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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. IVAN LEE MATTHEWS, Defendant and Appellant.	B304656 (Los Angeles County Super. Ct. No. BA044844)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Lori Nakaoka, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In 1993, a jury convicted defendant and appellant Ivan Lee Matthews of second degree murder (Pen. Code, § 187, subd. (a)[1]) and found true the allegation that a principal in the murder was armed with a firearm (§ 12022, subd. (a)(1)). The trial court sentenced defendant to 16 years to life in state prison. In 1995, a prior panel of this division affirmed defendant's conviction. (*People v. Milligan and Matthews* (June 21, 1995, B074378) [nonpub. opn.].)

In 2019, following the enactment of Senate Bill No. 1437 (Senate Bill 1437), defendant filed a petition for resentencing pursuant to section 1170.95. On January 30, 2020, the trial court denied the petition, finding that "it's clear that the case does not involve felony murder[ ] or the natural and probable consequences [doctrine.]" Defendant timely filed a notice of appeal.

We appointed counsel to represent defendant on appeal. Defendant's appointed appellate counsel filed an opening brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436, requesting that we independently review the entire record to determine if there are any arguable issues. On October 15, 2020, we notified defendant that appointed appellate counsel had failed to find any arguable issues and that he had 30 days within which to independently brief any grounds for appeal, contentions, or arguments he wanted us to consider. On October 26, 2020, defendant filed a supplemental brief contending that he was entitled to relief under Senate Bill 1437 because he was not convicted of second degree murder as a direct aider and abettor, he lacked the requisite intent to commit murder, and even if he

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[1] All further statutory references are to the Penal Code.

was convicted as a direct aider and abettor, he is entitled to relief under Senate Bill 1437.

We express no opinion on whether an independent review of the record is necessary under the circumstances of this case. We have, however, conducted such a review and reject defendant's contentions. The jury instructions in defendant's case did not include instructions on the felony murder rule or the natural and probable consequences doctrine. The jury received instructions only on direct aiding and abetting[2] and the elements of malice murder.[3] Because defendant could only have been

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[2] The trial court delivered CALJIC No. 3.01, which stated: "A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she, [¶] (1) with knowledge of the unlawful purpose of the perpetrator and [¶] (2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] [A person who aids and abets the [commission] [or] [attempted commission] of a crime need not be personally present at the scene of the crime.] [¶] [Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.] [¶] [Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]"

[3] The court delivered CALJIC No. 8.10, which stated: "[Defendants are accused in [Count 1 of] the information of having committed the crime of murder, a violation of . . . [s]ection 187.] [¶] Every person who unlawfully kills a [human being] [with malice aforethought] is guilty of the crime of murder in violation of [s]ection 187 . . . . [¶] In order to prove such crime, each of the following elements must be proved: [¶] 1. A human

convicted of murder as a direct aider and abettor and the jury necessarily found that he intended to kill the victim, defendant was ineligible, as a matter of law, for resentencing under section 1170.95. (*People v. Smith* (2020) 49 Cal.App.5th 85, 92, fn. 5 ["if the jury was not instructed on a natural and probable consequences or felony-murder theory of liability, the petitioner could not demonstrate eligibility as a matter of law because relief is restricted to persons convicted under one of those two theories"].) Therefore, the trial court did not err in denying defendant's petition. Further, we are satisfied that defendant's appointed appellate counsel has fully complied with her responsibilities and no arguable issues exist. (*People v. Wende, supra*, 25 Cal.3d at p. 441.)

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being was killed. [¶] 2. The killing was unlawful, and [¶] 3. The killing [was done with malice aforethought]."

DISPOSITION

The order denying the resentencing petition under section 1170.95 is affirmed.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.