Court of Appeal, Second Appellate District, Division One - No. B330525

**S290716**

# IN THE SUPREME COURT OF CALIFORNIA

## En Banc

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THE PEOPLE, Plaintiff and Respondent,

v.

DERRICK ELLIOT GRAY, Defendant and Appellant.

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The petition for review is denied.

Liu and Evans, JJ., are of the opinion the petition should be granted.

(See Dissenting Statement by Justice Evans.)

/s/
*Chief Justice*

PEOPLE v. GRAY

S290716

Dissenting Statement by Justice Evans

In 1982, Defendant Derrick Elliott Gray was convicted of felony murder with a special circumstance finding that the murder was committed during a felony, in this case, a robbery or burglary. (Pen. Code, § 190.2, subd. (a)(17); subsequent statutory references are to the Penal Code.) According to the factual recitation set forth in the decision on direct appeal, Gray (who was 18 years old at the time of offense) and a codefendant committed a robbery and burglary, during which they bound and gagged the 77-year-old victim, who died from strangulation or suffocation. (*People v. Gray* (Oct. 4, 1983, 2 Crim. No. 42179) [nonpub. opn.] (*Gray I*).) Gray was sentenced to life without the possibility of parole for the murder.

At the time of Gray's trial and conviction, "[f]elony-murder liability [did] not require an intent to kill, or even implied malice, but merely an intent to commit the underlying felony." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654.) With the enactment of Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill No. 1437) (Stats. 2018, ch. 1015, § 3), however, the Legislature overhauled the state's murder statutes. (*People v. Emanuel* (2025) 17 Cal.5th 867.) "Pertinent here, Senate Bill No. 1437 significantly narrowed the scope of the felony-murder rule by adding subdivision (e) to Penal Code section 189." (*Id.* at p. 880.) Pursuant to that provision, "[a] participant in the perpetration or attempted perpetration of a [specified felony] in which a death occurs is liable for murder only if one of the

following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e).)

Senate Bill No. 1437 also created a procedural mechanism for those previously convicted of murder under a theory amended in the bill to petition for resentencing. (See § 1172.6; *People v. Curiel* (2023) 15 Cal.5th 433, 449 (*Curiel*).) A trial court acting on such a petition first must evaluate whether the petitioner has made a prima facie case for relief. (§ 1172.6, subd. (c).) " 'If the petition and record in the case establish conclusively that the defendant is ineligible for relief, the trial court may dismiss the petition.' " (*Curiel*, at p. 450, citing § 1172.6, subd. (c).) " 'If, instead, the defendant has made a prima facie showing of entitlement to relief, "the court shall issue an order to show cause." ' " (*Curiel*, at p. 450, quoting § 1172.6, subd. (c).) At an evidentiary hearing, "the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder" under state law as amended by Senate Bill No. 1437. (§ 1172.6, subd. (d)(3).) If the prosecution fails to sustain its burden of proof, the murder conviction "shall be vacated and the petitioner shall be resentenced on the remaining charges." (*Ibid.*)

Some 40 years after his conviction, Gray petitioned for resentencing pursuant to section 1172.6. After the trial court determined that Gray stated a prima facie case for relief and

issued an order to show cause why the petition should not be granted, the People conceded that Gray was entitled to relief. At the evidentiary hearing, the trial court summarily rejected the People's concession and, without prior notice to the parties, sua sponte reconsidered its prima facie finding. Although much of the original trial record had been lost, the court took the view that jury instructions purportedly given at Gray's trial established conclusively that he was ineligible for relief.[1]

Those jury instructions provide that murder "is the unlawful killing of a human being with malice aforethought." The instruction on express malice is struck through. The implied malice instruction states: "Malice is implied when the killing is a direct causal result of the perpetration or the attempt to perpetrate a burglary or robbery." The only theory of murder presented in the instructions is first degree felony murder. Consistent with the law in effect at that time, the instruction imposes liability for a killing, "whether intentional, unintentional or accidental, which occurs as a result of the commission of or attempt to commit the crime of burglary or robbery, and where there was in the mind of the perpetrator the specific intent to commit such crime." Lastly, the felony-murder

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[1] Aside from a handful of pages not relevant here, the original trial records have been lost. Attached as exhibit 2 to the "People's Response to Petition for Resentencing Pursuant to Penal Code Section 1172.6" is a set of jury instructions purportedly given in the case. The filing is not accompanied by a declaration, and thus, the provenance of the instructions — which are not separately available as part of either the clerk's or reporter's transcripts — is unknown. The document is file stamped May 17, 1982. The People describe it as "Jury Instructions – Given," although the exhibit itself includes the markings "Given" and "Refused."

special-circumstance instruction states that the jury may return a true finding thereon only if it is proved that Gray "intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of the murder in the first degree."

The trial court found Gray ineligible for relief based solely on the special circumstance instruction, from which the court concluded that the jury necessarily found "intent to kill." The trial court gave preclusive effect to this purported finding without conducting any issue preclusion analysis. (Cf. *Curiel*, *supra*, 15 Cal.5th 433.) The Court of Appeal affirmed the trial court's order denying Gray's resentencing petition, also without conducting such an analysis. (*People v. Gray* (Sept. 20, 2024, B330525) [nonpub. opn.] (*Gray II*).) The Court of Appeal relied instead on *People v. Warren* (1988) 45 Cal.3d 471, 487 (*Warren*) for the proposition that this version of the special circumstance instruction is not erroneous for failure to require intent to kill. (*Gray II*, B330525.) We granted Gray's petition for review and transferred the case to the Court of Appeal to reconsider in light of *Curiel*. Upon reconsideration, the Court of Appeal concluded that *Curiel* does not compel a different result. (*People v. Gray* (Mar. 25, 2025, B330525) [nonpub. opn.] (*Gray III*).) The Court of Appeal again bypassed an analysis of the state of the law at the time of Gray's trial and conviction, instead invoking *Warren* to conclude that the special circumstance instruction "could only be interpreted to require the jury to find intent to kill." (*Gray III*, B330525.) As explained below, this approach is subject to question.

In *Curiel*, we explained that issue preclusion bars relitigation of issues earlier decided only if several threshold

requirements are fulfilled. (*Curiel*, *supra*, 15 Cal.5th at p. 451.) As pertinent here, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding; it must have been actually litigated in the former proceeding; and it must have been necessarily decided in the former proceeding. (*Ibid.*) " 'An issue is actually litigated "[w]hen [it] is *properly raised*, by the pleadings or otherwise, and is submitted for determination, and *is determined* . . . ." ' " (*Id.* at p. 452.) "An issue is necessarily decided so long as it was not ' "entirely unnecessary" to the judgment in the initial proceeding.' " (*Ibid.*) The party asserting collateral estoppel bears the burden of establishing these requirements. (*Ibid.*)[2] " 'In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts.' " (*Curiel*, at p. 451.)

Here, setting aside any threshold concern that the lower courts did not look carefully at the *entire* record from Gray's trial — because it no longer exists — the special circumstance instruction given at Gray's trial did not expressly require "intent to kill." This is not surprising, given that, at the time of Gray's trial and conviction, the special circumstance *statute* was not thought to require intent to kill. (See *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 139–143, overruled by *People v. Anderson* (1987) 43 Cal.3d 1104 (*Anderson*) [see fn. 1, *post*].) The statute, as rewritten by voters in 1978, specifically eliminated an earlier requirement that a defendant " 'with intent to cause death

[2] Although, in this case, that burden seemingly would have fallen to the trial court after it rejected the People's concession.

physically aided or committed such act or acts causing death.' " (*Carlos,* at p. 139, quoting former § 190.2, subd. (c); see *Carlos*, at pp. 140, 143.) Instead, the voters chose to impose liability where "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of" an enumerated felony, including robbery and burglary. (§ 190.2, subd. (a)(17), added by initiative, Gen. Elec. (Nov. 7, 1978), eff. Nov. 8, 1978 [commonly known as Prop. 7].) "The absence of any express requirement of intentionality" in this section suggested that the special circumstance applied to a defendant "whether or not he intended to kill." (*Carlos*, at p. 140; see also *People v. Silbertson* (1985) 41 Cal.3d 296, 304 [noting, in a "pre-*Carlos* case, intent to kill seemed irrelevant to both the felony-murder charge and the robbery special circumstance"].) On December 12, 1983, after Gray's trial and conviction — and, indeed, after his direct appeal was decided — this court interpreted subdivision (a)(17) of section 190.2, together with former subdivision (b) of the same section, to conclude that the felony-murder special circumstance requires intent to kill. (*Carlos*, at pp. 142–143, 153–154.) That decision was based, in part, on the (partially erroneous) conclusion that the statute had to be so construed to avoid serious constitutional questions. (*Id.* at pp. 136, 147–153; see *Anderson*, *supra*, 43 Cal.3d at p. 1141 [explaining "one of the bases on which we rested our decision in *Carlos*" proved to be unsound].)[3]

Given the state of the law at the time of Gray's trial and conviction, I question whether the threshold requirements of

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[3] In *Anderson*, this court overruled "the broad holding of *Carlos* that intent to kill is an element of the felony-murder

issue preclusion are met. The issue of whether Gray acted with intent to kill was not properly raised, by the pleadings or otherwise, because none of the charged crimes or special circumstance required such a finding. If there is any doubt that the felony-murder special circumstance was not thought to require intent to kill when the jury in this case rendered its verdict, such doubt is resolved by the fact that no express malice instruction was given. The jury was never instructed on "intent to kill," and those words appear *nowhere* in the charge.[4]

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special circumstance" and replaced it with a narrower holding: "when the defendant is an aider and abetter rather than the actual killer, intent must be proved before the trier of fact can find the special circumstance to be true." (*Anderson*, *supra*, 43 Cal.3d at pp. 1138–1139.) Former subdivision (b) of section 190.2, since redesignated as subdivision (c), now imposes liability for "[e]very person, not the actual killer, who, *with the intent to kill*, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree." (§ 190.2, subd. (c), italics added.) The standard jury instructions have been modified accordingly, expressly requiring "intent to kill." (CALJIC No. 8.80; CALCRIM No. 701.)

[4] Gray noted below that the trial court did not instruct his jury on express malice. (See *Gray III*, *supra*, B330525.) The Court of Appeal observed that this does not assist in answering the "key question," i.e., whether the special circumstance instruction required a finding of intent to kill, a matter on which it found *Warren*, *supra*, 45 Cal.3d at page 488 conclusive. (*Gray III*, *supra*, B330525.) The Court of Appeal observed that, "[h]ad the jury in *Warren* found express malice, i.e., specific intent to kill, then it would not have been necessary to decide whether the special circumstance instruction required a finding of intent to kill." (*Ibid.*) This confuses two distinct questions: (1) whether the jury's verdict in *Warren* necessarily reflected a finding of express malice, as opposed to reliance on some alternative theory

However a reasonable jury might understand the special circumstance instruction under different circumstances (see *post*, discussing *Warren*, *supra*, 45 Cal.3d at p. 488), it is difficult to conclude that the jury *in this case* would have thought a finding of intent to kill was required or that it necessarily made such a finding. It is indeed difficult to reach such a conclusion, given that nobody else in the room — not the presiding judge, the prosecutor, or the defense attorney — likely would have shared the view that a finding of intent to kill was required under the law in effect at that time. Accordingly, the issue of intent to kill was not " ' "actually litigated" ' " or " ' "necessarily decided." ' " (*Curiel*, *supra*, 15 Cal.5th at pp. 451, 452.) Rather, it was "entirely unnecessary" to the judgment. (*Ibid.*)

Even where the threshold requirements of issue preclusion are satisfied, " ' "the doctrine will not be applied if such application would not serve its underlying fundamental principles" of promoting efficiency while ensuring fairness to the parties.' " (*Curiel*, *supra*, 15 Cal.5th at p. 454.) We recognized one well-settled exception to the general rule of issue preclusion in *People v. Strong* (2022) 13 Cal.5th 698, 716, that is, "when there has been a significant change in the law since the factual findings were rendered that warrants reexamination of the issue." (Cf. *Curiel*, at p. 455 [noting the "intent to kill finding that was required at the time of Curiel's trial was governed by the same standards that exist today"].) Although the concept of express malice has not undergone a significant reformation,

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of guilt; and (2) whether the jury in *Warren* was instructed on express malice *at all*. I agree with Gray that the complete absence of an express malice instruction in this case is informative.

intent to kill simply was not required for a true finding on the felony-murder special circumstance at the time of Gray's trial and conviction. It is therefore doubtful that Gray had either the opportunity or incentive to litigate the issue of intent to kill, which was likewise *not* required for his underlying felony-murder conviction. (Cf. *Id.* at p. 459 [noting that Curiel "had more than adequate incentive to litigate his intent to kill" because, even setting aside the consequences of the special circumstance, "it was an element of the crime of murder" under one of the theories pursued by the prosecution].)

As stated above, the Court of Appeal did not conduct a comprehensive issue preclusion analysis, relying instead on *Warren*, another case decided years after Gray's trial and conviction. Our task in *Warren* was to consider how a reasonable juror would understand the special circumstance instruction given in that case and, "if necessary, the charge in its entirety." (*Warren*, *supra*, 45 Cal.3d at p. 487.) The *Warren* majority recognized that the language of the special circumstance instruction, considered together with the felony-murder instruction, "might conceivably be understood to mean that a special-circumstance finding could be made as to an aider and abetter if he acted merely with the intent to commit robbery and not with the intent to kill." (*Id.* at pp. 487–488.) The majority nonetheless held that a reasonable juror would construe the instruction to require intent to kill. (*Ibid.*) A three-justice concurrence noted that there was a "serious question whether the instructions satisfactorily informed the jury" that it had to find an aider and abettor intended to kill before sustaining the special circumstance allegation. (*Id.* at p. 490 (conc. opn. of Arguelles, J.).) The concurrence found it

unnecessary to resolve that question, however, because even assuming the instructions were inadequate, the error was not prejudicial. (*Ibid.* [noting that the defendant answered in the affirmative when his coparticipant asked, " 'Can I shoot?' "].)

As noted by Gray, *Warren* raised a claim of instructional error, asking whether a reasonable jury would have understood the instructions given in that case to require intent to kill. Contrary to the Court of Appeal's assertion (*Gray III*, *supra*, B330525 ["the issue in *Warren* is identical to the issue before us"]), *Warren* did not decide the issue relevant here — whether Gray's jury *necessarily* found that he acted with intent to kill. (*Curiel*, *supra*, 15 Cal.5th at p. 467 [in order to find an element satisfied at the prima facie stage of §1172.6 proceedings, "we must be confident the jury *necessarily* found" that element].) Bare reliance on *Warren* is therefore misguided, as it overlooks whether intent to kill was required by law at the time of Gray's trial and conviction. (See *People v. Antonelli* (2025) 17 Cal.5th 719, 730–731 [the defendant was not categorically ineligible for relief under § 1172.6 because the law in effect at the time of his trial and conviction did not require proof that he personally harbor malice].) Eligibility for relief under section 1172.6 generally "will turn on an examination of both the governing law at the time of trial and the record of conviction, including the jury instructions." (*Antonelli*, at p. 731.) The Court of Appeal dismissed Gray's reliance on *Carlos*, suggesting it was "misplaced" because *Carlos* "does not cast doubt on *Warren*, a subsequent case." (*Gray III*, B330525.) But *Carlos* imposed the requirement of intent to kill only *after* Gray's trial and conviction. Thus, it should be central to the issue preclusion analysis. (See *Antonelli*, at pp. 727–731; *id.* at p. 729

[identifying *People v. Concha* (2009) 47 Cal.4th 653, which first held that provocative act murder requires a finding that the defendant personally harbored malice, as "the relevant turning point" in the law].)

Because the law frequently undergoes revision, I urge lower courts to conduct a considered issue preclusion analysis before concluding that a defendant is ineligible for relief under section 1172.6 based on jury findings rendered decades ago. In my view, the failure to do so in this case constitutes a miscarriage of justice. Gray was 18 years old at the time of the offense and sentenced to life without the possibility of parole for a murder that, according to the facts laid out in the decision on direct appeal, could have been unintentional. (*Gray I*, *supra*, 2 Crim. No. 42179.) In view of the foregoing, I would grant review of this matter, notwithstanding that there is no published conflict on the issue. I note that our denial of review does not necessarily preclude other forms of relief, including recall and resentencing upon the recommendation of the district attorney (§ 1172.1), or pursuant to a commutation recommendation (§ 4801, subd. (a) ["The Board of Parole Hearings may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause"]).

**EVANS, J.**

**I Concur:**
**LIU, J.**