**THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF SAN DIEGO**

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| IN THE MATTER OF THE APPLICATION OF: | |
| BENJAMIN LEE BATHEN, | HSC11777<br>SCS294342 |
| Petitioner. | ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS |

AFTER REVIEWING THE PETITION FOR WRIT OF HABEAS CORPUS AND THE COURT FILE IN THE ABOVE REFERENCED MATTER, THE COURT FINDS:

On June 19, 2018 petitioner was convicted by jury trial of three counts of criminal threats made against his former psychologist, C.J. (Pen. Code[1], § 422). Petitioner was sentenced to the midterm sentence of two years for each count, with counts two and three to run concurrent to count one, for a total prison term of two years.

Petitioner timely appealed his conviction to the California Court of Appeal, Fourth Appellate District, Division One. (Case No. D074538.) On appeal, petitioner argued: (1) insufficient evidence supported the convictions; (2) the court had a *sua sponte* duty to instruct the jury on the lesser-included offense of attempted criminal threat; and (3) the court erred in denying probation and imposing the midterm sentence of two years in prison. The judgment was affirmed. A petition for review was denied.

[1] All unspecified statutory references are to the Penal Code.

On April 23, 2020 petitioner filed a petition for writ of habeas corpus in this court. Petitioner complains that his trial counsel, Alicia Freeze, was ineffective because she failed to investigate a mental health defense to the charges against petitioner. Specifically, she did not investigate the defense of voluntary intoxication based on the possibility that petitioner's antidepressant, Lexapro, caused his violent outbursts toward CJ.

The petition is denied.

In reviewing a petition for writ of habeas corpus, the court presumes the regularity of proceedings that resulted in a final judgment. (*Ex parte Bell* (1942) 19 Cal.2d 488, 500.) Every petitioner, even one filing in pro per, must set forth a *prima facie* statement of facts that would entitle him to habeas corpus relief. (*In re Bower* (1985) 38 Cal.3d 865, 872; *In re Hochberg* (1970) 2 Cal.3d 870, 875 fn 4.) The petitioner then bears the burden of proving the facts upon which he bases his claim for relief. (*In re Riddle* (1962) 57 Cal.2d 848, 852.) Vague or conclusory allegations do not warrant habeas relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The petition should include copies of "reasonably available documentary evidence in support of claims . . ." (*Id.*)

With regard to claims of ineffective assistance of counsel, petitioner's assertions must be corroborated independently by objective evidence. (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) Petitioner's unsubstantiated, self-serving statements do not provide a sufficient basis upon which to prove his claims. (*Id.* at 945.)

Petitioner was treated by C.J. from 2004 to 2008 when he moved to the east coast. Petitioner was not happy and became agitated when he learned C.J. would terminate his treatment because she was only licensed to practice on patients in California. A few months later, petitioner emailed C.J. telling her he was upset and asking for an apology. He threatened to complain with her professional organization if she did not listen to his grievances or apologize face-to-face. The emails made C.J. uneasy. Almost nine years later, C.J. received the following voicemail:

> Hey Dr. [C.J.], I just want to let you know that I'm going to bust your fucking skull open you worthless bitch. You don't ever fucking talk to me like that you fucking whore. Fuck you. I'll bash your fucking skull. You're fucking dead. I'm going to carve you up you fucking whore. Shut the fuck up!

C.J. recognized petitioner's voice when her husband mentioned petitioner's name. She recognized petitioner's inflection and high-pitched voice due to prior therapy sessions where he had become agitated. Petitioner's voice sounded the same as when he was "anxious," "angry," or "stirred up" in his therapy sessions. About a month later, C.J. received the following voicemail from petitioner:

> Hey Dr. [C.J.], I just want to let you know what a fucking bitch you are. You don't talk to me about fucking dating you asshole. You should start dating. You should start dating. I can hurt you too you mother fucker. I'm going to carve you up, I'm going to rape you, I'm going to torture you, I'm going to fuck you up. I'll carve your fucking smile off your face you stupid bitch. I'm not going to fucking start dating! Fuck you!

Two days later, C.J. received the following voicemail from petitioner:

> "Hey Dr. [C.J.], I just want to let you know that I'm still planning on coming out there kidnapping you, torturing you, raping the living shit out of you, and then I've come up with a great idea, I'm going to set you on fire. You dumb fucking bitch. Fuck you! Maybe you think, maybe get laid. Your friends think you need to get laid. You thought that shit was funny. You're going to fucking die. Then I'm going to find your daughter. I'm going to rape and murder that bitch too. You're fucking dead."

Petitioner argues that counsel was ineffective because she did not investigate the possibility petitioner's violent conduct toward CJ was caused by the antidepressant he was taking at the time. If she had investigated this information she could have put on the defense that petitioner was voluntarily intoxicated by his medication thereby negating the specific intent element of the criminal threats.

In support, petitioner offers his own declaration in which he explains, amongst other matters, that the Lexapro he was prescribed contained a warning on the outside of the bag to call a healthcare provider if the patient experienced acting "aggressive or violent", but counsel did not investigate the possibility that the medication caused petitioner to be violent. (Exhibit A.)

Petitioner also offers the declaration of a "Strickland Expert", Dr. Richard Gates (Exhibit C), in which Dr. Gates opines that counsel should have presented petitioner's medical information to a mental health expert to get an opinion that would serve to negate the intent element of the charges against petitioner and that it was unreasonable of her not to do so.

Petitioner offers the Declaration of Dr. Alan Abrams, Ph.D., J.D., who explains the connection between Lexapro and aggressive or violent conduct, and the fact it was common knowledge in the mental health community that aggressive conduct is a side effect of the drug. Dr. Abrams concludes the drugs caused petitioner's outburst. (Exhibit D.) Dr. Abrams concludes that Dr. Raymond Murphy, a psychologist to whom petitioner was referred by Ms. Freeze for a mental health assessment before trial, likely had no background in psychopharmacology and made no mention of considering the impact of Lexapro on petitioner's actions. Dr. Abrams charges Ms. Freeze with failing to have meaningful understanding of the relationship between antidepressants and violence

Petitioner also includes the declaration of Dr. Selma Eikelenboom-Schieveld, M.D., Ph.D., a forensic medical examiner, who performed DNA testing on petitioner. She concluded that he metabolizes medications at a slower rate, which resulted in neurotoxicity at the time of the offenses. (Exhibit E.) She also concludes that his conduct was brought about by the side effects of his medication, was not the product of deliberation, and his intoxication prevented him from forming the requisite intent.

Petitioner also includes information regarding the connection between Lexapro, antidepressants and violence as a side effect. (Exhibits F-1, F-2, F-3.)

> A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's

> unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390–391, 120 S.Ct. 1495, 1511–1512, 146 L.Ed.2d 389, citing *Strickland v. Washington* (1984) 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *In re Jones* (1996) 13 Cal.4th 552, 561, 54 Cal.Rptr.2d 52, 917 P.2d 1175.) The ineffectiveness must "deprive the defendant of a substantive or procedural right to which the law entitles him." (*Williams v. Taylor, supra,* 529 U.S. at p. 393, 120 S.Ct. at p. 1513, fn. omitted.) "[T]here are situations in which the overriding focus on fundamental fairness may affect the analysis." (*Id.* at p. 391, 120 S.Ct. at p. 1512.)
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> [¶]...[¶]
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> "Defense counsel have the obligation to investigate all defenses, explore the factual bases for defenses [citation] and the applicable law. [Citation.]" (*People v. Maguire* (1998) 67 Cal.App.4th 1022, 1028, 79 Cal.Rptr.2d 573.) "The defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial. [Citations.]" (*In re Alvernaz, supra*, 2 Cal.4th at p. 933, 8 Cal.Rptr.2d 713, 830 P.2d 747.)

(*In re Vargas* (2000) 83 Cal.App.4th 1125, 1132-1133.)

Here, petitioner has failed to show that counsel was ineffective. He has not shown that counsel's performance was deficient and, even assuming it was deficient, that he suffered any prejudice as a result.

With regard to the expert declarations, any relevance or impact they might have on petitioner's claim is wholly undermined by the complete lack of documentation or specific facts indicating when exactly petitioner starting taking Lexapro, in what dosage, and when he stopped. Without this information, the opinions of the experts are mere hollow speculation.

More important, there were no facts presented to Ms. Freeze to urge her to even consider that petitioner was acting under the influence of his medication and not his own will and deliberation. Indeed, Dr. Raymond Murphy's report, which reported the results of interviews conducted with petitioner on May 19, 24, and 31, 2018 and June 4, 2018 indicated that when asked about his health, petitioner responded, in part: "Currently, I am medicated with Lexapro by my general practitioner for depression. I think it helps." (Exhibit G, p. 3.) Petitioner again reported that Lexapro had been helpful in treating his

depression and denied any homicidal ideation. (*Id.*) Petitioner dismisses this report as having served no purpose at trial because it did not address the critical element of specific intent. However, the report shows that there were no facts supporting a connection between the use of Lexapro at or around the time of the offenses, and petitioner's conduct such that would put counsel, or Dr. Murphy, on notice to investigate the matter further. Particularly given that petitioner insisted on maintaining his innocence, reported that Lexapro had been helpful, and appeared to Dr. Murphy to be in overall good mental and emotional health.

Thus, the experts' indictments of Ms. Freeze for failing to see the connection between Lexapro and petitioner's behavior are baseless. Indeed, the facts available to Ms. Freeze at the time indicated the opposite conclusion was prudent.

In her declaration, Ms. Freeze explains that petitioner insisted on presenting the defense that he was innocent, he was not the person who made the calls. (Exhibit B.) Of particular note, paragraph 11 of her declaration reads:

> Based on my almost daily conversations with Mr. Bathen, in person meetings with him, interviews with his family members, and Dr. Murphy's report, I did not explore the defense of medication playing a role in the case. However, I did ask Mr. Bathen if that could be a possibility, and he always responded that he wished to deny the allegations in their entirety in that he never made the phone calls, and if he did, the issue went to the "immediacy" aspect, as he was physically located on the other side of the county during the time of the alleged calls. Finally, I don't believe he indicated that he was taking Lexapro in June and July 2017.

Petitioner claims that there is a dispute about whether or not he denied being the person on the recordings in his consultations with Ms. Freeze. He claims he admitted in his first discussion with Ms. Freeze that he was the caller (Exhibit A, para. 20.) However, petitioner's claim is completely undermined by Dr. Murphy's report, which is consistent with and corroborates Ms. Freeze's account of petitioner's denial.

In his written report prepared pre-trial, Dr. Murphy quoted petitioner as making the following statements: "[C.J.] alleges I am a threat to her, that I threatened her life in June and July 2017. She says there were three voicemails that were left on her machine. The court issued subpoenas for the phone number used. [C.J.] claims it is me.

There is no factual basis for that claim. I deny that I made those voicemail messages." (Exhibit G., p. 6.) Petitioner continued: "[W]e had a phone consultation till 2009, and the relationship ended by e-mail about April 2009. I have had no contact with her since then and I didn't leave those threatening messages." (*Id.*) Petitioner was unequivocal in maintaining his innocence before Dr. Murphy. This report supports Ms. Freeze's statement in her declaration that petitioner insisted on presenting a defense that he was innocent. Incidentally, the fact that the defense of "I didn't do it, but if I did, there was no immediacy element" was, as Dr. Gates opined, internally inconsistent, weak, and illogical, is consistent with Ms. Freeze's explanation that it was petitioner's idea, and not that of a licensed, seasoned defense attorney.

Further, petitioner cites no authority for the proposition that counsel should have insisted, over petitioner's objection, on a defense which admitted guilt, but focused on mental state. In fact, the law requires that counsel defer to her client on this point. If a defendant insists on maintaining his innocence, counsel is duty bound to present a defense consistent with that precondition:

> The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta*, 422 U.S., at 819–820, 95 S.Ct. 2525; see *Gannett Co. v. DePasquale*, 443 U.S. 368, 382, n. 10, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense"). Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Gonzalez v. United States*, 553 U.S. 242, 248, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) (internal quotation marks and citations omitted). Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. See *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).
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> Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so

> may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are. See *Weaver v. Massachusetts*, 582 U.S. ——, ——, 137 S.Ct. 1899, 1908, 198 L.Ed.2d 420 (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.").

(*McCoy v. Louisiana* (2018) 138 S.Ct. 1500, 1508.) Here, counsel's declaration, under penalty of perjury, indicates that petitioner wanted to maintain his innocence in court. Her declaration is supported by statements petitioner made to Dr. Murphy. The decision to maintain innocence was petitioner's choice to make and counsel could not argue a theory, such as voluntary intoxication, that was inconsistent with innocence. To do so would have been ineffective assistance of counsel.

In sum, though petitioner claims counsel failed to investigate the defense of voluntary intoxication based on adverse side effects from petitioner's use of Lexapro, the documentation provided in support of the petition shows that counsel did investigate and her investigation, together with petitioner's insistence on proclaiming innocence, provided no basis for that particular defense. Accordingly, counsel was not deficient in failing to present the defense of voluntary intoxication.

However, even assuming Ms. Freeze had been deficient in not probing the matter of petitioner's mental health further, petitioner has not shown that he suffered any prejudice as a result. Petitioner insists that a defense based on voluntary intoxication was the only legitimate defense. However, he does not establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

> A defendant is entitled to such an instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent." (*People v. Horton* (1995) 11 Cal.4th 1068, 1119, 47 Cal.Rptr.2d 516, 906

> P.2d 478; see also *People v. Saille* (1991) 54 Cal.3d 1103, 1117, 2 Cal.Rptr.2d 364, 820 P.2d 588 [explaining that a defendant charged with murder is free to show that "because of his mental illness or voluntary intoxication, he did not in fact form the intent unlawfully to kill" (original italics) ].) Here, defendant sought the instruction based solely on witness DeLisa Brown's testimony that defendant was "probably spaced out" on the morning of the killings. He now seeks to bolster that argument by pointing to comments he had made in the recorded interview with police that around the time of the killings he was "doped up" and "smokin' pretty tough then." Even if we consider all three of these statements, there was no error. Assuming this scant evidence of defendant's voluntary intoxication would qualify as "substantial," there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent.
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> (*People v. Williams* (1997) 16 Cal.4th 635, 677–678.)

Petitioner fails to provide any specific facts, details, or legal authority to support the contention that he would have been entitled to a voluntary intoxication defense instruction based on the circumstances of his offense. Specifically, there is no basis to conclude that the voluntary intoxication he claims he could have been experiencing at the time he made the threats, prevented him from forming the specific intent necessary to commit the offense. Petitioner does not explain how voluntary intoxication and antidepressant induced violent outbursts intersected to mitigate the specific intent element of making a criminal threat. He does not even attempt to explain how the fact Lexapro could cause violent outburst negates his mental state. He does not explain how the Lexapro rendered petitioner unable to appreciate that his conduct was violent or unable to control himself in those moments. There is no indication the violent outburst coincided with a loss of consciousness. There are no facts, evidence, documentation, or legal authority provided to show that such was the case. Petitioner admits in his declaration (Exhibit A, para 24), that he stopped taking antidepressants over one year ago and has had no outbursts since stopping the medication. However, the declaration is not dated. More important, he does not point to any other examples of violent outbursts that occurred while he was on the medication, no specific facts regarding a pattern of violence toward any other persons. Additionally, the facts deduced at trial

were that petitioner was angry with C.J. for terminating their doctor-patient relationship; in other words, petitioner had a motive for his conduct.

Accordingly, there is no basis to conclude that: 1) the trial court would have permitted the defense of voluntary intoxication and instructed the jury accordingly; and, 2) the defense would have had any chance of success with the jury such that petitioner missed the opportunity for a meaningful defense that might have resulted in a more favorable outcome. Petitioner simply concludes, without any meaningful examination of the relevant law as applicable to his facts, that he could have presented this defense instead. This is not sufficient to establish prejudice.

Pursuant to the foregoing, the petition is denied.

The request for judicial notice pf the appellate record from petitioner's appeal is also denied. Petitioner does not specify which records are at issue and has not provide this court with copies of those records as required. (Evid., Code, § 453.) The court does not have the copy of the appellate record that was prepared for the appeal; only the exhibits were returned to the county clerk. There were no other records returned from the court of appeal to this court.

A copy of this Order shall be served upon: 1) petitioner, Benjamin Bathen 1741 Santa Cruz Avenue, Santa Clara, CA 95051; 2) petitioner's counsel, Patrick Morgan Ford, 1901 First Avenue, Suite 400, San Diego, CA 92101; and, 3) the Office of the San Diego District Attorney, 330 West Broadway, San Diego, CA 92101.

IT IS SO ORDERED.

DATE: 5/6/2020

TIMOTHY R. WALSH
JUDGE OF THE SUPERIOR COURT

| SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO | FOR COURT USE ONLY |
|---|---|
| ☐ CENTRAL DIVISION, CENTRAL COURTHOUSE, 1100 UNION ST., SAN DIEGO, CA 92101<br>☐ CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101<br>☐ CENTRAL DIVISION, HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101<br>☐ CENTRAL DIVISION, FAMILY COURT, 1555 6TH AVE., SAN DIEGO, CA 92101<br>☐ CENTRAL DIVISION, MADGE BRADLEY, 1409 4TH AVE., SAN DIEGO, CA 92101<br>☐ CENTRAL DIVISION, KEARNY MESA, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123<br>☐ CENTRAL DIVISION, JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123<br>☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020<br>☐ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081<br>☐ NORTH COUNTY DIVISION, JUVENILE COURT, 325 S. MELROSE DR., VISTA, CA 92081<br>☒ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910 | **FILED**<br>San Diego Superior Court<br>MAY 06 2020<br>Clerk of the Superior Court<br>By: M. Gallardo |
| PLAINTIFF(S)/PETITIONER(S)<br>in the matter of the application of BENJAMIN L. BATHEN for petition for writ of Habeas Corpus | |
| DEFENDANT(S)/RESPONDENT(S) | JUDGE: TIMOTHY R. WALSH<br>DEPT: |
| **CLERK'S CERTIFICATE OF SERVICE BY MAIL** | CASE NUMBER<br>HSC 11777 |

I certify that I am not a party to the above-entitled cause, that I placed a copy of the following document(s):
ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

in a sealed envelope addressed to the parties shown with postage prepaid, and deposited it in the United States mail at ☒ Chula Vista ☐ El Cajon ☐ San Diego ☐ Vista, California.

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Date: May 6, 2020

Clerk of the Superior Court

by M. Gallardo, Deputy
M. Gallardo