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

THOMAS GOMEZ,)	Case No. CV 20-2393-DOC (JPR)
)	
Petitioner,)	
)	ORDER ACCEPTING FINDINGS AND
v.)	RECOMMENDATIONS OF U.S.
)	MAGISTRATE JUDGE
RON GODWIN, Acting Warden,)	
)	
Respondent.)	
)	
)	

The Court has reviewed the records on file and the Report and Recommendation of U.S. Magistrate Judge, which recommends that the Court grant Respondent's motion to dismiss the Petition. On February 12, 2021, Petitioner filed Objections to the R. & R., in which he mostly simply repeats arguments from his opposition to Respondent's motion. The Court accepts the findings and recommendations of the Magistrate Judge.

Petitioner doesn't dispute that the Magistrate Judge correctly found that the portions of grounds one and two contending that his original conviction was unconstitutional are untimely and that ground three is both untimely and impermissibly successive. (See R. & R. at 6-9 & n.5.) He argues, however,

1 that his challenge to the denial of his section 1170.95
2 resentencing petition, which the Magistrate Judge deemed timely
3 but not cognizable on federal habeas review, presents a federal
4 claim. Specifically, he argues that Senate Bill 1437 "creat[ed]
5 a liberty interest" by abolishing the natural-and-probable-
6 consequences theory of guilt for murder and that the state court
7 therefore violated his right to due process when it denied his
8 allegedly meritorious resentencing petition. (Objs. at 2, 4.)

9 Initially, as the Magistrate Judge recognized (see R. & R.
10 at 10), federal courts have routinely held that challenges like
11 Petitioner's "pertain solely to the state court's interpretation
12 and application of state sentencing law and therefore are not
13 cognizable" on federal habeas review. Cole v. Sullivan, 480 F.
14 Supp. 3d 1089, 1097 (C.D. Cal. 2020); see Huynh v. Lizarraga, No.
15 15cv1924-BTM (AGS), 2020 WL 1324826, at *42 (S.D. Cal. Mar. 20,
16 2020) ("[A]ny entitlement to relief [under section 1170.95] is
17 strictly a matter of the application of state law to which this
18 Court must defer."), appeal filed, No. 20-55343 (9th Cir. Apr. 1,
19 2020); see also Bellows v. Adams, No. CV 16-09608-DOC (SHK), 2019
20 WL 3220024, at *4 (C.D. Cal. Mar. 26, 2019) (denying petitioner's
21 motion for stay to exhaust claim under SB 1437 and section
22 1170.95 when it wasn't "cognizable on federal habeas review
23 because whether Petitioner is entitled to relief under [section
24 1170.95] is solely a matter of state law"), accepted by 2019 WL
25 1924977 (C.D. Cal. Apr. 29, 2019).

26 Even if SB 1437 does create a liberty interest for some
27 defendants because it requires that those convicted of first- or
28 second-degree murder under a felony-murder or natural-and-

1 probable-consequences theory be resentenced, see § 1170.95(a);
2 Bd. of Pardons v. Allen, 482 U.S. 369, 377-78 (1987) (to create
3 liberty interest, state law should include “mandatory language”
4 giving rise to presumption that relief will be granted when or
5 unless certain findings are made), the Magistrate Judge correctly
6 found that Petitioner was not in that group.

7 As she observed (see R. & R. at 12), the state court held in
8 denying Petitioner’s resentencing petition that he was “not
9 entitled to relief as a matter of law” because the record
10 reflected that he was “the actual killer or . . . harbored the
11 intent to kill by aiding and abetting the actual killer in the
12 commission of murder.” (Lodged Doc. 5 at 1; see id. at 2-3.)
13 Petitioner insists that because the jury found not true that he
14 personally used a firearm during the crime, it necessarily found
15 that he was “not the ‘Actual Killer.’” (Objs. at 5.) But as the
16 Magistrate Judge pointed out, even if he was not the shooter and
17 instead directly aided and abetted the murder, as the court of
18 appeal noted was possible (see Lodged Doc. 3 at 22-24),¹ then he
19 was still guilty of first-degree murder without application of
20 the natural-and-probable-consequences theory. (See R. & R. at
21 12.) He therefore wasn’t entitled to section 1170.95
22 resentencing. See Cole, 480 F. Supp. 3d at 1098 & n.8 (holding
23 that denial of section 1170.95 petition did not deprive
24 petitioner of due process because he was “actual killer” and
25 therefore “not convicted of felony murder or murder under a
26

27 ¹ Petitioner concedes that the jury was instructed on direct
28 aiding-and-abetting guilt. (Objs. at 3.)

1 natural and probable consequences theory"); Blacher v. Pollard,
2 No. 20-cv-07057-CRB (PR), 2020 WL 8484690, at *3 (N.D. Cal. Dec.
3 11, 2020) (dismissing claim that denial of petitioner's section
4 1170.95 petition "violated his federal rights" when state court
5 found that petitioner was not eligible for resentencing because
6 he couldn't satisfy one condition for relief).

7 It is true, as Petitioner contends, that the prosecution's
8 theory of guilt was that Petitioner was the "actual killer,"
9 which the jury likely rejected because it found not true that he
10 personally used a firearm, and he "could not have aided and
11 abetted himself." (Objs. at 5-6.) But there is no prohibition
12 on inconsistent jury verdicts. See United States v. Powell, 469
13 U.S. 57, 65 (1984) (noting that "nothing in the Constitution"
14 requires protecting defendants from inconsistent jury verdicts).
15 And as the state court found and the Magistrate Judge recognized,
16 the evidence amply demonstrated that he had the intent to kill
17 necessary for direct aiding and abetting. (See Lodged Doc. 5 at
18 1-3; R. & R. at 12.)

19 In any event, even if SB 1437 applied to Petitioner and the
20 state court's denial of his resentencing petition was erroneous,
21 his claim still fails because he hasn't demonstrated that the
22 court's application of California law was "so arbitrary or
23 capricious as to constitute an independent due process
24 [violation]." Richmond v. Lewis, 506 U.S. 40, 50 (1992) (state
25 court's misapplication of state sentencing law may violate due
26 process only if petitioner can demonstrate both error and that
27 error was "so arbitrary or capricious as to constitute an
28 independent due process . . . violation" (citation omitted)); see

1 Blacher, 2020 WL 8484690, at *3 (dismissing section 1170.95
2 resentencing claim when superior court's application of
3 sentencing law was "neither erroneous nor 'so arbitrary or
4 capricious as to constitute an independent due process
5 [violation]'" (quoting Richmond, 506 U.S. at 50) (alteration in
6 original)).

7 Petitioner contends that the state court improperly
8 determined that he was a "major participant" in the crimes and
9 "acted with reckless indifference" without first allowing him to
10 present evidence at a hearing. (See Objs. at 8 (citing People v.
11 Drayton, 47 Cal. App. 5th 965 (2020)).) Although the superior
12 court didn't make those findings in denying his resentencing
13 petition (see Lodged Doc. 5), it did in denying his habeas
14 petition challenging that ruling (see Lodged Doc. 12). But
15 unlike in Drayton, in which the petitioner sought resentencing
16 after being convicted under a felony-murder theory and therefore
17 had to prove that he wasn't a "major participant" and didn't "act
18 with reckless indifference," id. at 982, Petitioner's claim was
19 based on his alleged conviction under a natural-and-probable-
20 consequences theory (see Lodged Doc. 11 at 3-6). The court
21 therefore didn't need to make those findings or hold a hearing
22 once it concluded that he wasn't entitled to relief as a matter
23 of law because he wasn't convicted under that theory. (See
24 Lodged Docs. 5 & 12); People v. Verdugo, 44 Cal. App. 5th 320,
25 323, 336 (2020) (rejecting argument that superior court erred
26 when it summarily denied defendant's resentencing petition
27 without appointing him counsel or allowing briefing when denial
28 was "properly based on its ruling [that defendant] was ineligible

1 for relief as a matter of law" because record reflected that he
2 was convicted as direct aider and abettor and not under natural-
3 and-probable-consequences theory), review granted, 459 P.3d 1122
4 (Cal. 2020).

5 IT THEREFORE IS ORDERED that Respondent's motion to dismiss
6 the Petition is GRANTED and this action is dismissed with
7 prejudice.

David O. Carter

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9 DATED: March 8, 2021

10 DAVID O. CARTER
11 U.S. DISTRICT JUDGE
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