

**APPENDIX — OPINIONS, ORDERS, FINDINGS OF
FACT, AND CONCLUSIONS OF LAW, WHETHER
WRITTEN OR ORALLY GIVEN AND TRANSCRIBED,
ENTERED IN CONJUNCTION WITH THE JUDGMENT
SOUGHT TO BE REVIEWED.**

**1. Ninth Circuit order denying
application for certificate of appealability.**

FILED
AUG 18 2017
MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIDEOFOR AJAELO,

Petitioner-Appellant,
v.

RAYMOND MADDEN,

Respondent-Appellee.

No. 17-16315
D.C. No.
3:16-cv-06962-WHA
Northern District of
California, San Francisco

ORDER

Before: FARRIS and LEAVY, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied. Appellant has not shown that “jurists of

reason would find it debatable whether the 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.” Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

2. District Court opinion dismissing habeas corpus petition.

Ajaelo v. Madden

United States District Court for the Northern District of California May 24, 2017, Decided; May 24, 2017, Filed No. C 16-06962 WHA

Reporter : 2017 U.S. Dist. LEXIS 79968 *

JIDEOFOR AJAELO, Petitioner, v. RAYMOND MADDEN, Warden, Respondent. Prior History: Ajaelo v. Madden, 2016 U.S. Dist. LEXIS 170869 (N.D. Cal., Dec. 8, 2016) Core Terms

habeas petition, courts, motion to dismiss

Counsel:

For Jideofor Ajaelo, Petitioner: Robert Joseph Beles, Law
Offices of Beles &. Beles, Oakland, CA.

For Raymond Madden, Warden, California State Prison,
Centinela, Respondent: Roni Dina Pomerantz, Department
of Justice, San Francisco, CA.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT
JUDGE. Opinion by: WILLIAM ALSUP

Opinion

ORDER GRANTING MOTION TO DISMISS HABEAS
PETITION

INTRODUCTION

In this habeas action, respondent moves to dismiss the
petition as untimely. For the reasons stated below, the
motion to dismiss is GRANTED.

ANALYSIS

In 2007, a jury in Alameda County Superior Court convicted
petitioner Jideofor Ajaelo of first-degree murder (committed
by drive-by shooting) and three counts of attempted murder
(involving a firearm). He received a sentence of 25 years to
life in prison without the possibility of parole.

Ajaelo took a direct appeal on issues not presented in the instant habeas petition, but he also appealed the charge to the jury inasmuch as it instructed that petitioner could be found guilty of aiding and abetting attempted premeditated murder on a natural and probable consequence theory even if he lacked the intent to kill.

The California Court of Appeal affirmed the judgment, and the California Supreme Court

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denied review. Ajaelo did not seek a writ of certiorari to the United States Supreme Court.

In 2014, the California Supreme Court decided *People v. Chiu*, 59 Cal. 4th 155, 166, 172 Cal. Rptr. 3d 438, 325 P.3d 972 (2014), holding that a first-degree premeditated murder conviction could not be based on the natural and probable consequence theory. In other words, the California Supreme Court announced a rule that may have invalidated a charge to the jury that convicted Ajaelo.

In 2015, Ajaelo sought habeas relief in Alameda County Superior Court based on *Chiu*, which relief was denied based on a finding that Ajaelo had suffered no prejudice due to that instruction, in light of another jury finding that included as an element the intent to inflict death.

Ajaelo next sought the same relief from the California Court of Appeal, which relief was summarily denied. Ajaelo then

sought review by the California Supreme Court, alleging that the Court of Appeal had improperly denied his habeas petition. After entertaining an answer from the state, the California Supreme Court summarily denied review.

Ajaelo now seeks federal habeas relief pursuant to Section 2254 of Title 28 of the United States Code, seeking to reverse his conviction based on Chiu. Respondent moves to dismiss the action as untimely. This order follows full briefing

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on the motion to dismiss.

ANALYSIS The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposed a one-year statute of limitations that applies to federal habeas petitions. 28 U.S.C. 2244(d). All agree that the limitations period for a federal habeas petition generally commences on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). Here, the judgment became final in 2009, after the California Supreme Court denied review on direct appeal and the time to seek certiorari from the United States Supreme Court elapsed. Ajaelo's state-court petition was filed more than five years later, in 2015, well outside the limitations period based on that start date.

Ajaelo contends he is entitled to an alternative start date, pursuant to Section 2244(d)(1)(C) under AEDPA, which

restarts the clock on the limitations period from "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . "

The constitutional rule asserted was announced in Chiu — a decision from the California

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Supreme Court. Ajaelo contends Section 2244(d)(1)(C) applies to rules announced by the Supreme Court or the state supreme courts.

Ajaelo cites no authority directly supporting his position. None exists. Instead, Ajaelo responds that no binding authority has addressed his argument precisely and that his interpretation flows from the plain language of the statute.

The United States Supreme Court has previously interpreted the language of Section 2244(d)(1)(C) (as it appears identically in a different section) to afford an applicant "one year from the date on which the right he asserts was initially recognized by this Court" (referring to the Supreme Court). *Dodd v. United States*, 545 U.S. 353, 357, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005) (emphasis added). Moreover, every district court to address this question has rejected the argument that Chiu provides an alternative start date under Section 2244(d)(1). See, e.g., *Rettman v. Fisher*, No. 16-0885, 2017 U.S. Dist. LEXIS 58451, 2017 WL 1375201, at *3 (E D. Cal. Apr. 17, 2017)

(Judge Kendell Newman); *Lamar v. Adams*, No. 16-1269, 2017 U.S. Dist. LEXIS 65256, 2017 WL 1540175, at *3 (E.D. Cal. Apr. 28, 2017) (Judge Allison Claire); *Escalante v. Beard*, No. 15-2514, 2016 U.S. Dist. LEXIS 123440, 2016 WL 4742322 (S.D. Cal. June 2, 2016) (Judge Nita Stormes). The weight of authority uniformly supports respondent's interpretation. Ajalo's plain language argument fares no better. First, Ajalo's interpretation does not flow from the plain language of the statute. The statute refers to "the Supreme Court," using a definitive article and singular noun, indicating reference to a single entity, rather than a category with multiple members. Second, some states' highest courts are not called the "supreme court" and conversely, some states' "supreme courts" are not the highest courts in the state. Ajalo's interpretation would lead to the absurd result of vastly different and confusing procedures in different states for the administration of federal law. Finally, if Ajalo's interpretation applied throughout the statute, the interactions within the federal court system contemplated by AEDPA would become absurd. For example, state supreme courts would be empowered to transfer a writ of habeas corpus to federal district courts. See 28 U.S.C. 2241(b).

Neither the plain language of Section 2244(d)(1)(C) nor any authority interpreting that language supports Ajalo's position. Only a right recognized by the United States Supreme Court can trigger a new start date for the limitations period on a habeas petition. Accordingly, Ajalo's petition is untimely and must be DISMISSED.

CONCLUSION

For the reasons stated above, respondent's motion to dismiss is GRANTED. A certificate of appealability is DENIED. Judgment will follow.

IT IS SO ORDERED.

Dated: May 24, 2017.

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

JUDGMENT

For the reasons stated in the accompanying order dismissing

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this action, FINAL JUDGMENT IS HEREBY ENTERED in favor of respondent Raymond Madden and against petitioner Jideofor Ajalo. The Clerk SHALL CLOSE THE FILE.

IT IS SO ORDERED. Dated: May 24, 2017. /s/ William Alsup

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

3. California Supreme Court order denying petition for review

In re Ajaelo
Supreme Court of California
November 9, 2016, Opinion Filed

S237276

Reporter 2016 Cal. LEXIS 9194 *

In re JIDEOFOR AJAELO on Habeas Corpus.

Prior History: [*1] First Appellate District, Division Three,
No. A149124.

People v. Ajaelo (Jideofor), 2009 Cal. LEXIS 5382 (Cal., May
20, 2009)

Opinion

The petition for review is denied.

End of Document

**4. California Court of Appeal order
denying petition for writ of habeas corpus**

(Petition summarily denied by order)

**5. Superior Court order denying
petition for writ of habeas corpus.**

ENDORSED FILED
ALAMEDA COUNTY
JUL 22 2016
CLERK OF THE SUPERIOR COURT
By-FIL E CRUZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

IN RE

JIDEOFOR AJAELO,

on Habeas Corpus.

No.148769B

ORDER DENYING
PETITION FOR WRIT OF
HABEAS CORPUS

This court having reviewed the amended petition for writ of habeas corpus filed by Petitioner JIDEOFOR AJAELO on May 26, 2016, the lodged transcripts of the trial, the informal response to the Petition filed by the District Attorney for the County of Alameda on behalf of Respondent on December 16, 2015, the informal reply to the informal response filed by Petitioner on June 14, 2016, and the court file, 'NOW HEREBY ORDERS:

The Petition is denied for failure to state a prima facie case for relief.

PROCEDURAL BACKGROUND

In 2007, a jury convicted Petitioner of one count of murder (Penal Code,² § 187) and three counts of attempted murder (§§ 187,664). The jury also found true the special circumstance allegation that the murder on count one was perpetrated by means of a drive by shooting within the meaning of section 1902 (a)(21), and the allegations that Petitioner was armed with a firearm during the commission of all four crimes (§12022 (a)(1)).

The court takes judicial notice of the court file pursuant to Evidence Code section 452(d).

2 All further statutory references are to the Penal Code unless otherwise indicated.

Later that year, the trial court sentenced Petitioner to life without possibility of parole.

DISCUSSION

Citing to *People v. Chiu* (2014) 59 Cal.4th 145 (Chiu), Petitioner moves to vacate his conviction for first degree murder and the true finding for the attendant special circumstance allegation under Penal Code section 190.2(a)(21), which the parties refer to, and so does this court, as the "drive-by special."

Chiu held that "an aider and abettor may not be convicted of first degree premeditated murder under the natural and

probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. [Citation.]" (Chiu, supra, 59 Cal.4th at pp. 158-159.) Chiu is retroactive on collateral review. (In re Lopez (2016) 246 Cal.App.4th 350.)

As the District Attorney concedes, the People argued to the jury that Petitioner could be guilty of first degree murder under the natural and probable consequence doctrine, which under Chiu is error. The court also instructed on that theory of liability. Thus, Petitioner is correct that the trial court committed instructional error under Chiu.

Next, the court must determine whether the instructional error was harmless. (Chiu, supra, 59 Cal. 4th at p. 167.) "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally

incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (Ibid.) Petitioner's first degree murder conviction and special circumstance finding must be reversed unless this court "conclude[s] beyond a reasonable doubt that the jury based its verdict on the legally valid theory that [Petitioner] directly aided and abetted the premeditated murder." (Ibid) As discussed briefly below, this court finds that the instructional error was harmless.

Chiu does not "affect or limit an aider and abettor's liability for

first degree felony murder under section 189." (Chiu, *supra*, 59 Cal. 4th at p. 166.) "Alders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles. ([Citation omitted.]) Under those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." (Id. at pp. 166-167.)

Here, in addition to the natural and probable consequences theory of liability, the trial court also instructed on direct aider and abettor theory. The People offered, and the trial court instructed on two theories of first degree murder: premeditation and deliberation and shooting a firearm from a motor vehicle. A drive-by shooting is first degree murder where it is "perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death." (§ 189.) Under both theories for first degree murder, the jury was required to find that Petitioner had the intent to kill under a direct aider and abettor theory. However, under the natural consequence theory, the jury could have found Petitioner guilty of first degree murder even if he didn't have the intent to kill because the a fatal shooting is a foreseeable resulting harm of shooting from a vehicle.

However, Petitioner was also charged with the drive-by special. The drive-by special requires that the jury find that a defendant acted with the intent to kill whether the defendant is the actual shooter or an aider and abettor. (See § 190.2(c);

People v. Chavez (2004) 118 Cal. App. 4th 379, 386; People v. Rodriguez (1998) 66 Cal.App.4th 157, 164.) The court so instructed the jury pursuant to CALJIC 8.25.1. The jury found true the drive-by special connected to the first murder, which means that the verdict was unanimously and beyond a reasonable doubt. In so doing, the jury verdict on the drive-by special provides a basis in the record for this court to conclude beyond a reasonable doubt that the

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first degree murder verdict was based on the legally valid theory of first degree murder pursuant to section 189. Petitioner has not provided a basis, from the record, for this court to conclude that the jury reached inconstant verdicts of finding Petitioner guilty of first degree murder under the natural and probable consequence theory but then finding the drive-by special circumstance allegation. In sum, Petitioner is not entitled to relief requested.

DISPOSITION

Accordingly, the Petition is denied for failure to state a prima facie case for relief.

DATED: JUL 22 2016

LARRY J. GOODMAN

HON. LARRY J. GOODMAN JUDGE OF THE SUPERIOR
COURT