IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE	)	Case No. S226596
	)	
	)	Court of Appeal Case Nos.
HECTOR MARTINEZ,	)	D066705, D058929
	)	
On Habeas Corpus.	)	Superior Court Case No.
	)	SCD224457
	)	

AFTER DECISION OF THE FOURTH APPELLATE DISTRICT, DIVISION ONE FROM THE JUDGMENT OF THE SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO, THE HONORABLE ROBERT F. O'NEILL, JUDGE PRESIDING

REPLY BRIEF ON THE MERITS

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I

INTRODUCTION

As is customary, this reply brief is confined to recent developments and matters addressed in respondent's brief, on which appellant believes further discussion would be helpful to this Court. The absence of a point from this reply brief means only that it falls into neither of those categories. No point made in the opening brief is withdrawn or abandoned unless it is done so explicitly.

II

PETITIONER HAS ESTABLISHED A PRIMA FACE CASE FOR HABEAS RELIEF

Respondent acknowledges the applicability to petitioner's claim of the substantive rule announced in *People v. Chiu* (2014 59 Cal. 4th 155 (*Chiu*) (AB at 20 fn.6) However, respondent urges that petitioner has failed to prove he is not guilty of first degree murder as a matter of law and, therefore, he is not entitled to habeas relief. (RB at 11.) Petitioner, on the other hand, urges that he is entitled to

habeas relief unless this Court can find beyond a reasonable doubt that his first degree murder conviction was based on the legally valid theory that petitioner directly aided and abetted the premeditated murder. (*People v. Guiton* (1993) 4 Cal. 4th 1116, *Chiu* at 67.) Respondent also argues that instead of the *Chapman* standard, (*Chapman v. California* (1967) 386 U.S. 18 24 [87 S. Ct. 824, 17 L. Ed. 2d 705) applied on direct appeal in *Chiu*, this Court should apply the *Watson* standard. (*People v. Watson* (1956) 46 Cal. 2d 818, 836.) Petitioner maintains that anything less than the harmless beyond a reasonable doubt standard would, through no fault of petitioner, put him at a disadvantage over a person whose direct appeal was still pending when *Chiu* was decided, thus denying him the full retroactive benefit to which he is entitled.

Relief by way of writ of habeas corpus is available when the defendant could not be expected to obtain relief through the normal appellate process. (*In re Harris* (1993) 5 Cal. 4th 813,. 828-829.) Furthermore, a petitioner may raise an issue in habeas corpus proceedings if an intervening change in the law has occurred, even if the issue was raised on direct appeal. (*Id. at p. 841.*) See *In re Lucero* (2011) 200 Cal. App. 4th 38. This is the situation presented here. Petitioner raised the issue presented now on habeas on direct appeal and this Court denied his Petition for Review without prejudice to whatever relief he may be entitled to after the decision in *Chiu* which was then pending.

Respondent relies on a line of cases that are only partially applicable to the instant situation. It is well established that habeas corpus is available in cases where the court has acted in excess of its jurisdiction. (Pen. Code, § 1487, subd. 1; *Neal v. State of California* (1960) 55 Cal.2d 11, 16) The term 'jurisdiction' is not limited to its fundamental meaning, and in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the court's powers as defined by constitutional provision, statute, or rules developed by courts. In accordance with these principles a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his *conduct.* (*People v Mutch* (1971) 4 Cal. 3d 389, 396, quoting *In re Zerbe* (1964) 60 Cal.2d 666, 667-668. [citations committed] [emphasis added.] Under this line of cases, it is only where it appears as a matter of law that the defendant's *conduct* did not violate the statute under which he was convicted that the defendant is entitled to collateral relief under *Zerbe* [emphasis added]. (See *People v. Timmons* (1971) 4 Cal.3d 411, 416). However, as petitioner discusses below this line of cases, which is relied on by respondent, is not only not dispositive but is not particularly helpful in resolving the issue before this Court as *Chiu*'s holding is not grounded on sufficiency of the evidence or the conduct of the defendant but on the mental state a jury is legally permitted to infer from a defendant's conduct. See *In re Johnson*

2016 Cal. App. LEXIS 299, explaining why this older line of cases no longer defines the scope of California habeas review as illustrated in this Court's more recent jurisprudence. However, *In re Lopez* 2016 Cal. App. LEXIS 266 addressed a *Chiu* issue under the older line of case, finding that:

> "[U]nder the undisputed facts, Penal Code section 31 did not make Petitioner's conduct first degree murder under a natural and probable consequences doctrine: "'[T]here is no material dispute as to the facts relating to [Petitioner's] conviction and ... it appears that the statute under which he was convicted did not prohibit his conduct [as first degree murder under a natural and probable consequences doctrine].'" (*Mutch*, *supra*, p. 396.) Petitioner's conviction was, therefore, in excess of the trial court's jurisdiction, and Petitioner is entitled to habeas corpus relief" (*In re Lopez supra.)*

Seemingly, the *Lopez* court looked at the conduct alone and found that without the attendant mens rea required by *Chiu*, *Lopez* was, as a matter of law, not guilty of first degree murder because the evidence was insufficient. Thus, *Lopez*, unlike *Johnson*, fit the situation into the older line of cases.

At the time of petitioner's trial and direct appeal this court had not yet decided *Chiu*. Prior to the decision in *Chiu*, courts and practitioners throughout California assumed that the natural and probable consequences theory of liability applied to anyone who intended to aid and abet a target crime under circumstances where the commission of another, more serious charged crime by a co-participant was an objectively foreseeable consequence. (See, e.g., *People v. Medina* (2009) 46 Cal.4th 913; *People v. Prettyman* (1996) 14 Cal.4th 248; *People v. Beeman*

(1984) 35 Cal.3d 547.) At petitioner's trial, the court, upon request, instructed on both direct aider and abettor liability and on the natural and probable consequence theory of liablilty. In *Chiu*, this Court squarely held that as a matter of public policy, an aider and abettor cannot be convicted of first degree murder under a natural and probable consequences theory of liability. (*People v. Chiu, supra,* 59 Cal.4th at pp. 158-159, 166-167.)

It is undisputed that petitioner's jury was given the impermissible instruction and petitioner agrees with respondent's statement that a habeas corpus petitioner relying on *Chiu* must allege more than that his jury was instructed in first degree murder under the impermissible "natural and probable consequences" theory of aiding and abetting. However, petitioner disagrees with respondent's assertion that he also must plead facts establishing that he was not otherwise guilty of first degree murder under a correct theory such as that of directly aiding the perpetrator in the killing with the specific intent to do so. (AB, p. 11, citing *Chiu* at 166). Respondent claims that petitioner's conduct was not as a matter of law outside the scope of liability of first degree premeditated murder and, therefore, he has not met his burden of showing an excess of jurisdiction as a matter of law. (AB p. 11.) Respondent, however, incorrectly focuses on petitioner's conduct as opposed to petitioner's mental state. Here, the acts committed by petitioner are not in dispute. The prosecution relied on a direct aider and abettor theory of liability and, as an alternative, on a natural and

probable consequence theory of liability because, as is so often the case, the conduct of the defendant was ambiguous and subject to different interpretations. The alternative theory was that petitioner had the intent to comint an assault and to aid and abet in an assault and that the natural and probable consequence was that the direct perpetrator/co-defendant would engage in a premeditated murder. This Court's decision in *Chiu* voided the natural probable consequence theory of liability for first degree murder thus narrowing the scope of liability for the crime by narrowing the requisite mental state. The *Chiu* decision did not address or limit the conduct that could support a first degree murder conviction, but, as a matter of public policy, required that for an aider and abettor the conduct be joined with a certain mens rea.

Petitioner has pled and it is undisputed that the jury was instructed on the theory of liability prohibited by *Chiu. Chiu* mandates that the defendant's "first degree murder conviction must be reversed unless this Court concludes beyond a reasonable doubt that the jury based its verdict on the legally valid theory that the defendant directly aided and abetted the premeditated murder." (*People v. Chiu, supra*, 59 Cal.4th at p. 167.) Petitioner notes that in a similar context involving changes to the law *In re Lucero* (2011) 200 Cal. App. 4th 38 applied the *Chapman* standard and most recently in the context of *Chiu, In re Johnson, supra* Cal. App. LEXIS 299 applied the *Chapman* standard.

The fact that a jury *could have* found petitioner guilty under a direct

aider and abettor theory does not preclude relief. The record clearly establishes that the jury could have and likely did find petitioner guilty under the invalid theory. This is not a situation where the jury was instructed on both theories and only one theory was plausible or seriously argued by the prosecutor. In fact the natural probable consequence theory was extensively argued in closing. The record reveals three pages of argument by the prosecutor as to why murder was reasonably foreseeable. (10 R.T. 1604-1607.) In addition, as respondent acknowledges, during deliberations the jury submitted questions seeking clarification of the instruction on aiding and abetting and abetting intended target crimes. (AB, at 5, fn.4.) Given the record, this Court cannot say beyond a reasonable doubt that the jury did not rely on the now invalid legal theory to convict petitioner of first degree murder. Even, if respondent were correct in the standard he wishes to impose on habeas petitioners, it is more than reasonably probable that the jury convicted petitioner on the legally invalid theory.

CONCLUSION

The appropriate remedy is to allow the prosecution to accept a reduction in the conviction to second degree murder or to retry the case under a direct aiding and abetting theory. *(Chiu, supra*, 59 Cal. 4th a p. 168.)

Date: April 26, 2016

Respectfully submitted,

MARILEE MARSHALL
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

This brief consists of 1,953 words in 13 point font as counted by the word processing program used to generate it.

Dated: April 26, 2016

Respectfully submitted,

MARILEE MARSHALL
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, declare:

I am over eighteen (18) years of age, and not a party to the within cause; my business address is 595 East Colorado Blvd, Suite 324, Pasadena, CA 91101; that on April 27, 2016, I served a copy of the within:

REPLY BRIEF ON THE MERITS

on the interested parties by placing them in an envelope (or envelopes) addressed respectively as follows:

Clerk of the Superior Court
San Diego County Superior Court
Main Courthouse
220 West Broadway. Dept. SD-56
San Diego, CA 92101
For Delivery to Hon. Robert F. O' Neill

Mr. Hector Martinez, AF9134
B6-124
P.B.S.P.
P.O. Box 7500
Crescent City, CA 95531

Clerk of the Court of Appeal
Fourth Appellate District/ Division One
750 B. Street, #300
San Diego, CA 92101-8189

Each said envelope was then, on April 27, 2016, sealed and deposited in the United States mail at Pasadena, California, the county in which I maintain my office, with postage fully prepaid.

I, further declare that I electronically served a copy of the same above document from electronic notification address (marshall101046@gmail.com) on April 27, 2016 to the following entities electronic notification addresses:
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District Attorney, DA.Appellate@sdcda.org

I additionally declare that I electronically submitted a copy of this document to the Supreme Court on its website at www.courts.ca.gov in compliance with the court's Terms of Use, as shown on the website.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 27, 2016, at Pasadena, California.

LESLIE AMAYA