UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID L. DEW,

Petitioner,

v.

SHAWN HATTON, Warden, et al.,

Respondents.

Case No.: 16cv1985-MMA (MDD)

ORDER:

ADOPTING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE;

[Doc. No. 11]

GRANTING RESPONDENTS' MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS;

[Doc. No. 7]

DISMISSING PETITION FOR WRIT OF HABEAS CORPUS;

[Doc. No. 1]

AND DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY

Petitioner David L. Dew ("Petitioner"), a state prisoner, filed a petition for writ of habeas corpus ("petition") pursuant to Tile 28 of the United States Code, Section 2254, challenging the constitutionality of his conviction for second-degree felony murder in San Diego County Superior Court in light of the United States Supreme Court's ruling in

Johnson v. United States, 135 S. Ct. 2551 (2015). *See* Doc. No. 1.[1] Respondents filed a motion to dismiss the petition, to which Petitioner responded. *See* Doc. Nos. 7, 9.

The matter was referred to United States Magistrate Judge Dembin for preparation of a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1), and Civil Local Rule HC.2. On March 7, 2017, Judge Dembin issued a thorough and well-reasoned Report recommending that the Court grant Respondents' motion to dismiss. *See* Doc. No. 11. Petitioner filed objections to the Report and Recommendation on March 27, 2017. *See* Doc. No. 12. For the reasons set forth below, the Court **OVERRULES** Petitioner's objections in substantial part[2] and **ADOPTS** the Recommendation that the petition be dismissed.

DISCUSSION

1. Standard of Review

Pursuant to Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1), the Court must "make a *de novo* determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part,

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[1] All citations refer to the CM/ECF pagination.

[2] The Court incorporates the factual background as set forth in the Report and Recommendation, and adopts that portion of the Report in all respects, except as to footnote 3 on page 8. *See* Doc. No. 11 at 8 n.3 (finding the petition untimely even if *Johnson* applies retroactively to collateral vagueness attacks on California's second-degree felony murder rule because the deadline to file such a petition was June 26, 2016—one year after the Supreme Court announced the *Johnson* decision). Petitioner objects to this finding, asserting that if *Johnson* applies retroactively to this case, his petition is timely. Doc. No. 12 at 4. On May 9, 2016, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court, raising for the first time his argument that *Johnson* rendered California's second-degree felony murder rule invalid. *See* Doc. No. 1-2 at 42. The California Supreme Court denied the petition on June 22, 2016, tolling Petitioner's AEDPA statute of limitations for 44 days, or until August 5, 2016. *See id.* at 44; *see also* 28 U.S.C. § 2244(d)(2). Petitioner filed the instant petition on August 5, 2016. *See* Doc. No. 1. Thus, if *Johnson* did apply retroactively to this case, the petition is timely. Accordingly, the Court **SUSTAINS** Petitioner's objection and declines to adopt the magistrate judge's finding as set forth on page 8, footnote 3 of the Report and Recommendation. However, because the Court concludes *Johnson* does not provide the basis for a new constitutional right applicable to Petitioner for the reasons stated below, the Court's ruling on Petitioner's objection does not impact the Court's ultimate conclusion that the petition is untimely.

the findings or recommendations made by the magistrate [judge]." 28 U.S.C. § 636(b)(1); *see also United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989).

2. Analysis

Petitioner objects to the Report and Recommendation on two grounds. First, Petitioner contends the Supreme Court's decision in *Johnson* constitutes a new rule of constitutional law which applies retroactively to Petitioner. Second, Petitioner asserts he is entitled to a later statute of limitations start date under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d) in light of the new rule of constitutional law announced in *Johnson*. *See* Doc. No. 12.

AEDPA provides a one-year statute of limitations period for a state prisoner to file a federal petition for writ of habeas corpus pursuant to the judgment of the State court. 28 U.S.C. § 2244(d)(1). The limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) 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; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D). Additionally, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

Petitioner argues *Johnson* renders California's second-degree felony murder rule invalid, thereby creating a new rule of constitutional law which applies retroactively to

Petitioner pursuant to § 2244(d)(1)(C). Doc. No. 12 at 3. "In order for a constitutional right newly recognized by the Supreme Court to delay the statute of limitations the right must not only be newly recognized, but must also be retroactively applicable to cases on collateral review." *Davis v. C.C.I. Tehachapi Warden*, 2017 WL 901884, at *3 (C.D. Cal. Mar. 6, 2017) (citing *Packnett v. Ayers*, 2008 WL 4951230, at *4 (C.D. Cal. Nov. 12, 2008)). The one-year limitations period "runs from the date the right was initially recognized, even if the [Supreme] Court does not declare that right to be retroactive until later." *Johnson v. Robert*, 431 F.3d 992, 992 (7th Cir. 2005) (citing *Dodd v. United States*, 125 S. Ct. 2478, 2481 (2005)).

The Supreme Court in *Johnson* found unconstitutionally vague the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), a federal criminal statute. The residual clause of the ACCA defined a "violent felony" as any felony that "involves conduct that presents a serious potential risk of physical injury to another." *Johnson*, 135 S. Ct. 2257. The Supreme Court indicated that the residual clause "both denies fair notice to defendants and invites arbitrary enforcement by judges" and "denies due process of law." *Id.* In *Welch v. United States*, the Supreme Court held that *Johnson* is a new, substantive decision that has retroactive effect in cases on collateral review. 136 S. Ct. 1257, 1268 (2016).

Here, Petitioner argues California's second-degree felony murder rule is unconstitutionally vague. California law defines second-degree felony murder as "an unlawful killing in the course of the commission of a felony that is *inherently dangerous to human life* but is not included among the felonies enumerated in [California Penal Code] section 189. . . ." *People v. Sarun Chun*, 203 P.3d 425, 430 (Cal. 2009) (emphasis added). Petitioner asserts just as the phrase "a serious potential risk of physical injury" is unconstitutionally vague, so is the phrase "inherently dangerous to life." *See* Doc. No. 12 at 2 ("California's second-degree felony-murder rule—which covers felonies 'inherently dangerous to life'—relies on precisely the same kind of hypothetical fact-based analysis that the Supreme Court found constitutionally impermissible in *Johnson*."). Moreover,

Petitioner claims both the ACCA residual clause and California's second-degree felony murder rule "use a categorical approach to assess risk," considering crimes in the abstract and not according to how the crimes were actually committed. Doc. No. 12 at 2.

Petitioner relies on the Ninth Circuit's decision in *Dimaya v. Lynch*, wherein the Ninth Circuit applied *Johnson* to strike down similarly vague language in the Immigration and Nationality Act. 803 F.3d 1110, 1112 (9th Cir. 2015). Petitioner argues "the Supreme Court's analysis in *Johnson* is not limited to the ACCA, and can be applied equally to similar statutes that require a categorical approach to define crime of violence[.]" Doc. No. 1 at 22-23; *see also Dimaya*, 803 F.3d at 1115 (noting that the Supreme Court's reasoning in *Johnson* "applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the [Immigration and Nationality Act]."). Petitioner urges the Court to "reach the same result" as the Ninth Circuit did in the *Dimaya* case. Importantly, *Dimaya* is currently on appeal before the Supreme Court. [3]

That the Ninth Circuit extended the holding of *Johnson*, however, is not determinative in this case. Pursuant to 28 U.S.C. § 2244(d)(1)(C), the one-year limitations period set forth under AEDPA begins to run 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[.]" 28 U.S.C. § 2244(d)(1)(C) (emphasis added). The constitutional right acknowledged by the Supreme Court in *Johnson* is inapposite to the case at bar. Neither California's second-degree murder statute nor the second-degree felony murder rule contains the problematic phrase "otherwise involves conduct that

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[3] The Solicitor General, on behalf of the Attorney General, filed a petition for writ of certiorari with the Supreme Court in light of the Ninth Circuit's ruling in *Dimaya*. On September 29, 2016, the Supreme Court granted certiorari. The Supreme Court heard oral argument on January 17, 2017. On June 26, 2017, the case was restored to the Court's calendar for reargument for the October 2017 term. Additional information pertaining to this case can be found on the Supreme Court's official website: https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-1498.htm.

presents a serious potential risk of physical injury to another." As one court from the Central District, considering the same challenge Petitioner raises here, noted:

> *Johnson* is inapposite because Petitioner's sentence was not enhanced under ACCA's 'residual clause' or any other similar statute. Indeed, Petitioner challenges: (1) a *state* statute; that (2) does *not* discuss any sentencing enhancements; and (3) does *not* require a wide-ranging inquiry into whether Petitioner's crimes posed any serious potential risk of physical injury to another [as in *Johnson*]. Therefore, because Petitioner was not sentenced under ACCA's residual clause, or even any state law equivalent, *Johnson* created no new Due Process right applicable to Petitioner, and the limitations period prescribed in [28 U.S.C. § 2244(d)(1)(C)] does not apply.

Johnson v. Fox, 2016 WL 8738264, at *2-3 (C.D. Cal. Dec. 20, 2016) (emphasis in original), *Report and Recommendation adopted by* 2017 WL 1395512 (C.D. Cal. Apr. 14, 2017).

Further, numerous district courts have rejected the argument that *Johnson* creates a new due process right upon which habeas petitioners may base vagueness challenges to California state laws. *See Keller v. Hatton*, 2017 WL 2771529, at *5 (C.D. Cal. May 19, 2017) (holding *Johnson* does not provide the basis for a new constitutional right applicable to a petitioner challenging California's second-degree felony murder rule), *Report and Recommendation adopted by* 2017 WL 2766433 (C.D. Cal. June 26, 2017); *Huber v. Lizarraga*, 2017 WL 2495175, at *2 (C.D. Cal. Apr. 12, 2017) (noting "Petitioner has not shown, and *Johnson* does not suggest, that under the circumstances of Petitioner's case California's felony murder rule is void for vagueness."), *Report and Recommendation adopted by* 2017 WL 2495173 (C.D. Cal. May 10, 2017); *Renteria v. Asunsion*, 2016 WL 7336558, at *3 (C.D. Cal. Dec. 16, 2016) (noting that "*Johnson* cannot be read so broadly as to have also found California's second-degree felony-murder elements also unconstitutionally vague."); *Birdwell v. California*, 2016 WL 5897780, at *2 (C.D. Cal. Oct. 5, 2016) (finding "the *Johnson* decision is irrelevant here because Petitioner's *state* prison sentence was not enhanced under ACCA's 'residual clause' nor was his conviction based on any state analogue of that federal criminal

statute.").

In light of the foregoing, the Court concludes that *Johnson* does not constitute a new rule of constitutional law applicable to Petitioner and **OVERRULES** Petitioner's objection on this basis.[4] In the event the Supreme Court's ruling in *Dimaya* announces a new rule of constitutional law applicable to Petitioner, Petitioner can move for an order from the Ninth Circuit Court of Appeals authorizing the district court to consider a second or successive habeas corpus application. *See* 28 U.S.C. § 2244(b)(1)-(3). Moreover, because *Johnson* does not constitute a new rule of law applicable to Petitioner, Petitioner is not entitled to a later start date of the AEDPA statute of limitations. Judge Dembin correctly determined the statute of limitations expired in April 1997, and that statutory and equitable tolling do not make the petition timely.

Accordingly, upon due consideration and after conducting a *de novo* review of the pertinent portions of the record, the Court **ADOPTS** the Recommendation that the petition be dismissed.

CERTIFICATE OF APPEALABILITY

The federal rules governing habeas cases brought by state prisoners require a district court that dismisses or denies a habeas petition to grant or deny a certificate of appealability in its ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. For the reasons set forth above, Petitioner has not shown "that reasonable jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 743, 484 (2000). Accordingly, the Court **DECLINES** to issue a certificate of appealability.

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[4] The Supreme Court recently considered a vagueness challenge to another federal law—a provision of the United States Sentencing Guidelines containing the *same language* held unconstitutional in *Johnson*. *See Beckles v. United States*, 137 S. Ct. 886 (2017). In *Beckles*, the Court held that the Guidelines were not subject to a void-for-vagueness challenge because "[u]nlike the ACCA, . . . the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Id.* at 892. Thus, *Beckles* does not affect this Court's conclusion that *Johnson* did not announce a new rule of constitutional law applicable to Petitioner.

CONCLUSION

Based on the foregoing, the Court **OVERRULES** Petitioner's objections in substantial part, **ADOPTS** the Recommendation that the petition be dismissed, and **DISMISSES** the petition with prejudice. The Court **DECLINES** to issue a certificate of appealability. The Clerk of Court is instructed to terminate this case and enter judgment in favor of Respondents.

IT IS SO ORDERED.

Dated: July 21, 2017

HON. MICHAEL M. ANELLO
United States District Judge