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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDWARD AROCHE, Defendant and Appellant.	H051290 (Santa Clara County Super. Ct. No. 172599)

Persons convicted of murder or attempted murder under former law are eligible for resentencing under Penal Code section 1172.6 subdivision (a)(3) if they "could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019."[1] A defendant is not eligible for resentencing, however, where "[t]he problem" raised in a section 1172.6 petition "has nothing to do with the legislative changes to California's murder law effected" by these recent amendments. (*People v. Burns* (2023) 95 Cal.App.5th 862, 867 (*Burns*).)

The trial court denied Edward Aroche's petition for relief under section 1172.6 at the prima facie stage because the jury that convicted him of two first degree murders also found true the special circumstances that the murders were committed while lying in wait. On appeal, Aroche concedes that an aider/abettor, to be subject to the lying-in-wait

[1] Undesignated statutory references are to the Penal Code.

special circumstance, must intend to kill. (§ 190.2, subd. (c).) He contends, however, that the special circumstance instruction at trial allowed the jury to find the special circumstance true as to Aroche without finding he had the required intent. Because this implicit claim of trial error exceeds the scope of section 1172.6, we affirm.

I. BACKGROUND

A. *Convictions Final on Direct Appeal*

As is pertinent here, a jury in 1997 convicted Aroche and three codefendants of the first degree murders of Barry San Jose (count 1, § 187) and Federico Arevalo (count 2, § 187) and found true as to both counts the special circumstance of murder while lying in wait (§ 190.2, subd. (a)(15)). This court affirmed the murder convictions and lying-in-wait special circumstances, although it reversed for insufficiency of the evidence one robbery conviction and another special circumstance—murder during the commission of a felony—the jury had also found true as to both murders. (See *People v. Fernandez et al.* (Aug. 28, 2001, H017793) [nonpub. opn.].)

B. *Aroche's Resentencing Petition*

In 2022, Aroche, representing himself, petitioned for resentencing under section 1172.6. The District Attorney opposed Aroche's petition, arguing that the lying-in-wait special circumstance required an intent to kill, which conclusively rendered Aroche ineligible for relief. Aroche, now represented by counsel, offered no substantive response to the district attorney's legal argument.

The trial court denied the petition at the prima facie stage, concluding that Aroche was ineligible for relief under section 1172.6 because "[p]ersons who intended to kill are still guilty after the changes to sections 188 and 189 effective January 1, 2019" and the jury's true finding on the lying-in-wait special circumstance required a finding that Aroche had a specific intent to kill. The jury "necessarily concluded that [Aroche] had an intent to kill as was, and still is, required for killers and non-killers alike."

Aroche timely appealed.

II. DISCUSSION

We independently review a trial court's determination that a petitioner failed to make a prima facie case for relief under section 1172.6. (*Burns*, *supra*, 95 Cal.App.5th at p. 866.) Our inquiry here turns on the adjudicated special circumstance of lying in wait and its requirement that a defendant—even if "not the actual killer"—acted "with the intent to kill." (§ 190.2, subd. (c); see also Ballot Pamp., Primary Elec. (June 5, 1990) text of Prop. 115, § 10, p. 66 (Prop. 115 Pamphlet) [amending § 190.2 to add current subd. (c)]; *People v. Sandoval* (2015) 62 Cal.4th 394, 416 [" 'Lying in wait is the functional equivalent of proof of premeditation, deliberation, and intent to kill' "].) If the petition and record of conviction conclusively establish that Aroche is ineligible for relief, denial at the prima facie stage is proper. (See *People v. Lewis* (2021) 11 Cal.5th 952, 959–960 (*Lewis*); *People v. Strong* (2022) 13 Cal.5th 698, 708.)

Aroche's challenge here is not to the elements of the lying-in-wait special circumstance but to the adequacy of the special-circumstance instruction given at trial, which he argues permitted the jury to find the special circumstance without finding that he had the required intent to kill. If Aroche is correct that the instruction did not communicate the requirement that he had a specific intent to kill, then the special-circumstance instruction constituted legal error at the time it was given. (See generally *People v. Aledamat* (2019) 8 Cal.5th 1, 7.) A necessary premise of Aroche's argument, then, is that his conviction cannot be credited as proof that the jury found the facts essential to its verdict because the trial court erred in instructing the jury. But section 1172.6 "was designed to permit the resentencing of defendants who were properly convicted under the law that applied at the time, but 'could no longer be convicted of murder' because of recent legislative changes." (*Burns*, *supra*, 95 Cal.App.5th at p. 867; see also *id*. at pp. 865, 868–869; *People v. Flores* (2023) 96 Cal.App.5th 1164, 1173–1174 (*Flores*); *People v. Berry-Vierwinden* (2023) 97 Cal.App.5th 921, 936 (*Berry-Vierwinden*); *People v. Bodely* (2023) 95 Cal.App.5th

1193, 1205 (*Bodely*); *People v. Farfan* (2021) 71 Cal.App.5th 942, 947 (*Farfan*); *People v. DeHuff* (2021) 63 Cal.App.5th 428, 438 (*DeHuff*).) A section 1172.6 petition is not a second appeal to raise claims of trial error under the law applicable then as now. (*Burns*, at p. 865.)

A. *The Purpose of a Section 1172.6 Petition*

Amendments to sections 188 and 189 limiting the felony-murder rule and abrogating the natural and probable consequences doctrine " 'ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life' " (*Lewis*, *supra*, 11 Cal.5th at p. 959.) A section 1172.6 petition "supplements a defendant's traditional direct appeal by providing an opportunity to make arguments that did not exist at the time of the appeal, but have arisen since 2019 as a result of recent statutory amendments." (*Burns*, *supra*, 95 Cal.App.5th at p. 867; see also § 1172.6, subd. (a)(3) [providing for relief only where "[t]he petitioner could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019"].) Resentencing under section 1172.6, however, is neither a substitute for direct appeal nor a successive appeal from the original conviction. (*Burns*, at p. 865.)

In *Burns*, for example, the defendant was convicted of first degree murder for participating with a codefendant in a gang-related shooting. (*Burns*, *supra*, 95 Cal.App.5th at p. 865.) The trial court instructed the jury that " '[a] person is *equally* guilty of the crime, whether he or she committed the crime personally or aided and abetted the perpetrator who committed it.' " (*Id*. at p. 864, fn. omitted.) By that time, however, appellate courts had "warned that the 'equally guilty' language of the instruction might mislead jurors in some circumstances by suggesting that once they decide the direct perpetrator is guilty of a particular crime (e.g., first degree murder), the aider and abettor is necessarily guilty of the same crime, regardless of his or her mental

state." (*Id*. at pp. 864–865.) Burns did not assert instructional error on his direct appeal. (*Id.* at p. 865.) When the superior court summarily denied his eventual section 1172.6 petition, the Court of Appeal affirmed. Even accepting that the jury instruction was flawed, "the alleged error . . . has nothing to do with the 2018 and 2021 legislative changes that gave rise to section 1172.6's petition process. Section 1172.6 does not create a right to a second appeal, and Burns cannot use it to resurrect a claim that should have been raised in his 2013 direct appeal." (*Burns*, at p. 865.)

Numerous cases align with *Burns*. (See *Flores*, *supra*, 96 Cal.App.5th at p. 1173 [explaining that without "any legislative change supporting relief, Flores's argument reduces to a claim that the instructions given at his trial did not clearly require the jury to find that he personally acted with malice to find him guilty of provocative act murder"—"a routine claim of instructional error [that] could have been asserted on appeal from the judgment of conviction"]; *Berry-Vierwinden*, *supra*, 97 Cal.App.5th at p. 936 [applying *Burns* and *Flores* to argument that jury instructions permitted conviction "as a direct aider and abettor of murder on an imputed malice theory," because "Berry-Vierwinden [was] necessarily asserting that [the instructions] were erroneous under the law in effect at the time of his 2010 trial and subsequent direct appeal"]; *Bodely*, *supra*, 95 Cal.App.5th at p. 1205 [rejecting challenge to causation instructions because the "judgment [was] long since final and" the defendant could not on his § 1172.6 petition "raise any issues related to the conduct of his trial"]; *Farfan*, *supra*, 71 Cal.App.5th at p. 947 [explaining that petition under former § 1170.95 did "not afford the petitioner a new opportunity to raise claims of trial error"]; *DeHuff*, *supra*, 63 Cal.App.5th at p. 438 [explaining that former § 1170.95 "does not permit a petitioner to establish eligibility on the basis of alleged trial error" in rejecting contention that DeHuff made a prima facie case based on instructional error].)

B. ***Lying-in-Wait Special Circumstance***

For our purposes, section 190.2 has two relevant subdivisions. Subdivision (a) lists special circumstances that subject a defendant found guilty of first degree murder to death or life in prison without the possibility of parole. Among those: "The defendant intentionally killed the victim by means of lying in wait." (§ 190.2, subd. (a)(15).) Subdivision (c) provides that individuals who aid or abet first degree murder "with the intent to kill" are subject to the same punishment if a special circumstance is present. This fundamental statutory structure has been in place since the voters adopted Proposition 115 in 1990. (See Prop. 115 Pamphlet, *supra*, text of Prop. 115, § 10, p. 66; *People v. Solis* (2020) 46 Cal.App.5th 762, 773.) So by the time of Aroche's trial, and under present law, the plain text of the statute unambiguously provided that Aroche could only be subject to a lying-in-wait special circumstance if he intended to kill, even if not the actual killer.

The clear dictates of the plain statutory text have been confirmed by our Supreme Court: "A lying-in-wait special circumstance can apply to a defendant who, intending that the victim would be killed, aids and abets an intentional murder committed by means of lying in wait." (*People v. Johnson* (2016) 62 Cal.4th 600, 630 (*Johnson*); see also *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1753 [observing that § 190.2, subd. (c) required a prosecution showing "that the aider and abettor had intent to kill"]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1142, 1147 [interpreting former § 190.2, subd. (b), applied to one who " 'intentionally' " aided or abetted " 'in the commission of murder in the first degree,' " to require "intent to kill" be shown for an aider or abettor in a felony murder even though the felony-murder special circumstance applicable to actual killers did not require intent to kill]; *People v. Cage* (2015) 62 Cal.4th 256, 278 (*Cage*) [lying-in-wait special circumstance requires intent to kill in actual killer context].)

C. *The Lying-in-Wait Special Circumstance Refutes Aroche's Prima Facie Showing*

Aroche expressly concedes that the lying-in-wait special circumstance charged as to both murders required, as a matter of law, a finding that Aroche specifically intended to kill both victims. (See, e.g., *Cage*, *supra*, 62 Cal.4th at p. 278; *Johnson*, *supra*, 62 Cal.4th at p. 630.) Further, Aroche implicitly concedes that if his intent to kill both victims is established by the record of conviction, his petition is properly subject to denial at the prima facia stage. We recognize that "[a] finding of intent to kill does not, standing alone, cover all of the required elements." (*People v. Curiel* (2023) 15 Cal.5th 433, 463 (*Curiel*).) But the lying-in-wait special circumstance covers all required elements for a still-valid theory of lying-in-wait first degree murder (see *People v. Flinner* (2020) 10 Cal.5th 686, 748), and Aroche contests only whether the true finding establishes his intent to kill.

The sole argument Aroche presses on appeal is, in substance, a belated challenge to the trial court's instruction on the lying-in-wait special circumstance. Aroche disclaims any desire to challenge the lying-in-wait special circumstance. But he contends that, as worded, the instruction permitted the jury to reach its lying-in-wait finding by imputing to him a codefendant's intent to kill. His contention asks us to conclude that the jury found Aroche liable for lying in wait without finding the essential elements of that special circumstance because the jury instruction was defective. (See *Berry-Vierwinden*, *supra*, 97 Cal.App.5th at p. 936.) At bottom, he asks us to conclude that the jury did not resolve issues that its verdict on the lying-in-wait special circumstance required as a matter of law.

Aroche objects that he does not seek to disturb the special circumstance true finding but merely to defend against the use of the special circumstance to defeat his petition. But Aroche still would relitigate an issue that has already been decided. (See *People v. Bratton* (2023) 95 Cal.App.5th 1100, 1104–1105, 1116–1117, 1127; see also

Curiel, *supra*, 15 Cal.5th at p. 451 [reaffirming that issue preclusion is "informative" in the § 1172.6 context].) Aroche's intent to kill was actually litigated and necessarily decided as part of the lying-in-wait special circumstance. (See *Bratton*, at p. 1117.) "An issue is necessarily decided so long as it was not ' "entirely unnecessary" to the judgment in the initial proceeding.' " (*Curiel*, *supra*, 15 Cal.5th at p. 452.) This is so even if viable legal arguments could have but were not made at trial as to the essential elements of an offense. (See *Bratton*, at p. 1118.) Aroche's intent to kill having been necessary to the final judgment, he cannot prevail on his appellate argument without relitigating that finding based on an alleged defect in the relevant instruction. (See *Berry-Vierwinden*, *supra*, 97 Cal.App.5th at p. 936.)

Aroche urges us to conduct the same analysis he believes is appropriate in all section 1172.6 cases—consider the jury instructions to illuminate what significance to ascribe to the verdict. We agree that jury instructions help assess whether a defendant was convicted under a still-valid theory of murder where the law at the time permitted conviction under a since-invalidated theory of murder. (See *People v. Harden* (2022) 81 Cal.App.5th 45, 52–60 [analyzing jury instructions].) But there was and is only one viable pathway for a jury to find the lying-in-wait special circumstance true—Aroche had to have the intent to kill. Thus, the true finding, if valid, forecloses the possibility that his first degree murder convictions depended on a theory of liability that has since been abrogated. Were we to examine the jury instructions in this case, it would be to test the validity of the true finding—not to identify which of two or more then-valid theories the jury applied.[2] So Aroche asks us " 'to resurrect a claim that should have been raised

[2] The abrogated theory presented to the jury was based on robbery murder. On direct appeal, however, this court reversed for evidentiary insufficiency the robbery convictions and robbery-murder special-circumstance findings for all defendants, while affirming the first degree murder convictions. The Attorney General maintains that, as a result, Aroche's convictions necessarily rest on still-valid theories of first degree murder. We need not reach this argument.

in . . . [direct] appeal.' " (See *Berry-Vierwinden*, *supra*, 97 Cal.App.5th at p. 936.) As in *Berry-Vierwinden*, where the Court of Appeal rejected an analogous challenge to the jury instruction on a lying-in-wait theory of murder, "What [defendant] is really arguing is that the instructions 'may have misled the jury as to what was *then* required to convict [him].' " (*Id*. at p. 935, quoting *Burns*, *supra*, 95 Cal.App.5th at p. 868.)

Section 1172.6 is not the vehicle to litigate Aroche's claim of instructional error. This claim, the "problem . . . raise[d by the] petition, . . . has nothing to do with the legislative changes to California's murder law" that section 1172.6 extends to otherwise final convictions dependent on now-defunct law. (*Burns*, *supra*, 95 Cal.App.5th at p. 867.) Aroche argues that the lying-in-wait instruction is not the problem raised by his petition, because he raises the issue only in response to the argument that the special circumstance true finding forecloses his right to relief. But if establishing instructional error is necessary for him to ultimately demonstrate his entitlement to relief, then the instructional error is the ultimate problem raised by his petition. If the jury instruction was defective in omitting what even then was an essential element of express malice, Aroche's recourse was to raise the issue on direct appeal. (See, e.g., *id*. at pp. 867–868.) The issue is not properly raised by the present petition. (See *ibid*.; see also *Flores*, *supra*, 96 Cal.App.5th at pp. 1173–1174; *Berry-Vierwinden*, *supra*, 97 Cal.App.5th at p. 936.)

III. DISPOSITION

The order denying the petition for resentencing is affirmed.

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LIE, J.

WE CONCUR:

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GREENWOOD, P. J.

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GROVER, J.

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