7,
27 2025) (“To the extent Petitioner intends to seek relief directly under the CRJA
28 instead of attacking his post-conviction counsel’s performance, Petitioner still

1 cannot state a cognizable habeas claim.”); *Muniz v. Phillips*, No. 2:23-cv-05421-
2 SPG-BFM, 2024 U.S. Dist. LEXIS 58124, at *9–10 (C.D. Cal. Mar. 28, 2024)
3 (“Claims brought under the CJRA are . . . not cognizable under federal habeas
4 review.”); *Brooks v. McDowell*, No. 22-cv-06334-JST, 2024 U.S. Dist. LEXIS
5 23399, at *7 (N.D. Cal. Feb. 9, 2024) (“Claim No. 5 is DISMISSED with prejudice
6 because it only states a claim of state law error—violation of the California Racial
7 Justice Act.”); *Rose v. Warden*, No. 2:22-cv-08155-DOC(LAL), 2023 U.S. Dist.
8 LEXIS 235210, at *21–22 (C.D. Cal. Dec. 26, 2023) (“To the extent Petitioner
9 bases his sentencing claim on state courts’ rejection of his CRJA claim, he fails to
10 present a cognizable federal claim.”), *report and recommendation adopted*, 2024
11 U.S. Dist. LEXIS 24308, (C.D. Cal. Feb. 5, 2024); *Montgomery v. Matteson*, No.
12 5:21-cv-00501-FWS (AFM), 2022 U.S. Dist. LEXIS 199620, at *22 (C.D. Cal.
13 Sept. 14, 2022) (“[The CRJA claim] involves an alleged application of state law. As
14 such, it fails to present a cognizable federal claim.”), *report and recommendation*
15 *adopted*, 2022 U.S. Dist. LEXIS 198154 (C.D. Cal. Oct. 31, 2022). This case
16 presents no reason to reach a different result. Thus, to the extent the Petition could
17 be read as asserting a direct challenge to the California courts’ rejection of
18 Petitioner’s CRJA claim, it should be denied.

19
20 **B. California Penal Code Section 1473(e) Does Not Create an**
21 **Independent Liberty Interest**

22 Petitioner argues, however, not that the state court’s denial of his CRJA-
23 based habeas petition is itself cognizable on federal habeas review, but that the state
24 court’s failure to appoint counsel before denying that petition is cognizable as the
25 denial of a state-created liberty interest without due process. The CRJA also
26 amended one of the California Penal Code sections regarding writs of habeas
27 corpus. *See* Cal. Penal Code § 1473(e) (“Section 1473(e)”). This section reads:

28 ///

1 Notwithstanding any other law, a writ of habeas corpus
2 may also be prosecuted after judgment has been entered
3 based on evidence that a criminal conviction or sentence
4 was sought, obtained, or imposed in violation of
5 subdivision (a) of Section 745 A petition raising a
6 claim of this nature for the first time, or on the basis of
7 new discovery provided by the state or other new
8 evidence that could not have been previously known by
9 the petitioner with due diligence, shall not be deemed a
10 successive or abusive petition. . . . The petition shall state
11 if the petitioner requests appointment of counsel and the
12 court shall appoint counsel if the petitioner cannot afford
13 counsel and either the petition alleges facts that would
14 establish a violation of subdivision (a) of Section 745 or
15 the State Public Defender requests counsel be appointed.

16 Section 1473(e).⁵

17 “The Due Process Clause of the Fourteenth Amendment prohibits states from
18 ‘depriv[ing] any person of life, liberty, or property, without due process of law.’”
19 *Johnson v. Ryan*, 55 F.4th 1167, 1179 (9th Cir. 2022) (quoting U.S. Const. amend.
20 XIV, § 1). Analyzing a due process claim involves two steps: “First, we determine
21 whether the inmate was deprived of a constitutionally protected liberty or property
22 interest. Second, we examine whether that deprivation was accompanied by
23 sufficient procedural protections.” *Id.* A “liberty interest ‘may arise from the
24 Constitution itself ... or it may arise from an expectation or interest created by state
25 laws or policies.’” *Id.* (quoting *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)).

26 ⁵ Petitioner cites to the version of Section 1473 that was in effect at the time the
27 Superior Court Petition was denied on September 29, 2021. (*See, e.g.,* Opp. Ex. D.)
28 At that time, the quoted language was located in California Penal Code section
1473(f). Effective January 1, 2024, Section 1473 was revised and its subparagraphs
renumbered, and the relevant language was renumbered as Section 1473(e). The
Court refers throughout this Report and Recommendation to the statute by its
current designation, Section 1473(e), but notes that Petitioner’s references to
Section 1473(f) correctly identify the same statutory language by its earlier
designation.

1 While a “protected liberty interest may be created by state law,” this occurs “only in
2 limited circumstances.” *Bonin v. Calderon*, 59 F.3d 815, 841–42 (9th Cir. 1995)
3 (finding that “California statute which gives the defendant in a capital case the right
4 to have two defense attorneys argue in his behalf” “clearly does not create a
5 protected liberty interest”). When a state does create such a liberty interest,
6 however, “the Due Process Clause requires fair procedures for its vindication—and
7 federal courts will review the application of those constitutionally required
8 procedures.” *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam).

9 Petitioner’s argument fails at the first step of this analysis. A state that
10 creates a right to the appointment of counsel has not created a new *liberty interest*.
11 The appointment of counsel is a procedural safeguard that may assist a prisoner in
12 pursuing another, more fundamental, legal right. In other words, “California’s
13 appointment of counsel is designed to protect [Petitioner’s] right to present a habeas
14 petition, not to create a ‘substantive end’ in itself.” *Redd v. California Supreme*
15 *Court*, No. CV 16-1540-DMG (PJWx), 2021 U.S. Dist. LEXIS 88239, at *28 (C.D.
16 Cal. Mar. 31, 2021), *rev’d and remanded on other grounds sub nom. Redd v.*
17 *Guerrero*, 84 F.4th 874 (9th Cir. 2023), *rehearing and rehearing en banc denied*,
18 122 F.4th 1203 (9th Cir. Dec. 11, 2024), *petition for cert. filed* (U.S. Feb. 28, 2025)
19 (No. 24-948); *see Bonin*, 59 F.3d at 842 (statute providing for appointment of two
20 defense attorneys “merely creates a state procedural right which is itself designed to
21 facilitate the protection of more fundamental substantive rights such as the rights to
22 effective assistance of counsel and a reliable verdict”).

23 A state does not create new constitutional rights by
24 enacting laws designed to protect existing constitutional
25 rights. *See Bonin*, 59 F.3d at 842 (explaining that a state
26 law does not create a protected liberty interest where it
27 “merely creates a state procedural right which is itself
28 designed to facilitate the protection of more fundamental
substantive rights” arising from the Constitution, such as
the right to effective assistance of counsel). Thus, when a

1 state establishes procedures to protect a liberty interest
2 that arises from the Constitution itself . . . the state does
3 not thereby create a new constitutional right to those
4 procedures themselves, and non-compliance with those
5 procedures does not necessarily violate the Due Process
6 Clause.

7 *James v. Rowlands*, 606 F.3d 646, 656–57 (9th Cir. 2010). More succinctly,
8 “[p]rocess is not an end in itself. Its constitutional purpose is to protect a
9 substantive interest to which the individual has a legitimate claim of entitlement.”
10 *Olim v. Wakinekona*, 461 U.S. 238 (1983).

11 Thus, even when a prisoner has a right to seek habeas relief, he does not have
12 an independent right to have counsel appointed to assist him in doing so. *Coleman*
13 *v. Thompson*, 501 U.S. 722, 752 (1991) (“There is no constitutional right to an
14 attorney in state post-conviction proceedings.”); *Pennsylvania v. Finley*, 481 U.S.
15 551, 555 (1987) (“We have never held that prisoners have a constitutional right to
16 counsel when mounting collateral attacks upon their convictions . . . and we decline
17 to so hold today.” (internal citation omitted)); *Redd v. Guerrero*, 84 F.4th at 880
18 (“[T]here is no federal constitutional right to habeas counsel.”). Therefore, even if
19 Petitioner were correct that a state statute required the Los Angeles Superior Court
20 to appoint counsel to represent Petitioner in pursuing his habeas petition under the
21 CRJA, that court’s failure to do so would not have amounted to the “depriv[ation]
22 of a constitutionally protected liberty or property interest,” *Johnson*, 55 F.4th at
23 1179, and thus would not constitute a Fourteenth Amendment Due Process
24 violation.

25 **C. Section 1473(e) Requires More than Indigency**

26 Further, Petitioner fundamentally misconstrues what the Los Angeles
27 Superior Court was required to do under Section 1473(e). Petitioner repeatedly
28 asserts that this code section required the Superior Court to appoint counsel if the

1 petitioner requests it and is found to be indigent. (*See, e.g.*, Pet. 11 (“[T]he
2 petitioner request appointment of counsel and the court shall appoint counsel if the
3 petitioner can not afford counsel.”); Pet. 12 (“I requested appointment of
4 counsel . . . and the court instantly denied [the] petition . . . without the appointment
5 of counsel as the court was required to do before making a ruling.”); Pet. 12–13
6 (arguing that Section 1473(f)) “creates a liberty interest and entitlement to relief” if
7 the “petitioner request[s] appointment of counsel, the court shall appoint counsel if
8 the petitioner can not afford counsel”); Opp. 6 (“The petitioner *shall* state if the
9 petitioner request appointment of counsel and the court *shall appoint counsel* if the
10 petitioner can not afford counsel.” (emphasis in original)).) However, the
11 appointment of counsel under Section 1473(e) is contingent on more than just a
12 petitioner’s inability to afford counsel. Rather, that code section states that “the
13 court shall appoint counsel if the petitioner cannot afford counsel *and either the*
14 *petition alleges facts that would establish a violation of subdivision (a) of Section*
15 *745 or the State Public Defender requests counsel be appointed.*” Cal. Penal Code
16 § 1473(e) (emphasis added). The state court therefore had no obligation to appoint
17 counsel unless either the petition alleged sufficient facts to show a violation of the
18 CRJA or the State Public Defender requested the appointment of counsel, neither of
19 which conditions was present in Petitioner’s case. (*See* LD 7, at 60–63.)

20 Petitioner relies on the case of *Redd v. Guerrero* to oppose Respondent’s
21 Motion to Dismiss, arguing that *Redd* supports the premise that petitioners have a
22 constitutionally protected due process liberty interest in the right to challenge
23 convictions via habeas corpus petitions. (Opp. at 13.) *Redd* does indeed support
24 that premise, having found that California law guaranteed the plaintiff in that case,
25 a death row inmate, the “right to challenge his conviction collaterally via a habeas
26 corpus petition, so he has a constitutionally protected liberty interest in that right.”
27 *Redd v. Guerrero*, 84 F.4th at 899. However, what is at issue here is not whether
28 Petitioner has a state-created right to petition for habeas relief, but whether the

1 state's failure to appoint counsel to assist him in asserting any such right he may
2 have had is either a constitutional violation in itself or impacted his ability to assert
3 his right to petition for habeas relief so profoundly that it amounted to a deprivation
4 of his liberty interest in petitioning for habeas relief. *Redd* provides no assistance
5 on either of those points. As to the first point, the *Redd* court explicitly declined to
6 reach the question of whether a state statute providing for the appointment of
7 counsel to represent death row inmates in pursuing habeas relief created a distinct
8 *liberty interest in the appointment of counsel* sufficient to trigger due process
9 protections. *Id.* at 892. And as to the second point, the *Redd* court did consider the
10 plaintiff's claim that his established *liberty interest in petitioning for habeas corpus*
11 had been violated by the state's failure to appoint counsel, but did not resolve that
12 issue in the plaintiff's favor. The court noted that this claim was "premised on the
13 theory that the delay in appointing him counsel undermined his ability to petition
14 for habeas," but held that the plaintiff had not alleged facts sufficient to support
15 this theory, as "[u]nder Supreme Court precedent, the absence of appointed counsel,
16 without more, does not preclude [the plaintiff] from vindicating his liberty interest
17 in petitioning for habeas." *Id.* at 899–900.

18 The *Redd* court did hold that the plaintiff in that case had pleaded, sufficient
19 to survive a motion to dismiss, the existence of a state-created *property* (as opposed
20 to liberty) interest in the appointment of habeas counsel to death row inmates that
21 might have been violated under the unique circumstances present in that case. *Id.* at
22 894. However, this does not help the instant Petitioner. Even assuming that a
23 procedural due process violation of a property interest could provide Petitioner with
24 a basis for habeas relief,⁶ the California statute at issue in the *Redd* case was a
25 different code section, with different language, than the one at issue here.

27 ⁶ *Redd* was not a habeas case; it was brought under 42 U.S.C. § 1983. *Redd v.*
28 *Guerrero*, 84 F.4th at 877.

1 In *Redd*, the code section at issue was California Government Code section
2 68662, which provided:

3 that the ‘superior court that imposed the sentence shall
4 offer to appoint counsel to represent a state prisoner
5 subject to a capital sentence for purposes of state
6 postconviction proceedings’ and ‘shall enter an order’
7 appointing such counsel ‘*upon a finding* that the person is
8 indigent and has accepted the offer to appoint counsel or
is unable to competently decide whether to accept or
reject that offer.’

9 *Redd v. Guerrero*, 84 F.4th at 879 (quoting Cal. Gov’t Code § 68662(a)) (emphasis
10 in original). That code section—which applied only to habeas petitions filed by
11 state prisoners subject to capital sentences—did in fact mandate the appointment of
12 counsel subject only to a finding of indigency and the petitioner’s decision to accept
13 (or a finding that the petitioner was not competent to accept) the appointment. Cal.
14 Gov’t Code § 68662(a); *see also* Cal. Penal Code § 1509(b) (“After the entry of a
15 judgment of death in the trial court, that court shall offer counsel to the prisoner as
16 provided in Section 68662 of the Government Code.”). As discussed above,
17 however, the code section at issue here also conditions the appointment of counsel
18 on an additional finding: that either the petition alleged sufficient facts to show a
19 violation of the CRJA or the State Public Defender requested the appointment of
20 counsel. Cal. Penal Code § 1473(e).

21 Thus, the *Redd* court’s finding that the plaintiff in that matter might have
22 sufficiently pleaded a procedural due process claim based on the state’s failure to
23 appoint counsel after the plaintiff requested counsel and was found indigent does
24 not help Petitioner. Though he, too, may have requested counsel and may have
25 been indigent, that was not sufficient under the plain language of California Penal
26 Code section 1473(e) to make the appointment of counsel mandatory. Accordingly,
27 *Redd* does not support Petitioner’s claim.

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1 For the reasons set forth above, the Petition does not present any basis for
2 federal habeas relief, and Respondent's Motion to Dismiss should therefore be
3 granted.

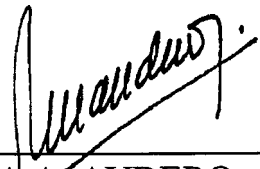
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5 **IV. PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT**

6 On October 11, 2024, a week before Respondent filed the Motion to Dismiss,
7 Petitioner filed a "Motion for Relief from Judgment Pursuant to Federal Rules of
8 Civil Procedure 60(b)(4)(5)" ("Motion for Relief from Judgment"). The sole relief
9 sought in this motion is relief from the judgment entered in *Allen I*. Petitioner filed
10 the same Motion for Relief from Judgment in *Allen I*, where it is pending before the
11 District Judge. *See Allen I*, ECF No. 38. Whatever the merits of that motion, it
12 must be adjudicated in the *Allen I* case. No judgment has yet been entered in this
13 case, so there is no basis, within the four corners of this case, for any relief under
14 Federal Rule of Civil Procedure 60. Thus, the Motion for Relief from Judgment
15 filed in the docket for this case should be denied, though this denial should be
16 without prejudice to Petitioner's ability to pursue the Motion for Relief from
17 Judgment filed in *Allen I*.

18
19 **V. RECOMMENDATION**

20 For the foregoing reasons, it is recommended that the District Court issue an
21 Order: (1) approving and accepting this Report and Recommendation; (2) granting
22 Respondent's Motion to Dismiss (ECF No. 14); (3) denying Petitioner's Motion for
23 Relief from Judgment (ECF No. 12); and (4) directing that Judgment be entered
24 denying the Petition and dismissing this action with prejudice.

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26 DATED: March 12, 2025

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MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 MICHAEL E. ALLEN,
12
13 Petitioner,
14 v.
15 S. MOORE, Warden,
16 Respondent.

Case No. 2:23-cv-10929-SVW-MAA

**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

17 Rule 11 of the Rules Governing Section 2254 Cases in the United States
18 District Courts provides:

19 (a) **Certificate of Appealability.** The district court must
20 issue or deny a certificate of appealability when it enters a final order
21 adverse to the applicant. Before entering the final order, the court may
22 direct the parties to submit arguments on whether a certificate should
23 issue. If the court issues a certificate, the court must state the specific
24 issue or issues that satisfy the showing required by 28 U.S.C.

25 § 2253(c)(2). If the court denies a certificate, the parties may not
26 appeal the denial but may seek a certificate from the court of appeals
27 under Federal Rule of Appellate Procedure 22. A motion to reconsider
28 a denial does not extend the time to appeal.

1 (b) **Time to Appeal.** Federal Rule of Appellate Procedure

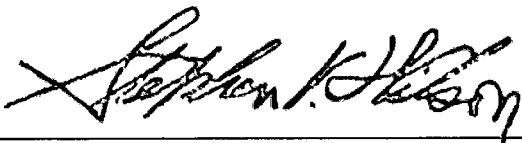
2 4(a) governs the time to appeal an order entered under these rules. A
3 timely notice of appeal must be filed even if the district court issues a
4 certificate of appealability.

5 Pursuant to 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue
6 “only if the applicant has made a substantial showing of the denial of a
7 constitutional right.”

8 The Supreme Court has held that this standard means a habeas petitioner
9 must show that “reasonable jurists could debate whether (or, for that matter, agree
10 that) the petition should have been resolved in a different manner or that the issues
11 presented were adequate to deserve encouragement to proceed further.” *Slack v.*
12 *McDaniel*, 529 U.S. 473, 484 (2000) (citation and quotation marks omitted).

13 After duly considering Petitioner’s contentions in support of the claims
14 alleged in the Petition, the Court finds that Petitioner has not satisfied the
15 requirements for a certificate of appealability. Accordingly, a certificate of
16 appealability is DENIED.

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18 DATED: April 30, 2025

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20 _____
21 HONORABLE STEPHEN V. WILSON
22 UNITED STATES DISTRICT JUDGE
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**Additional material
from this filing is
available in the
Clerk's Office.**