IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

NO. _____

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HECTOR MOLINA,

PETITIONER,

v.

ROBERT W. FOX, WARDEN,

RESPONDENT.

_____
_____

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1) Whether conviction for premeditated murder committed by others while the defendant was incarcerated based on the natural and probable consequences of a gang conspiracy violate Due Process where gang membership substitutes for the knowledge and intent elements of the crimes?

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The petitioner, HECTOR MOLINA, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered July 9, 2020.

OPINION BELOW

The Ninth Circuit Court of Appeals entered a memorandum opinion in *Molina v. Fox*, No. 18-15599, on July 9, 2020. A copy of the Opinion is attached as Appendix A.[1]

A timely Petition for Rehearing and Rehearing *En Banc* was filed on July 23, 2020. This petition was denied on August 26, 2020. A copy of the Order is attached as Appendix B.

The District Court's Order Denying the Petition for Writ Of Habeas Corpus; Denying a Certificate of Appealability in *Molina v. Fox*, 16-cv-00207 JST is attached as Appendix C. The matter was not referred to the magistrate.

On September 25, 2018, the Ninth Circuit Court of Appeals granted a certificate of appealability in *Molina v. Fox*, No. 18-15599. This Order is attached as Appendix D.

RELATED CASES

MOLINA's underlying state case is currently pending before the California Court of Appeal (First District) as *People v. Molina*, A159796. This appeal is anticipated to address the issue of whether recently enacted California

[1] The caption of this Opinion contains the name of the parties to the proceedings.

Penal Code § 1170.95, which amended the application of the natural and probable consequences doctrine to murder, applies to MOLINA's case. Briefing has not yet been filed in that matter.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This appeal is from the District Court's denial of a state prisoner's petition for writ of habeas corpus.

On June 28, 2012, petitioner HECTOR MOLINA (MOLINA), was convicted by a jury in Contra Costa County Superior Court of three counts of first-degree murder [Counts 1, 7, 9] and one count of second-degree murder [Count 8] in violation of Penal Code § 187; attempted murder in violation of Penal Code § 664/187 [Counts 2, 3]; conspiracy to commit murder and assault with a deadly weapon in violation of Penal Code § 182(a)(1) [Count 4]; and participation in a criminal street gang conspiracy in violation of Penal Code § 182.5 [Count 5]. With respect to Counts 1 – 4, the jury found that MOLINA personally used and discharged a firearm, causing great bodily injury or death within the meaning of Penal Code § 12022.53. The jury also found that

MOLINA committed these acts for the benefit of a criminal street gang in violation of Penal Code 186.22(b).

On September 7, 2012, MOLINA was sentenced to state prison for a term of 169 years and 4 months consecutive to a term of life without the possibility of parole.

MOLINA unsuccessfully challenged his conviction in the California appellate courts. On direct appeal, MOLINA challenged the same issues raised in his petition for writ of habeas corpus. On June 6, 2014, the California Court of Appeal affirmed his convictions. On August 27, 2014, the California Supreme Court denied MOLINA's petition for review.

MOLINA, a state prisoner serving life without the possibility of parole, filed a petition for writ of habeas corpus in the United States District Court, Northern District of California, on January 12, 2016. MOLINA claimed that he was denied due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution because there was insufficient evidence to support the murder convictions in Counts 8 and 9.

On February 20, 2018, the Honorable Jon S. Tigar, District Court Judge, in a memorandum opinion in *Molina v. Fox*, 16-cv-00207 JST, denied MOLINA's petition and denied a certificate of appealability.

MOLINA filed a timely notice of appeal on April 4, 2018.

On September 27, 2018, the Ninth Circuit Court of Appeals issued a certificate of appealability on the following issue: whether the evidence was sufficient to support appellant's convictions for the murders of Lisa Thayer [Count 8] and Rico McIntosh [Count 9].

The matter was submitted to the Ninth Circuit panel without oral argument on June 9, 2020.

On July 9, 2020, the Court of Appeals issued a Memorandum Opinion, affirming the judgment of the District Court. This Memorandum is attached as Appendix A.

On July 23, 2020, MOLINA filed a timely Petition for Rehearing and Rehearing *En Banc*. This Petition was denied on August 26, 2020.

STATEMENT OF FACTS

The district court incorporated the statement of facts as summarized by the California Court of Appeal in *People v. Molina*, No. A136914 (June 6, 2014) (unpublished)[2]:

> According to the prosecution's gang expert witness and former gang members, by 2007, the VFL and ML Sureño gangs were encountering hard times. Gang members were breaking the prohibition on killing other members, and successive leaders were

[2] This Opinion is attached as Appendix E.

forced to leave the country. Following an informal amalgamation, VFL and ML members sought to boost their waning prestige with a strategy of killing rival Norteño gang members. Defendant was a member of VFL and one of the members hunting down Norteños.

Defendant went hunting on the night of December 22, 2007. Defendant was one of a number of Sureños who hid behind a fence until some Norteños came into view and then opened fire.

Defendant killed Antonio Cintron (count one) and attempted to kill Adrian Espinoza (count two) and Neil Wixon (count three).

Defendant was also convicted of conspiring to kill (count four) and engaging in gang activity (count five).

On February 16, 2008, defendant was driving one of . . . two vehicles full of Sureños. When a suspected Norteño was found, defendant told the others to "get that motherfucker." Other gang members got out and killed Luis Perez (count seven).

Defendant was arrested on February 27, 2008 and was never thereafter out of custody. While in custody, defendant had a number of telephone calls with his mother and the then VFL leader. The calls were recorded. During the conversation, defendant made a number of statements that could be construed as confessing to murder. Defendant also made a number of incriminating statements—including that he had shot Antonio Cintron—to a VFL member who had agreed to become a police informant. The informant also testified that two other gang members identified defendant as Cintron's murderer.

February 27 was also the day on which homeless bystander Lisa Thayer was killed (count eight) when she was caught between Sureños firing at the occupants of a passing car.

On April 26, 2008, Rico McIntosh was shot on the streets of San Pablo. Before he died of his wounds (count nine), McIntosh told police that he had been shot by the Hispanic male occupants of a

> vehicle. McIntosh was killed by VFL members in the mistaken belief he was a Norteño.
>
> Defendant did not testify in his own behalf. The only witnesses called for the defense were: (1) Adrian Espinoza, who testified that he was unable to identify who shot him; (2) a private investigator, who testified that Espinoza gave him a version of the shooting that Differed from his trial testimony; and (3) Dr. Carol Walser, who testified to defendant's low I.Q. and lifelong impaired cognitive functions which placed him "at the mental retardation level."

(Exhibit C, pp. 2-3).

DISTRICT COURT'S DENIAL OF MOLINA'S PETITION FOR WRIT OF HABEAS CORPPUS

The district court found that the California courts did not unreasonably reject Molina's claims:

> Based on a review of the record, and applying these legal principles to petitioner's current allegations, the state court's rejection of this claim was not contrary to, and did not involve an unreasonable application of, Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

Molina v. Fox, 16-cv-00207-JST, February 20, 2018. (ER 41, CR 36).

In support of that opinion, the district court extensively quoted and deferred to the opinion of the California Court of Appeal:

> Under this caption in his brief, "two of appellant's four convictions of murder must be reversed because the evidence fails to show that appellant perpetrated, aided and abetted, or conspired to commit

them," defendant argues: "Appellant was tried and convicted of murder in counts one, seven, eight, and nine. The prosecution presented evidence to show that appellant fired the shots that killed Antonio Cintron in count one and evidence to show that appellant drove the getaway car from the shooting that killed Luis Perez in count seven. However, the prosecution presented no evidence to show that appellant had any responsibility for the shooting deaths of Lisa Thayer in count eight or Rico McIntosh in count nine."

It is significant that defendant does not challenge his conviction for conspiracy (count four), because it is that peculiar creature, the law of conspiracy, which defeats defendant's attempt to overturn the two murder convictions. Defendant, on the other hand, has only naked logic on this side. After all, he maintains: "I was in the county jail, I did not provide the gun(s) or any other instrumentality used in the murders, and I gave no direct orders for the murders."

The law on this issue may continue to be controversial, but it is settled.

"Since conspiracy is a continuing offense [citation], a defendant who has joined a conspiracy continues to violate the law 'through every moment of [the conspiracy's] existence,' [citation], and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot." (*Smith v. United States* (2013) 568 U.S. [106], [133 S.Ct. 714, 719].) This court made the same point three decades ago: "Once the conspiracy is established it is not necessary to prove that each conspirator personally participated in each . . . [act of the conspiracy] . . . since members of the conspiracy are bound by all acts of all members committed in furtherance of the conspiracy." (*People v. Cooks* (1983) 141 Cal.App.3d 224, 312; see *People v. Kauffman* (1907) 152 Cal. 331, 334 ["'In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates'"].)

We continued: “The crime of conspiracy can be committed whether the conspirators fully comprehended its scope, whether they acted together or in separate groups, or whether they used the same or different means known or unknown to them.” (*People v. Cooks*, *supra*, 141 Cal.App.3d 224, 312.) One of the authorities cited for this principle was our decision in *People v. Means* (1960) 179 Cal.App.2d 72, 80, where we stated: “[T]here need be no showing of direct association between members of a conspiracy. Common design is the essence of a conspiracy and the crime can be committed whether the parties comprehend its entire scope, or whether they act in separate groups or together, by the same or different means known or unknown to them, if their actions are consistently leading to the same unlawful result . . . .”

And, strikingly applicable here, we further stated in 1983: “Once the defendant’s participation in the conspiracy is shown, it will be presumed to continue unless he is able to prove, as a matter of defense, that he effectively withdrew from the conspiracy. [Citation.] [¶] Although a defendant’s arrest and incarceration may terminate his participation in an alleged conspiracy, his arrest does not terminate, or constitute a withdrawal from the conspiracy as a matter of law. [Citations.] Withdrawal from, or termination of, a conspiracy is a question of fact.” (*People v. Cooks*, *supra*, 141 Cal.App.3d 224, 316.)

“‘Each member of the conspiracy is liable for the acts of any of the others in carrying out the common purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design.’“ (*People v. Flores* (2005) 129 Cal.App.4th 174, 182, quoting what is now 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Elements, § 98, p. 404.) And, in the classic formulation by our Supreme Court: “whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury [citations], and if there be any evidence

to support the finding of the jury on this question, its determination is conclusive." (*People v. Kauffman, supra*, 152 Cal. 331, 335.) This is part of the jury's power "considering the unique circumstances and the nature and purpose of the conspiracy of each case—to determine precisely when the conspiracy has ended." (*People v. Saling* (1972) 7 Cal.3d 844, 852.)

From these authorities it should be clear that defendant's incarceration and lack of direct communication to the killers of Thayer and McIntosh is not legally dispositive. Neither his actual presence nor his direct participation was required for liability.

Defendant does not dispute his membership in a criminal street gang. He does not dispute the existence of the conspiracy, or that he was properly convicted of that substantive offense. He does not contend he ever withdrew from that conspiracy. He is thus liable for the Thayer and McIntosh murders committed after his incarceration, if they can be deemed the "ordinary and probable effect[s]" (*People v. Kauffman, supra*, 152 Cal. 331, 335), the "'reasonable and probable consequences'" (*People v. Flores, supra*, 129 Cal.App.4th 174, 182) of the conspiracy.

This is where defendant makes his stand: he argues that he cannot be convicted of the Thayer and McIntosh killings because, adopting another Supreme Court phrasing, "those two killings were not the natural and probable consequences of any conspiracy [see *People v. Prieto* (2003) 30 Cal.4th 226, 250] entered into by appellant . . . . [N]othing about appellant's expressed intention suggested that appellant and other gang members conspired that they would aggressively hunt for Norteños and anyone who resembled Norteños and kill them at every opportunity for an indefinite period of time into the future . . . . No evidence was presented to show that appellant aided, facilitated, or encouraged either of the killings in counts eight and nine. It would be unreasonable to expand conspiracy theory liability to cover murders committed after a conspirator is in custody when there is no clear link between the

conspirator and the killing. Thus, the shooting deaths of Thayer and McIntosh could not be the natural and probable consequences of any conspiracy involving appellant." We do not agree.

Insofar as defendant is relying on his status as a prisoner in the county jail, it has been shown that the fact of his incarceration does not terminate his potential criminal liability as a matter of law. In any event, it would be inaccurate to picture defendant as sitting silently in his cell, with no contact with his VFL colleagues. The jury heard evidence of recorded phone conversations that defendant made to the gang's current leader. The leader promised to send money to defendant while he was in jail, and to take care of defendant's mother. The leader also provided information of the latest developments concerning other gang members and gave defendant messages to pass on to other gang members in the jail.

Most crucially, he gave orders to defendant and made it clear defendant was still under gang discipline. The jury also heard testimony from a jail guard that defendant appeared to be associating and socializing with the other Sureños inmates. From this evidence the jury could conclude that defendant never withdrew from the conspiracy but remained an active part of it.

Defendant's emphasis on the lack of a "clear link" between himself in jail and other gang members is also misplaced, for it erroneously assumes that a direct connection and correlation is required. (*People v. Means*, *supra*, 179 Cal.App.2d 72, 80.) It is also contrary to the presumption that defendant remained a member of the conspiracy. (*People v. Cooks*, *supra*, 141 Cal.App.3d 224, 316.)

Defendant's assumption is also at odds with the nature of conspiracies. "'[I]t was not necessary for the State to prove that the parties actually came together, mutually discussed their common design, and after reaching a formal agreement set out upon their previously agreed course of conduct.'" (*Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 57.) "It is seldom possible for the prosecution

> to offer direct evidence of an agreement to commit a crime. The agreement to commit the crime is usually made in secrecy. The conspiracy must be inferred by the trier of fact from all the circumstances" (*People v. Chavez* (1962) 208 Cal.App.2d 248, 253), which here would include the "common gang membership . . . 'the conduct [of the conspirators] in mutually carrying out a common illegal purpose, the nature of the act, the relationship of the parties [and] the interests of the alleged conspirators . . . .'" (*People v. Superior Court* (*Quinteros*) (1993) 13 Cal.App.4th 12, 20-21.)
>
> The jury heard more than ample evidence that the VFL and ML Sureño gangs had a systematic practice of hunting down and trying to kill rival Norteño gang members and suspected members. The killings were accomplished in the same manner—on the streets, using handguns. Defendant participated in that campaign of killing before he was arrested. Thus, the jury had a basis for treating subsequent Norteño killings as the natural and probable consequences of the conspiracy, and for treating defendant, even after he was incarcerated, as still a member of the on-going conspiracy. (*People v. Zamudio, supra*, 43 Cal.4th 327, 357; *People v. Kauffman, supra*, 152 Cal. 331, 335; *People v. Flores, supra*, 129 Cal.App.4th 174, 182; *People v. Cooks, supra*, 141 Cal.App.3d 224, 316.)

People v. Molina, 2014 WL 2553335, at *11-14 (footnote omitted). (Exhibit E).

BAIL STATUS

MOLINA is currently incarcerated at the Salinas Valley State Prison at Soledad, California, pursuant to the sentence of 169 years to life without the possibility of parole imposed by the Contra Costa County Superior Court in this case.

REASON FOR GRANTING THE WRIT

This Court Should Grant Certiorari to Determine Whether the Ninth Circuit Court of Appeals Decision Undermines a Criminal Defendant's Constitutional Right to Due Process and a Fair Trial by Permitting Gang Membership to Substitute for the Knowledge and Intent Elements of Premeditated Murder Where the Defendant Did Not Participate in the Commission of the Crime

A. Importance of the Issues:

The question of whether a criminal defendant can be convicted of premeditated murder when the crime was committed by others without the defendant's participation is an issue of national importance. What limitations, if any, are placed on the use of membership in a criminal street gang as a substitute for the knowledge and intent elements required to support a criminal conviction is an issue which arises repeatedly in the criminal justice system, and an issue for which there is no clear guidance.

B. Application to This Case:

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A reviewing court determines whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 433 U.S. 307, 319 (1979).

It is undisputed that MOLINA was in custody at the time of the shootings of Lisa Thayer [Count 8] and Rico McIntosh [Count 9]. MOLINA did not personally participate in the acts which lead to these deaths. He did not aid and abet these killings. Instead, the only theory of liability presented to the jury was that these killings were the natural and probable consequences of the conspiracy to commit assault and/or murder charged in Count 4 which was based on MOLINA's status as a gang member.

Under California law, "'[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime.'" *People v. Medina,* 46 Cal.4th 913, 920 (2009)*;* citing *People v. Prettyman,* 14 Cal.4th 248, 260–262 (1996). "Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault*."* *People v. McCoy*, 25 Cal. 4th 1111, 1117 (2001). A nontarget offense is a "'natural and probable consequence'" of the target offense if, judged objectively, the additional offense

was reasonably foreseeable. *Medina, supra,* 46 Cal.4th at 920. The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. *Ibid.* Rather, liability "'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'" *Ibid.* The natural and probable consequences doctrine applies to co-conspirator liability in the same fashion. *People v. Rivera,* 234 Cal. App. 4th 1350, 1356 (2015).

In affirming MOLINA's convictions the Ninth Circuit decision expands MOLINA's liability beyond what is reasonably foreseeable. The opinion suggests that being a gang member is enough to show participation in an ongoing conspiracy to commit assaults and/or to kill rival gang members. This expansion of liability is not even consistent with Ninth Circuit precedent:

> [T]here can be no conviction for guilt by association, and it is clear that mere association with members of a conspiracy, the existence of an opportunity to join a conspiracy, or simple knowledge, approval of, or acquiescence in the object or purpose of the conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator. While each of these circumstances may be a relevant factor to be considered in a given case where existence of an agreement is in issue, no mere suspicion or surmise is permitted to replace the essential analysis of the qualitative nature of the acts in question. The line between conspiracy and an unexercised opportunity to join a conspiracy may

> be difficult to draw, but it must be drawn where the existence of an agreement is absent.

United States v. Melchor-Lopez, 627 F.2d 886, 891 (1980) (citations omitted).

In *Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997), cert. denied, 118 S. Ct. 295, 139 L. Ed. 2d 227 (1997), overruled in part on other grounds, *Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998) (en banc), the court overturned a state conviction of a gang member where the theory of liability was that he aided and abetted a murder by "fanning the fires of gang warfare." The *Mitchell* court expressed concern that this was tantamount to guilt by association. *Ibid.* The conviction rested on the "faulty assumption" that gang members could be expected to act together in a particular fashion. *Ibid.* The *Mitchell* court found that a generalized readiness to do violence does not establish a specific objective for aiding and abetting. *Ibid.* The *Mitchell* court also expressed concern that allowing such a broad theory could lead to the absurd result that any gang member could be held liable for the acts of any other gang member anywhere, anytime, as long as the common purpose was "fighting the enemy" or "backing up" each other. *Id.* at 1341.

In *United States v. Garcia*, 151 F.3rd 1243, 1246 (1998), the court applied the reasoning of *Mitchell* to the conspiracy theory of liability. The *Garcia* court found that the existence of an implicit, general agreement among gang members

to support one another in fights against rival gang is not sufficient evidence to support a conviction of conspiracy to commit assault when the conduct of the alleged conspirators is otherwise insufficient. *Garcia, supra* at 1244.

> [A]llowing a general agreement among gang members to back each other up to serve as sufficient evidence of a conspiracy would mean that any time more than one gang member was involved in a fight it would constitute an act in furtherance of the conspiracy and all gang members could be held criminally responsible - whether they participated in or had knowledge of the particular criminal act, and whether or not they were present when the act occurred. Indeed, were we to accept "fighting the enemy" as an illegal objective, all gang members would probably be subject to felony prosecutions sooner rather than later, even though they had never personally committed an improper act.

Garcia, supra, at 1246.

In the present case, MOLINA does not challenge his conviction for conspiracy to commit assault and/or murder on December 22, 2007. There is evidence that MOLINA agreed with others to fire a gun at a specific group of people and carried out the object of that conspiracy. However, that conspiracy cannot continue beyond the date on which MOLINA was arrested to encompass the murders charged in Counts 8 and 9, unless the objective of the conspiracy shifts from “attack these specific rival gang members” (as charged in the Indictment) to “attack any rival gang members, anywhere, anytime” which is the equivalent of “fighting the enemy” as discussed in *Mitchell*. This is nothing

more than a way of saying gang members act in a particular way. The resulting "conspiracy" is so undefined in its scope and objectives that the jury could easily substitute "guilt by association" for the elements of the offense in violation of Due Process.

The Ninth Circuit opinion focused on MOLINA's failure to withdraw from the conspiracy as a basis for liability. However, given the amorphous nature of the conspiracy, it is impossible to determine how MOLINA was supposed to withdraw, and from what he was supposed to withdraw. Presumably, MOLINA would have been required to undergo a formal debriefing process and renounce the gang in order to successfully withdraw from this conspiracy since he could not renounce acts that he could not anticipate others would commit while he was in custody.

By failing to consider how the conspiracy was defined and to consider the practical limitations of that conspiracy, the Ninth Circuit opinion is inconsistent principles of due process and the requirement that each and every element of the offense be proven beyond a reasonable doubt. It leaves open-ended a defendant's potential liability for crimes committed by others without his knowledge or participation. As such, it denies defendants like MOLINA, who are charged with gang crimes, a fair trial. This expansion of liability represents a

real danger that defendants accused of gang crimes can be found guilty solely based on association with others. Clear guidance from this Court is necessary to correct this injustice.

CONCLUSION

For the foregoing reasons, petitioner HECTOR MOLINA, respectfully suggests that a writ of certiorari should issue in this case.

Dated: November 20, 2020

Respectfully submitted,

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