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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK ELLIOT GRAY,

Defendant and Appellant.

B330525

(Los Angeles County
Super. Ct. No. A365859)

APPEAL from an order of the Superior Court of
Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Michael Allen, under appointment by the Court of Appeal,
for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Assistant
Attorney General, Amanda V. Lopez and Gary A. Lieberman,
Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner Derrick Elliot Gray appeals from an order denying his Penal Code section 1172.6 petition.¹ He argues the felony murder special circumstance instruction “given at Gray’s trial did not prove beyond a reasonable doubt that the jury found Gray intended to kill.” Gray further contends the jury could have concluded he intended only to commit robbery and burglary, not murder. Following *People v. Warren* (1988) 45 Cal.3d 471 (*Warren*), which held no reasonable jury would adopt Gray’s interpretation of an identical felony murder special circumstance instruction, we rejected Gray’s arguments and affirmed the resentencing court’s order.² Our Supreme Court granted Gray’s petition for review and transferred the case to us to reconsider in light of *People v. Curriel* (2023) 15 Cal.5th 433, 451–452 (*Curriel*). We vacated our prior opinion, received supplemental briefs, and reconsidered the cause. Upon reconsideration, we affirm the trial court’s order denying Gray’s resentencing petition.

BACKGROUND³

According to Gray’s papers filed in the resentencing court: “Gray and Alvin Bobo . . . broke into George Latronis’ residence more than forty (40) years ago, on February 5, 1981. When Latronis’ son and wife returned home that evening, ‘both the garage and kitchen windows were broken and numerous items of

¹ Undesignated statutory citations are to the Penal Code.

² We refer to the original sentencing court as the trial court and the court that considered Gray’s resentencing petition as the resentencing court.

³ We summarize only those facts relevant to the issue on appeal. The transcript of Gray’s trial is not available and is not relevant to our resolution of this appeal.

property were missing.['] . . . Mr. Latronis was found bound and gagged and died as a result of strangulation or suffocation.”

1. *Record of conviction and procedural history*

The People alleged that in 1981, Gray murdered George Latronis. The People further alleged the murder was committed while Gray was engaged in a burglary and robbery within the meaning of the felony murder special circumstance. The People also alleged Gray committed a burglary and robbery. Gray was tried separately from his confederate Alvin Bobo. A jury convicted Gray of burglary, robbery, and the first degree murder of George Latronis. (*People v. Bobo et al.* (Oct. 4, 1983, 2 Crim. No. 42179) at p. 2 (*Gray I*.) The jury found true the alleged felony murder special circumstance, that is the murder was committed during the course of the robbery and burglary.⁴ (*Gray I, supra*, 2 Crim. No. 42179 at p. 2.)

The trial court instructed the jury on felony murder as follows: “If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of burglary or robbery all persons who either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental.”

⁴ Former section 190.2 included a felony murder special circumstance where a “murder was committed while the defendant was engaged in or was an accomplice in, the commission of” a robbery or burglary. (§ 190.2, subd. (a)(17) as enacted in 1978.)

The trial court further instructed the jury on first degree felony murder, the only theory of first degree murder given to the jury: “The unlawful killing of a human being, 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, is murder of the first degree.”

The court instructed the jury on the elements of the felony murder special circumstance. It is the meaning of this instruction that is central to this appeal and that the parties dispute. Thus, the court instructed the jury: “If you find the defendant[s] in this case guilty of murder of the first degree, you must then determine if murder was committed under [one or more of] the following special circumstance[s]: in the commission of burglary or in the commission of robbery. [¶] A special circumstance must be proved beyond a reasonable doubt. . . . [¶] . . . If defendant, Derrick Gray, was not the actual killer, it must be proved beyond a reasonable doubt that he 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 further instructed the jury that it could find the special circumstance true only if “the proved facts not only are consistent with the theory that the defendant had the required mental state but cannot be reconciled with any other rational conclusion.”

In 1982, the trial court sentenced Gray for the murder to life without the possibility of parole.⁵ (*Gray I, supra*, 2 Crim. No. 42179 at p. 2.) Gray appealed from the judgment and this court modified Gray’s sentence to stay the sentences on the burglary and robbery pending service of the sentence on murder. (*Id.* at p. 19.) As modified, we affirmed the judgment. (*Ibid.*)

2. *Gray petitions for resentencing and the resentencing court denies his petition*

On September 17, 2021, Gray petitioned for resentencing pursuant to section 1172.6. The resentencing court appointed counsel for Gray. The People opposed the petition. The People argued: Gray “cannot make a prima facie showing that he is entitled to resentencing under section 1172.6. Petitioner is arguably the actual killer since evidence was presented that he was hitting the 77-year-old victim very hard and the blunt force injury was a contributing cause of death. Petitioner had the intent to kill as shown by the jury finding true the felony-murder special circumstance” (Boldface omitted.)

In reply, Gray argued, “[T]he jury was not asked to determine whether Petitioner Gray was the actual killer or aided and abetted the perpetrator with the intent to kill. No ‘major participant’ and/or ‘reckless indifference’ findings were presented for the jury’s consideration. As a result, Petitioner Gray has established a prima facie case for relief under Penal Code section 1172.6.”

⁵ The original sentencing court sentenced Gray to the upper terms for robbery and burglary and stated that “sentence on those counts would merge with the sentence on the murder count.” (*Gray I, supra*, 2 Crim. No. 42179 at p. 2.)

The resentencing court issued an order to show cause. No witness testified at the order to show cause hearing. The People could not locate the transcript of Gray’s trial and for that reason, conceded Gray should be resentenced. The resentencing court rejected the People’s concession. Relying on the special circumstance instruction, the resentencing court found beyond a reasonable doubt that Gray was guilty of murder because either he was the actual killer or given the instruction on the felony murder special circumstance, the jury had to have found he had the intent to kill when he committed the felony murder. Gray timely appealed.

DISCUSSION

“In Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill 1437), the Legislature significantly narrowed the scope of the felony-murder rule. It also created a path to relief for defendants who had previously been convicted of murder on a felony-murder theory but who could not have been convicted under the new law. Resentencing is available under the new law if the defendant neither killed nor intended to kill and was not ‘a major participant in the underlying felony [who] acted with reckless indifference to human life’ [Citations.]” (*People v. Strong*, (2022)13 Cal.5th 698, 703, citing Pen. Code, § 189, subd. (e)(3); see Pen. Code, § 1172.6; Stats. 2018, ch. 1015, §§ 3–4; Stats. 2022, ch. 58, § 10.) *People v. Curiel, supra*, 15 Cal.5th 433 held that a criminal defendant who petitions for resentencing under section 1172.6 puts at issue all elements of murder. (*Curiel*, at p. 462.)

A. The Jury Necessarily Concluded Gray Intended To Kill

Respondent argues the jury found all elements of felony murder as it is currently defined under section 189, subdivision (e)(2), which provides: “A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) [including robbery and burglary] in which a death occurs is liable for murder” if 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.” (§ 189, subd. (e)(2); see also *Strong, supra*, 13 Cal.5th at p. 708 [current felony murder includes person with the intent to kill aids and abets the actual killer in the commission of murder in the first degree].)

Gray disputes only the element of intent to kill. He argues the resentencing court erred in concluding beyond a reasonable doubt that he harbored intent to kill. According to Gray, under the special circumstance instruction given at his trial, the jury could have concluded he intentionally aided and abetted a robbery and burglary, not a murder. To reiterate, that instruction required the jury to find Gray was either the actual killer or “intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of the murder in the first degree” Gray emphasizes that “other instructions explained that [the] actual killer could commit first degree murder by merely participating in an underlying robbery or burglary and without intending to kill.” (*Italics omitted.*)

Warren, supra, 45 Cal.3d 471 considered the same issue and rejected Gray’s argument. (*Id.* at pp. 487–488.) *Warren* involved two defendants and two victims. Robert Warren, one defendant, ordered the murder victim, Antonio Herrera, to lie down. (*Id.* at p. 476.) An unidentified man pulled Homero Flores, the other murder victim, from a car and pushed him down. (*Id.* at pp. 476–477.) Woodrow Warren, another defendant, tried unsuccessfully to start Flores’s car. (*Id.* at p. 477.) When the unidentified person began to search Herrera, Herrera tried to protect his pockets. Robert asked, “Can I shoot?” and Woodrow replied, “Yes.” (*Id.* at p. 477.) Robert shot Herrera in the head and then shot Flores in the side. (*Ibid.*) Flores and Herrera died of the gunshot wounds. (*Ibid.*)

As relevant here, the jury convicted Robert and Woodrow⁶ of two first degree murders, a robbery, and a felony murder robbery special circumstance. (*Warren, supra*, 45 Cal.3d at p. 476.) With respect to the felony murder special circumstance, the jury instruction provided, “[T]he defendant was either the actual killer or a person who intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of murder in the first degree.’” (*Id.* at p. 486.) As in this case, the trial court also instructed on felony murder as follows: “The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there was in the mind of

⁶ We use the first names of the defendants in *Warren* because the defendants have the same last name. We intend no disrespect by doing so.

the perpetrator the specific intent to commit the crime of robbery, is murder of the first degree.’” (*Id.* at p. 487.)

In our high court, Woodrow argued the trial court “failed to inform the jurors they were required to find that he acted with intent to kill if they determined he was not the actual killer.” (*Warren, supra*, 45 Cal.3d at p. 487.) The court indicated it had to consider “how would a reasonable juror understand the instruction” and “if necessary, the charge in its entirety.” (*Ibid.*) The court found a “reasonable juror” would understand the special circumstance instruction as requiring intent to kill to be found true. (*Ibid.*) The court recognized that based on the language of the felony murder instruction, the special circumstance instruction “might conceivably be understood to mean that a special-circumstance finding could be made as to an aider and abettor if he acted merely with the intent to commit robbery and not with the intent to kill.” (*Id.* at pp. 487–488.) The high court, however, concluded that the “instructions here would not be so construed by a reasonable juror.” (*Id.* at p. 488.) “A reasonable juror . . . would not undertake such tortuous analysis.” (*Ibid.*)

Justice Arguelles, in a concurring opinion signed by two other justices, indicated “there is a serious question whether the instructions satisfactorily informed the jury it must find Woodrow intended to kill before sustaining the two special circumstance allegations against him.” (*Warren, supra*, 45 Cal.3d at p. 490, italics omitted.) Notwithstanding the concurring opinion (on which Gray relies), our high court has repeatedly reaffirmed *Warren*’s majority holding. (*People v. Pinholster* (1992) 1 Cal.4th 865, 954, overruled on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 458–459.) In *People v.*

Sanders (1990) 51 Cal.3d 471, our Supreme Court explained *Warren* held a reasonable juror would understand the special circumstance instruction to require that if the defendant was not the actual killer, he “acted with the intent to kill.” (*Sanders*, at pp. 516–517.) In *People v. Champion* (1995) 9 Cal. 4th 879, the high court stated it has “repeatedly held that a reasonable juror would construe [the special circumstance instruction given in this case] as imposing a requirement of intent to kill.” (*Id.* at p. 929, overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860.)

Although *Warren* involved a direct appeal and not a resentencing petition, the issue in *Warren* is identical to the issue before us—whether the felony murder special circumstance instruction necessarily required the jury to find defendant harbored intent to kill. The *Warren* majority concluded the felony murder special circumstance instruction required the jury to find intent to kill.

Gray contends, “[H]ere there were no facts and no jury instructions to indicate the jury was likely to have understood” the special circumstance instruction “to require the jury to find that Gray intended to kill.” Gray’s argument misconstrues *Warren*. Our high court did not rely on case specific facts when it concluded for a jury to find the felony murder special circumstance true, that the instruction required the jury to find the defendant intended to kill. Instead, the *Warren* court looked to the language of the special circumstance instruction, not the particular facts underlying Robert and Woodrow Warren’s crimes. Gray’s assertion that other jury instructions did not also require a finding that Gray intended to kill does not alter the conclusion that under *Warren*, the jury necessarily found intent

to kill when it convicted Gray of the felony murder special circumstance.

Gray is correct that the trial court did not instruct his jury on express malice. Had 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. The fact that the trial court in this case did not instruct the jury on express malice thus does not assist in answering the key question: Did the special circumstance instruction require the jury find Gray harbored intent to kill when it found the felony murder special circumstance true? *Warren* answers that question in the affirmative as to the identical instruction given at Gray's trial.

In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, relied on by Gray, our high court considered "whether a defendant can be charged or convicted of murder with the special circumstance of felony murder under the 1978 death penalty initiative if he did not intend to kill or to aid in the commission of a killing." (*Id.* at p. 134.) The court indicated the initiative "should be construed to require an intent to kill or to aid in a killing as an element of the felony murder special circumstance." (*Id.* at p. 135.) The court issued a writ barring trial on a special circumstance where no evidence suggested the defendant intended to kill the victim. (*Id.* at p. 136.)

The Supreme Court later overruled *Carlos* explaining "that the broad holding of *Carlos* that intent to kill is an element of the felony-murder special circumstance cannot stand, and that the following narrow holding must be put in its place: intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abettor rather than the

actual killer, intent must be proved before the trier of fact can find the special circumstance to be true.” (*People v. Anderson* (1987) 43 Cal.3d 1104, 1138–1139.)⁷ Gray’s reliance on *Carlos* is misplaced because *Carlos* does not cast doubt on *Warren*, a subsequent case, or the many Supreme Court cases following *Warren*.

Gray correctly states that the current special circumstance felony murder instruction differs from the one given in his trial.⁸

⁷ Subsequent to *Anderson*, “the voters adopted Proposition 115, modifying aider-and-abettor liability under the felony-murder special circumstance to provide that ‘a person other than the actual killer is subject to the death penalty or life without parole if that person was a major participant in the underlying felony . . . and *either* intended to kill *or* acted with reckless indifference to human life.’ [Citations.]” (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 163, fn. 20.)

⁸ CALJIC No. 8.80.1 currently provides in relevant part: “If you find that a defendant was not the actual killer of a human being, [or if you are unable to decide whether the defendant was the actual killer or [an aider and abettor] [or] [co-conspirator],] you cannot find the special circumstance to be true [as to that defendant] unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree] [.] [, or with reckless indifference to human life and as a major participant, [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of the crime of (Penal Code, § 190.2(a)(17) crime) which resulted in the death of a human being, namely _____.]

“[In determining whether a defendant as an aider and abettor was a ‘major’ participant to a first degree felony murder,

That assertion does not assist Gray because it does not elucidate the meaning of the instruction given in his case—the issue

you must consider the totality of the circumstances surrounding the commission of the crime, including but not limited to the following:

“1. What role, if any, did the defendant have in planning the criminal enterprise that led to [one or more] death[s] of the victim[s]?

“2. What role, if any, did the defendant have in supplying or using lethal weapons?

“3. What awareness, if any, did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants?

“4. Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder?

“5. Did the defendant’s actions or inactions play a particular role in the death?

“6. What did the defendant do after lethal force was used?

“No one of these considerations is necessary, nor is any one of them necessarily sufficient. All must be weighed in determining the ultimate question, namely, whether the defendant’s involvement in the criminal enterprise was sufficiently significant to be a ‘major participant’.]

“[A defendant acts with reckless indifference to human life when that defendant knows or is aware that [his] [her] acts involve a grave risk of death to an innocent human being. By participating in a violent felony with lethal weaponry, one should reasonably foresee that bloodshed is a possibility. However awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a ‘grave risk of death’ is sufficient.]”

Warren considered. We are bound by our high court's holding in *Warren*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

We have focused on Gray's intent if he was not the actual killer. The resentencing court found either Gray was the actual killer, or he acted with intent to kill. Gray does not argue that if he were the actual killer, he would be entitled to resentencing. (*Strong, supra*, 13 Cal.5th at p. 703.) We add that under the current definition of murder, a participant in a robbery or burglary "in which a death occurs is liable for murder" if "[t]he person was the actual killer." (§ 189, subd. (e)(1).) In sum, the resentencing court did not err in denying Gray's resentencing petition because Gray participated in a robbery and burglary in which a death occurred and he was either the actual killer, or with intent to kill, aided and abetted the killer.

Finally, we recognize section 1172.6 provides for the parties to "waive a resentencing hearing and stipulate that the petitioner is eligible" for resentencing. (§ 1172.6, subd. (d)(2).) We, however, reject Gray's argument that the People's concession it could not establish its burden at the evidentiary hearing is the equivalent of a stipulation that Gray was eligible for resentencing.⁹ Stipulations generally are "agreements between counsel that the facts stipulated to are true." (*People v. Farwell*

⁹ Gray made this argument in a supplemental brief requested by this court on the following question: "What impact, if any, does the resentencing of Derrick Elliot Gray's codefendant Alvin Bobo and the People's concession in the trial court that Gray is entitled to resentencing have in evaluating Gray's appeal from the denial of his Penal Code section 1172.6 resentencing petition."

(2018) 5 Cal.5th 295, 308; *In re Horton* (1991) 54 Cal.3d 82, 94 [stipulation “normally refers to an agreement between attorneys”].) The prosecutor opposed Gray’s resentencing petition and argued that as a matter of law, Gray was ineligible for resentencing and further contended the true finding on the special circumstance showed Gray harbored intent to kill. The prosecutor and defense counsel neither entered into an agreement that Gray should be resentenced nor waived the evidentiary hearing.¹⁰ Because the prosecutor and defense counsel did not stipulate to resentencing, we need not consider Gray’s argument that had the parties so stipulated, the resentencing court would have been required to accept that stipulation.

B. Curiel Does Not Compel a Different Result

In *Curiel*, *supra*, 15 Cal.5th 433, our high court considered a resentencing petition that followed a first degree murder conviction with a true finding on a gang-murder special circumstance. (*Id.* at p. 440.) The jury also found true two firearm enhancements and convicted Curiel of active participation in a criminal street gang. (*Ibid.*)

In his resentencing petition, the defendant alleged, *inter alia*, “that he had been convicted of first degree murder under the natural and probable consequences doctrine and could not currently be convicted of murder because of changes to the murder statutes enacted by Senate Bill [No.] 1437.” (*Curiel*, *supra*, 15 Cal.5th at p. 440.) The trial court denied the petition at the *prima facie* stage. (*Ibid.*) The appellate court reversed,

¹⁰ Although Gray states that the prosecutor “waived a hearing,” the record does not support that assertion.

finding that the defendant's intent to kill was not dispositive. (*Ibid.*) The Supreme Court granted review to determine the effect of the jury's true finding on the gang-murder special circumstance, "specifically its finding that Curiel intended to kill, on his ability to state a prima facie case for relief under Senate Bill [No.] 1437." (*Id.* at pp. 440–441.)

The Supreme Court affirmed the appellate court: "The jury's finding of intent to kill does not, itself, conclusively establish that Curiel is ineligible for relief. Curiel's allegation that he could not currently be convicted of murder because of the changes in substantive law enacted by Senate Bill [No.] 1437 put at issue all the elements of murder under current law. Murder liability as an aider and abettor requires both a sufficient mens rea and a sufficient actus reus. A finding of intent to kill, viewed in isolation, establishes neither." (*Curiel, supra*, 15 Cal.5th at p. 441.) The court further concluded that the instructions given in that case did not show, as a matter of law, Curiel had knowledge of the perpetrator's "intent to commit an unlawful act constituting the offense and the intent to aid the perpetrator in its commission." (*Ibid.*)

In reaching these conclusions, *Curiel, supra*, 15 Cal.5th at pp. 450–452, considered issue preclusion. The high court described the requirements of issue preclusion: " "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the

former proceeding.” ’ [Citation.]” (*Id.* at pp. 451–452.) “An issue is necessarily decided so long as it was not ‘ “entirely unnecessary” to the judgment in the initial proceeding.’ [Citation.]” (*Id.* at p. 452.)

Applying these principles, *Curiel* held a gang-murder special circumstance instruction, which included an intent to kill element, actually litigated the defendant’s intent to kill when the defendant pleaded not guilty. (*Curiel, supra*, 15 Cal.5th at p. 452.) The high court also held the jury’s intent to kill finding should be given preclusive effect in a subsequent section 1172.6 proceeding. (*Id.* at p. 460.)

The court’s analysis did not end there. Notwithstanding the jury’s intent to kill finding, *Curiel* held that under the instructions given in that case, the jury “could have relied on the natural and probable consequences doctrine to convict Curiel of murder, and the findings required under that theory—even when combined with the finding of intent to kill . . . do not encompass all of the elements of any theory of murder under current law.” (*Curiel, supra*, 15 Cal.5th at p. 471.) In particular, the court noted that for aiding and abetting liability, the People also had to show the defendant’s knowledge of the actual killer’s purpose and intent to aid in that purpose. (*Id.* at pp. 441, 470–471.)

Upon remand from our high court for reconsideration in light of *Curiel*, Gray argues whether he harbored intent to kill was not actually litigated or necessarily decided because the felony murder special circumstance instruction was ambiguous. Gray explains that the special circumstance instruction allowed the jury to find the felony murder circumstance true merely based on finding he intended to aid the robbery or burglary because the felony murder and first degree murder instructions

would have allowed the jury to find first degree murder based on Gray's intent to aid a robbery or burglary.

As forth in part A of our Discussion, *ante*, our high court has held that an identical special circumstance instruction could only be interpreted to require the jury to find intent to kill to find the felony murder special circumstance instruction true. The court so held even where the felony murder instruction permitted an unintentional or accidental death.

Whether Gray intended to kill was put at issue in Gray's trial, and by finding the felony murder special circumstance true, the jury necessarily found Gray intended to kill. Under *Curiel*, the jury's finding of intent to kill precludes Gray from arguing in the section 1172.6 proceeding that he lacked such intent, which is his only argument on appeal. (*Curiel, supra*, 15 Cal.5th at p. 460.)

Gray does not dispute that the jury necessarily found the *other* elements of felony murder as currently defined. To reiterate, under current law, a person commits a felony murder when he or she is a "participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) [including robbery and burglary] in which a death occurs is liable for murder" if 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." (§ 189, subd. (e)(2).) Here, the jury found Gray participated in a burglary and robbery and that a human being was killed in the commission of a burglary or robbery. Additionally, by finding the special circumstance true, the jury found 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” Thus, the jury necessarily found all of the elements of felony murder under current law. (See *People v. Williams* (2022) 86 Cal.App.5th 1244, 1255–1256 [appellate court considers all of the instructions to determine whether jury necessarily found all elements of murder under current law].) In sum, the resentencing court did not err in denying Gray’s resentencing petition.

DISPOSITION

The order denying Derrick Elliot Gray’s Penal Code section 1172.6 resentencing petition is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.