No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAIME B. GARCIA,

Petitioner,

vs.

WARREN L. MONTGOMERY, WARDEN,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

VERNA WEFALD
65 North Raymond Avenue, Suite 320
Pasadena, California 91103
Telephone: 626-577-2658
Facsimile: 626-685-2562
Email: verna@vernawefald.com

Counsel of Record

QUESTION PRESENTED

Because the appellate court must issue a certificate of appealability ("COA") when the issue is debatable among jurists of reason, should the Ninth Circuit have issued a COA when the jury was instructed on an invalid legal theory to convict Petitioner of first degree murder and the prosecutor conceded she did not know which theory the jurors relied on to convict?

RELATED PROCEEDINGS

Los Angeles County Superior Court

People v. Garcia, MA037295

California Court of Appeal

People v. Garcia, B231949

In re Garcia, B278777

California Supreme Court

In re Garcia, S238945

United States District Court

Garcia v Pfeiffer, CV-14-1319-VBF(JPR) (C. D. Cal.)

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Garcia v. Montgomery, 20-56109

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jaime B. Garcia, respectfully prays that a writ of certiorari issue to review the order denying a certificate of appealability ("COA") by the United States Court of Appeals for the Ninth Circuit filed on January 14, 2022. The order is unpublished.

OPINION BELOW

On January 14, 2022, the Court of Appeals denied the request for a COA under 28 U.S.C. § 2253(c)(2). (Appendix A .)

JURISDICTION

On January 14, 2022, the Court of Appeals denied the request for a COA. (Appendix A.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). *Hohn v.*

United States, 524 U.S. 236 (1998) ("this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability"). This petition is due for filing on April 14, 2022. Supreme Court Rule 13(3). Jurisdiction existed in the District Court pursuant to 28 U.S.C. § 2254 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §§ 1291, 1294, and 2253.

CONSTITUTINAL PROVISIONS INVOLVED

Fourteenth Amendment (pertinent part)

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253(c)

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Rule 22(b)(1), Federal Rules of Appellate Procedure

> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

STATEMENT OF THE CASE

Petitioner Jaime Garcia, and codefendants Javier Esparza and Claudio Bernardino were each charged with the kidnapping and first degree murder of Nicholas Ramirez in violation of California Penal Code §§ 207 and 187. A firearm enhancement was also alleged true under § 12022(a)(1).

The prosecution's case depended on the testimony of immunized witness Matthew Foust who told numerous different stories to police prior to trial. Foust implicated Petitioner only after the police said they were going to charge him with murder.

Foust testified that Ramirez had attended a party at Petitioner's house for Ramirez' brother Jesse, where drugs and alcohol were consumed. A fight broke out between Jesse and Esparza but Petitioner was able to calm things down. When Jesse left the party at 7:00 p.m. he slashed the tires of Petitioner's car. Petitioner also noticed some stereo equipment was missing.

According to Foust, he, Petitioner, and Esparza picked up Cesar Reyes and located Ramirez at a gas station. They took Ramirez to Bernardino's house. Petitioner and Reyes beat Ramirez and demanded to know where their stuff was. Bernardino told them to take Ramirez to the garage because they were getting blood on the carpet. Inside the garage, Petitioner tied Ramirez to a chair and gagged him. Reyes beat him with a pipe. When Petitioner said he was going to shoot Ramirez, Bernardino said not to do it there but to take him to the desert.

Foust further testified that Petitioner dropped Reyes off and then drove Ramirez in the trunk of his own car to the desert, while he and Esparza followed. At one point, Petitioner stood next to Esparza with a gun in his hand. Foust looked away and then heard some shots. When he looked up he saw petitioner standing in the back of Ramirez's car. Foust then drove Petitioner to his home in Arizona. Petitioner threatened him not to tell anyone what happened.

Foust's body was found in his bullet ridden car parked on a dirt road near a desert field. Nine .40 caliber casings were found next to Ramirez' car, which were determined to have been fired from the same gun. The murder weapon was never recovered. (6 RT 1225, 1262-1264.) The casings matched casings from a gun that was stolen from someone named James Wilson the year before. At that time, blood on the wall at Wilson's home was determined to be Petitioner's blood. (6 RT 1308, 10 RT 2435.)

Forensic evidence put Bernardino and Esparza at the crime scene. Bernardino's prints were discovered on Ramirez' car. No prints belong to Petitioner were discovered. Esparza's genetic material was found on the passenger door handle. Reyes' genetic material was discovered on the gag in Ramirez' mouth. (CR 34 [LD 3], AOB at 6, citations.)

Ramirez's genetic material was discovered in bloodstains on Bernardino's carpet and floor. (CR 34 [LD 3], AOB at 6, citations.)

In closing argument, the prosecution told the jury it would not have to decide who the actual shooter was. (14 RT 3358-3402.) It contended that all three defendants were guilty of first degree murder based on five different vicarious liability theories: (1) aiding and abetting (2 CT 339 [CALCRIM 400]); natural and probable consequence of aiding and betting (2 CT 340-342 [CALCRIM 403]); conspiracy (2 CT 342-343 [CALCRIM 416]); liability for a co-conspirator's acts or natural and probable consequence of a conspiracy (2 CT 343-344 [CALCRIM 417]); and felony murder with kidnapping as the target offense (2 CT 347-348 [CALCRIM 540b]). (CR 79-2 at 107-116.) They were also instructed on second degree murder as a lesser included offense. (14 RT 3351-3352.)

Petitioner's defense was that Matthew Foust's testimony was not corroborated as required by California Penal Code § 1111. Defense counsel noted there was:

> "Not one piece of evidence that tied Mr. Garcia to this murder. No gun, no ammo, no shoe laces missing. Nothing ....¶ .... Well, if you really believe Mr. Foust, the last person was Mr. Garcia. Nothing. No DNA, no prints, no nothing." (14 RT 3428.)

"We come to Mr. Foust. The detective admitted that Mr. Foust has this habit of interchanging names with Javier and with Jaime." (14 RT 3429.) "Mr. Foust continues to give you a reason for this particular horrendous murder, and he changes it every time he speaks to the detective." (14 RT 3429.) "It is the lack of corroboration that anything Mr. Foust tells you that's really frightening. And as I told you earlier, there is a reason why he wasn't corroborated because there is nothing to corroborate him." (14 RT 3436.)

During deliberations, the jury asked the following question: "Clarification on item three, age 20. If a defendant did not personally commit kidnapping, then what did he, slash, she do? Section 540(b)." (14 RT 3632.)

The prosecutor said it sounded like they were stumped on aiding and abetting and requested clarification. All three defense counsel objected to any additional instructions. The court said it would instruct the jurors "something to the effect of" "the jury is to determine what any defendant" or "it is up to the jury to determine what a defendant did or did not do." (14 RT 3635.)

On January 21, 2011, all three defendants were convicted of first degree murder and kidnapping. The firearm enhancement was found true. (14 RT 3638-364.) As the jurors were not asked to return a special verdict, the prosecutor conceded it was not possible to tell which theory the jurors believed. (14 RT 3920.) The prosecutor said:

> "Because the jury was presented with alternative theories on the murder charge, only one of those theories was the felony murder including the kidnapping. Because we did not ask for any special findings from the verdicts – from the jury, we don't know which of the theories or if more than one theory was used as as basis for the verdict." (14 RT 3920.)

On March 22, 2011, all three defendants were sentenced to 26 years to life. At the prosecution's request, the court imposed but stayed 8 years for the kidnapping count under Penal Code § 654. (14 RT 3922.)

After the direct appeal was concluded (Appendix D), the California Supreme Court held in *People v. Chiu,* 59 Cal.4th 155, 159 (2014), that a defendant cannot be convicted of aiding and abetting first degree murder under the natural and probable consequences theory. If it is not possible to tell which theory the jurors believed, reversal is required under the federal constitution. *Id*. at 167. In lieu of a retrial, the prosecution can accept a reduction to second degree. *Id.* at 168.

See also People v. Chun, 45 Cal.4th 1172, 1201, 1203-1205 (2009) (instructional error on the elements of the offense requires reversal unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict); *Neder v. United States,* 527 U.S. 1, 15 (1999) (same); *Washington v. Sarasaud*, 555 U.S. 17, 190-91 (2009) (instructions unlawfully relieved prosecution of its burden to prove every element of charged crime beyond a reasonable doubt); *Hedgpeth v. Pulildo*, 555 U.S. 57, 58 (2008) (when jury may have relied on invalid theory to convict, reversal required).

The California Supreme Court explained that "aider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature" and is:

> not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.

Chiu, 59 Cal.4th at 164 (citations omitted).

> The natural and probable consequences doctrine is based on the principle that liability extends to reach the actual, rather than the planned or 'intended' crime, committed on the policy that aiders and abettors should be responsible for the criminal harm they have naturally, probably, and foreseeably put in motion.

Id. at 64.

The public policy behind this doctrine is to deter aiders and abettors from "encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing." *Id*. at 165. Convicting aiders and abettors of second degree murder serves this primary rationale of deterrence. *Id.*

This public policy, however, does not extend to first degree premeditated murder which has the "additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty." *Chiu,* 59 Cal.4th at 166. Therefore, "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." *Id.* at 159.

Further, "an aider and abettor's liability for murder under the natural and probable consequences doctrine operates independently of the felony murder rule." *Chiu*, 59 Cal.4th at 166. The "holding does not affect or limit an aider and abettor's liability for first degree felony murder under section 189." *Id.*

"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." *Chiu*, 59 Cal.4th at 167. A first degree murder conviction must be reversed unless the reviewing court can conclude "beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." *Id.*

After Petitioner timely filed a habeas corpus petition under 28 U.S.C. § 2254, he was granted a request to stay and abey the proceedings while he returned to state court to exhaust the *Chiu* issue. The California Supreme Court initially granted a petition for review but then dismissed the petition. (Appendix C at 64-65.)

The magistrate's Report and Recommendation ("Report") agreed that Foust's testimony was confusing and inconsistent. (Appendix B at 40; Report at 30.) (Appendix B at 40.) Nevertheless, the Report found that the jury credited Foust by finding Petitioner and the others guilty. (Appendix B at 41; Report at 31.) The Report believed

that "Garcia's kidnapping conviction precludes him from showing reversible error, as the jury could not reasonably have found him guilty of kidnapping without also finding him guilty of first-degree murder." (Appendix B at 53; Report at 43.)

REASONS FOR GRANTING THE WRIT

BECAUSE REASONABLE JURISTS COULD DEBATE WHETHER THE JURY RELIED ON A LEGALLY INVALID THEORY TO CONVICT, THE NINTH CIRCUIT WAS REQUIRED TO ISSUE A COA

To obtain a COA under 28 U.S.C. § 2253(c), the petitioner must make a substantial showing of a denial of a constitutional right such that reasonable jurists could debate whether the issue should have been resolved differently. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The threshold COA inquiry is not "coextensive with a merits analysis" but asks only if the decision is debatable among jurists of reason. *Buck v. Davis*,___ U.S. ___, 137 S.Ct. 759, 774, 197 L.Ed.2d 1, citing *Miller-El v. Cockrell*, 537 U. S. 322, 327, 348 (2017).

Reasonable jurists would debate the Report's denial of the 2254 petition, because it failed to consider that aiding and abetting and conspiracy instructions also applied to the kidnapping charge. All three defendants were convicted of kidnapping and first degree murder. The jury was not required to agree on which theory it relied on to convict. (14 RT 3341.)

The Report also noted that the theory which the prosecutor "devoted the most time to" was felony murder and she "never argued" he was guilty under the natural and probable consequences theory. (Appendix B at 53-54; Report at 43-44.) The prosecutor said the natural and probable consequences theory applied "most fittingly to" codefendant Bernardino and Garcia's trial counsel agreed with that assessment. (Appendix B at 54; Report at 44.)

It makes no difference, however, whether the prosecutor primarily argued felony murder. The prosecutor did not require the jury to agree with that theory. It cannot be overemphasized that the firearm enhancement charged was no more than that a "principal" used a firearm under § 12022(a)(1). The fact that no one was charged with being the actual shooter and the fact that there were no less than five different theories by which the defendants could be convicted of first degree murder indicates that the prosecution was worried about Foust's testimony. While it is possible that felony murder was the theory upon which the jury relied, it is equally possible that it relied on the invalid natural and probable consequences doctrine which was the easiest path to a first degree murder conviction. The jury's note highlighted the fact that it was uncertain as to who did what.

The Report also found that Petitioner has the "necessary mental state for first-degree murder all by himself, with no bootstrapping required." (Appendix B at 56; Report at 46.) "After all, the evidence established that Petitioner, after binding and

gagging Ramirez at Bernardino's house, forced him into the trunk of his car and drove him to a secluded location, where he fired his gun repeatedly into the trunk." (*Id*.) And Petitioner "was the also the defendant with the most motive to kill Ramirez, in retaliation for slashing his tires and stealing from him." (*Id*.) The Report failed to acknowledge that this "evidence" came entirely from Matthew Foust. There was no independent evidence to corroborate Foust's testimony. The state appellate court wrote that "Some physical evidence connected appellants to the murder of Ramirez, but most of the evidence against them came from the testimony of Mathew Foust." (Appendix D at 69.)

It is not surprising that the prosecutor argued Petitioner was the principal because that was what Foust testified to. But it was also not surprising that in the end she told the jury it did not have to agree that he was the shooter. In other words, the jury did not have to believe what Foust said about Petitioner's role, particularly given that the physical evidence put Esparza and Bernardino, but not Petitioner, at the crime scene.

The district court, in accepting the Report, said it was "not bound by the prosecutor's 'concession'" that she did not know which theory the jury relied on to convict. (Appendix B at 7.) The prosecutor did argue that Petitioner was the shooter. (*Id*.) Therefore, no "grave doubt" exists that Garcia was convicted under a valid theory of first-degree murder. (*Id*. citing *Davis v. Ayala*, 56 U.S. at 268.) Here again, the district court failed to mention that the prosecutor told the jury it would not be asked to decide

who the shooter was: "And just as we talked about before you will not be asked to decide who was the principal, who was the shooter. It is an unnamed principal." (14 RT 3396.)

The Ninth Circuit's denial of a COA in this case indicates that the court believed Petitioner would not prevail on appeal. It cannot be overemphasized that in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court clarified that in order to obtain a COA the applicant does not have to show that he will win his appeal.

> The threshold inquiry does not require full consideration of the factual or legal bases adduced in support of his claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Milller-El at 336-337.

> A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of 'mere good faith' on his or her part. We do not require the petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for writ of habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail .... the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'

Id. at 338.

This case is the perfect case to provide a much needed reminder to the lower circuit courts that a COA must issue if there is room for debate among reasonable jurists. Here, the jury was repeatedly instructed on the now forbidden natural and probable consequences doctrine to reach a first degree murder verdict and the prosecutor conceded

that she did not know upon which theory the jurors relied in order to convict. Given that *Hedgpeth v. Pulildo*, 555 U.S. at 58 requires a reversal under these circumstances, the Ninth Circuit was not justified in denying a COA.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: February 28, 2022 Respectfully submitted,

VERNA WEFALD

Counsel of Record