APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

In re KELLEY LYNCH, on Habeas Corpus.	No. BX 001309 Central Trial Court No. 2CA04539 **ORDER**

The court has read and considered petitioner Kelley Lynch's petition for writ of habeas corpus filed on April 30, 2013.

The petition is denied.

Petitioner was convicted in a jury trial on April 12, 2012 of five counts of violating a court order (Pen. Code, § 273.6, subd. (a))[1], and two counts of making annoying telephone calls and sending annoying e-mails (§ 653m. subd. (b)). As indicated in the opinion affirming petitioner's convictions on appeal filed on today's date (case No. BR 050096), the evidence presented at petitioner's trial showed that petitioner called the victim dozens of times and sent him thousands of e-mails. Many of the calls and e-mails contained threats to the victim's personal safety and directed profane insults at him, and the calls and e-mails continued even after a Colorado protective order was registered in California. Petitioner testified at her trial

[1] All further statutory references are to the Penal Code unless otherwise stated.

and admitted she made the calls and sent the e-mails, but asserted they were made and sent for the legitimate business purpose of trying to obtain financial information from the victim so she could prepare her tax returns regarding income she received while working for him.

The petition is denied for failure to provide any documentary evidence to support her arguments. The petition summarizes several documents, such as e-mails and the contents of an "IRS Binder," but does not attach any of these items to the petition or explain why they cannot be attached. Because a petition for writ of habeas corpus "'seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them.' [Citation.] At the pleading stage, the petition must state a prima facie case for relief. To that end, the petition 'should both (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations.' [Citations.]" (*In re Martinez* (2009) 46 Cal.4th 945, 955-956.) "'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.' [Citation.] We presume the regularity of proceedings that resulted in a final judgment [citation], and, as stated above, the burden is on the petitioner to establish grounds for [relief].'" (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The petition is fatally deficient due to its total lack of supporting documentary evidence.

The petition is also denied because none of petitioner's numerous arguments warrant granting relief.

Many of the grounds asserted by petitioner either were raised in her direct appeal or could have been raised on appeal. These include her arguments that improper character evidence was admitted at her trial; that her arrest was unlawful; that the trial court lacked personal jurisdiction over her; that the underlying protective order was invalid; that the evidence at trial showed she had no knowledge of the protective order and she was not served with the order; that the court erred in not allowing her to call two witnesses in her defense; that

///

prosecutorial misconduct occurred during the trial; and that criminalizing her speech violated the First Amendment.

"'It is well settled that a writ of habeas corpus ordinarily may not be employed as a substitute for an appeal.' [Citation.]" (*In re Harris* (1993) 5 Cal.4th 813, 826-827.) A habeas petition thus cannot serve as a second appeal. (*In re Terry* (1971) 4 Cal.3d 911, 927.) Petitioner has failed to allege sufficient facts establishing an exception to the rule barring consideration of claims in a habeas petition that could or should have been raised on appeal. (*In re Harris, supra*, 5 Cal.4th at pp. 825-826; *In re Dixon* (1953) 41 Cal.2d 755, 759.)

Petitioner further argues that her trial counsel was ineffective. Petitioner contends that her counsel did not communicate to her the prosecutor's plea offer until voir dire had started in her trial; that by that time, it was too late for her to accept the offer; that she would have accepted the offer had counsel timely informed her of the offer; and that the offer was more favorable to her than the sentence that was imposed after she was convicted at trial.

"In determining whether a defendant, with effective assistance, would have accepted the offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

Petitioner has not shown ineffective assistance of counsel because there is no indication that she was amenable to accepting any plea offer. Moreover, "a defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she would have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence." (*In re Alvernaz, supra*, 2 Cal.4th at p. 938.) Petitioner's argument therefore fails because her assertion that she would have accepted the plea offer was not corroborated.

Petitioner makes many additional arguments regarding why her counsel was ineffective, including her counsel failed to attack the messages and e-mails' authenticity; failed to make

arguments to the jury explaining why she made the calls and sent the e-mails; failed to subpoena witnesses to impeach the victim; failed to object to prosecutorial misconduct; and failed to move to exclude character evidence.

Under *Strickland v. Washington* (1984) 466 U.S. 668, 694, in order to establish ineffective assistance of counsel, it must be proved both that counsel's performance fell below the objective standard of reasonableness expected of an attorney, and that counsel's performance was prejudicial to the defendant. Petitioner's claims lack merit because, assuming without deciding that counsel's performance fell below the objective standard of reasonableness, petitioner has failed to establish prejudice.

Petitioner did not demonstrate in her petition that "there is a reasonable probability that but for counsel's unprofessional errors, the results of the proceedings would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) The proof at trial of petitioner's guilt was extremely strong. The jury heard and considered evidence of dozens of telephone calls she admitted she made and thousands of e-mails she admitted she sent. Given the content of the calls and e-mails, and the implausibility that they were made and sent for a legitimate business purpose, there is no reasonable probability of a different outcome with respect to her convictions.

Petitioner further argues that false evidence was presented at her trial, and that the prosecution violated her right to due process by withholding exculpatory evidence.

"[U]nder Penal Code section 1473, a [petitioner] may seek relief in habeas corpus on, among other grounds, that '[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against [him] at any hearing or trial relating to his incarceration . . . .' (Pen. Code, § 1473, subd. (b)(1).) [¶] False evidence is 'substantially material or probative' if it is 'of such significance that it may have affected the outcome,' in the sense that 'with reasonable probability it could have affected the outcome . . . .' [Citation.] In other words, false evidence passes the indicated threshold if there is a 'reasonable probability' that, had it not been introduced, the result would have been different." (*In re Sassounian* (1995) 9 Cal.4th 535, 546, italics omitted.)

With respect to withholding exculpatory evidence, "[u]nder the due process clause of the Fourteenth Amendment to the United States Constitution, a [petitioner] may seek relief in habeas corpus on the ground that the prosecution did not disclose evidence. [¶] The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant. [Citation.] [¶] But such evidence must be both favorable to the defendant and material on either guilt or punishment. [Citation.]" (*In re Sassounian, supra*, 9 Cal.4th at p. 543.) "Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.'" (*Id.* at p. 544.)

Petitioner's arguments regarding false evidence and violation of due process fail due to insufficient showing of prejudice. Given the strength of the case against her, there is simply no reasonable probability that, had the false evidence not been presented and the exculpatory evidence been disclosed to her, the result at her trial would have been different.

Lastly, petitioner argues that the cumulative impact of all the errors prejudiced her right to a fair trial. The argument lacks merit because, given the overwhelming evidence of petitioner's guilt presented at her trial, "[n]o reasonable possibility exists that the jury would have reached a different result absent any of the acknowledged or asserted errors under the applicable federal or state standard of review. [Citations.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1233.)

Ricciardulli, J.