SUPREME COURT OF THE UNITED STATES

APPENDIX A

PETITION FOR A WRIT OF CERTIORARI

Filed 9/29/23

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. SAMUEL WINDHAM, Defendant and Appellant.	H047278 (Monterey County Super. Ct. No. MCR4493)

I. INTRODUCTION

Defendant Samuel Windham appealed a postjudgment order denying his petition for resentencing pursuant to Penal Code section 1170.95 (now Penal Code section 1172.6),[1] which allows individuals convicted of murder under a theory in which malice is imputed to a person based solely on that person's participation in a crime to petition the sentencing court to vacate the conviction under recent changes to the law. We dismissed defendant's appeal, concluding that defendant did not present an arguable issue on appeal. (*People v. Windham* (May 21, 2020, H047278) [nonpub. opn.].)

On June 28, 2023, the California Supreme Court transferred the matter back to this court "with directions to vacate [our] decision and reconsider whether to exercise [our]

[1] All further statutory references are to the Penal Code. For ease of reference, we will refer to this statute by its current designation, section 1172.6.

Appendix A

26

discretion to conduct an independent review of the record or provide any other relief in light of" *People v. Delgadillo* (2022) 14 Cal.5th 216, 232–233 & fn. 6 (*Delgadillo*) and *People v. Lewis* (2021) 11 Cal.5th 952, 971–972 (*Lewis*). Accordingly, this court vacated its prior decision in this matter.

Defendant filed a supplemental brief raising several issues challenging the validity of his convictions. After considering these issues, we requested supplemental briefing. Having considered the supplemental briefing, the issues defendant personally raised, and our review of the record, we conclude that the sentencing court did not err in denying defendant's petition for relief under section 1172.6 without issuing an order to show cause. Therefore, we will affirm the sentencing court's denial of defendant's petition.

II. BACKGROUND

The charged offenses took place in 1982. Defendant waived his right to a jury trial in return for the prosecution agreeing not to seek the death penalty. On April 17, 1985, the trial court found defendant guilty of first degree murder (§ 187), three counts of assault (§ 245, subd. (a)(1)), burglary with intent to commit arson (§ 459), and arson (former § 451a).[2] The court also found true the special circumstance allegations that defendant committed the murder during the commission of arson (former § 190.2, subd. (a)(17)(viii)) and that the murder was intentional and involved the infliction of torture (§ 190.2, subd. (a)(18)). The court sentenced defendant to 25 years to life for the murder and life without the possibility of parole for the special circumstances. The court imposed concurrent terms of varying lengths for the remaining offenses.

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[2] The information and minutes from the trial contained in the appellate record list defendant's arson conviction as under former section 451a. However, the conviction appears to have actually occurred under section 451, subd. (a), not section 451a, as section 451a was renumbered before the time of the charged offenses as section 455. (Stats. 1979, ch. 145, § 9.)

Defendant appealed, and in a 1987 opinion, this court struck the 25-years-to-life term imposed for the murder and made "defendant's sentence for first degree murder special circumstances simply life without possibility of parole." (*People v. Windham* (Jan. 22, 1987, H000726) [nonpub. opn.].) This court also stayed the sentence for burglary and affirmed the judgment as modified. (*Ibid.*)

In 2019, defendant filed a petition for resentencing pursuant to section 1172.6. The sentencing court appointed counsel to represent defendant. The prosecution filed an opposition to the petition and attached this court's 1987 opinion as an exhibit, along with the information, minutes from defendant's trial, and the abstract of judgment. Defendant filed a response through counsel, arguing that defendant was not the actual killer and that the court should issue an order to show cause to determine whether defendant was a major participant in an underlying felony who acted with reckless indifference to human life.

The sentencing court denied the petition, determining defendant did not make a prima facie showing of entitlement to relief. The court found: "The facts underlying this case are remarkable in their tragedy. It is a situation where the defendant went to the home of the victim where she had really escaped him, and along with a friend broke into the home, poured gasoline on her during a struggle, and ignited her. She had burns over -- I believe it was 95 percent of her body and died within hours, leaving children in the home who were unconscious, but did survive." The sentencing court also quoted this court's 1987 opinion as follows: " 'We fully agree with the trial [c]ourt's observation that where one holds another down, saturates her with gas, threatens her with death, and asks for a match, the only reasonable conclusion is that the actor intends and desires to cause both intense pain and death by burning her.' " Finally, the sentencing court denied the petition, stating: "This is certainly not a case that the [L]egislature intended the new statute apply to."

Defendant timely filed a notice of appeal. We appointed counsel to represent defendant in his appeal, and counsel filed an opening brief that cited *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *People v. Serrano* (2012) 211 Cal.App.4th 496 (*Serrano*), providing a statement of the case and facts but raising no issues. We notified defendant of his right to submit written argument on his own behalf within 30 days, and defendant then filed a handwritten supplemental brief. In May 2020, we concluded that nothing in defendant's supplemental brief raised an arguable issue, and we dismissed the appeal. (*People v. Windham* (May 21, 2020, H047278) [nonpub. opn.].)

After the California Supreme Court transferred this matter back to this court, the Attorney General and defendant's counsel both notified this court they would not submit a supplemental brief. However, defendant notified this court that he wished to file a supplemental brief, and this court granted defendant additional time to do so. Defendant then personally submitted a handwritten brief, raising the following allegations: (1) his due process rights were violated because he received insufficient notice concerning proceedings involving his section 1172.6 petition; (2) he was not his victim's actual killer under section 189, subdivision (e)(1); (3) the trial court erred by denying the petition at the prima facie stage without defendant's presence and without issuing an order to show cause and conducting an evidentiary hearing; (4) substantial evidence does not support his convictions; and (5) the procedures outlined in *Wende* and *Serrano*, *supra*, should apply to his appeal from the sentencing court's order regarding his section 1172.6 petition.

After reviewing the issues defendant raised, we requested supplemental briefing from the parties concerning whether the sentencing court properly considered this court's 1987 opinion as part of the record of conviction, and whether the sentencing court

properly determined that defendant failed to establish a prima facie case for relief under section 1172.6.[3]

III. DISCUSSION

A. *Statutory Background*

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) "Under the felony-murder doctrine as it existed at the time of [defendant's] trial, 'when the defendant or an accomplice kill[ed] someone during the commission, or attempted commission, of an inherently dangerous felony,' the defendant could be found guilty of the crime of murder, without any showing of 'an intent to kill, or even implied malice, but merely an intent to commit the underlying felony.' [Citation.] Murders occurring during certain violent or serious felonies were of the first degree, while all others were of the second degree. [Citations.]" (*People v. Strong* (2022) 13 Cal.5th 698, 704 (*Strong*).)

Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill 1437) took effect on January 1, 2019, imposing "statutory changes to more equitably sentence offenders in accordance with their involvement in homicides." (Stats. 2018, ch. 1015, § 1, subd. (b).) Senate Bill 1437 "significantly limited the scope of the felony-murder rule to effectuate

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[3] Specifically, this court requested briefing on the following issues: (1) Did the sentencing court properly consider this court's 1987 opinion (case No. H000726) as part of the record of conviction in determining whether defendant established a prima facie case for relief under section 1172.6; (2) Do the trial court's true findings on the special circumstance allegations of torture murder and murder in the commission of arson conclusively establish that defendant is ineligible for relief under section 1172.6 because defendant was either the actual killer of the victim or a major participant in an underlying felony who acted with reckless indifference to human life; (3) Apart from the trial court's true findings on the special circumstance allegations of torture murder and murder in the commission of arson, does the record of conviction in defendant's trial conclusively establish that defendant is ineligible for relief under section 1172.6 because defendant was either the actual killer of the victim or a major participant in an underlying felony who acted with reckless indifference to human life; and (4) Based on the questions above, was the sentencing court required to issue an order to show cause and conduct an evidentiary hearing on defendant's petition?

the Legislature's declared intent 'to 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.' [Citations.]" (*Strong, supra*, 13 Cal.5th at pp. 707–708.) Senate Bill 1437 thus amended section 189 to provide that a participant in the perpetration or attempted perpetration of a listed 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, "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"; or (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 1437 added section 1172.6, which provides an avenue for a person convicted in a case involving felony murder or murder under the natural and probable consequences doctrine to petition the sentencing court to vacate the conviction and to be resentenced. Under section 1172.6, "[a]fter the parties have had an opportunity to submit briefings, the court shall hold a hearing to determine 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. [Citations.] If, instead, the defendant has made a prima facie showing of entitlement to relief, 'the court shall issue an order to show cause.' [Citation.]" (*Strong, supra*, 13 Cal.5th at p. 708.) "[T]he court may appropriately deny a petition at the prima facie stage if the petitioner is ineligible for relief *as a matter of law*." (*People v. Harden* (2022) 81 Cal.App.5th 45, 52.) "We independently review a trial court's determination on whether a petitioner has made a prima facie showing. [Citation.]" (*Ibid.*)

B. *Analysis*

Two of the issues defendant raises allege the sentencing court erred by denying his section 1172.6 petition at the prima facie stage. Defendant asserts that he was not the actual killer under section 189, subdivision (e)(1), arguing that he did not actually set fire to the home. Relatedly, he argues that the sentencing court erred in denying his petition without issuing an order to show cause and conducting an evidentiary hearing because he established a prima facie case for relief. Our request for supplemental briefing centered on these two issues.

In denying defendant's petition, the sentencing court quoted a statement from this court's 1987 opinion that stated that defendant intended and desired to cause both intense pain and death by burning his wife, and the sentencing court recited some of the facts as stated in this court's 1987 opinion. The appellate record contains no transcript from defendant's trial or other documents that detail the evidence in defendant's trial, apart from this court's 1987 opinion.[4] However, in response to this court's supplemental briefing request, the Attorney General moved to augment the record or for this court to take judicial notice of the preliminary hearing transcript of a minor who described herself as a friend of defendant. The appellate record indicates this transcript from the preliminary hearing was admitted at defendant's trial. This court granted the motion, deeming the record on appeal augmented.

We assume without deciding that the sentencing court erred by relying on the recitation of facts contained in this court's 1987 opinion. In particular, we assume that the sentencing court erred by relying on the statement about defendant holding the victim down, saturating her with gasoline, threatening her with death, and asking for a match. This statement was contained in this court's analysis of the sufficiency of the torture-

[4] The appellate record contains two cover pages titled reporter's transcript of proceedings from defendant's preliminary hearing, but the transcripts themselves are not included.

murder special circumstance finding. Under the current version of section 1172.6, the trial court may not admit the statement of facts from a prior appellate opinion as substantive evidence at an evidentiary hearing. (§ 1172.6, subd. (d)(3); *People v. Arnold* (2023) 93 Cal.App.5th 376, 392; *People v. Clements* (2022) 75 Cal.App.5th 276, 292; cf. *People v. Vance* (2023) 94 Cal.App.5th 706, 714 [there are "good reasons to make an appellate opinion inadmissible" at a section 1172.6 evidentiary hearing, but "they are not good reasons to preclude the trier of fact from considering an appellate opinion under any circumstances"]; *People v. Cooper* (2022) 77 Cal.App.5th 393, 400, fn. 9 [the sentencing court may not rely on a prior appellate opinion's factual summary at an evidentiary hearing without the defendant's acquiescence].) At the prima facie stage, the California Supreme Court has held that prior appellate opinions "are generally considered to be part of the record of conviction," and that "the probative value of an appellate opinion is case specific . . . ." (*Lewis*, *supra*, 11 Cal.5th at p. 972.) However, this decision was issued before the addition of a statement in section 1172.6, subdivision (d)(3), that limits the use of a prior appellate opinion at an evidentiary hearing, and our Supreme Court also cautioned that " 'an appellate opinion might not supply all answers,' " and that at the prima facie stage, "a trial court should not engage in 'factfinding involving the weighing of evidence or the exercise of discretion.' [Citation.]" (*Lewis*, *supra*, at p. 972.) At least one Court of Appeal has held that under the most current version of section 1172.6, the sentencing court may not consider a prior appellate opinion, including a statement of facts in that opinion, at the prima facie stage. (*People v. Flores* (2022) 76 Cal.App.5th 974, 988.) In supplemental briefing requested by this court, the Attorney General acknowledges: "The sentencing court erred by relying on the statement of facts in this Court's 1987 opinion." We therefore assume without deciding that the sentencing court erred in this respect.

However, even omitting consideration of the facts summarized in this court's 1987 opinion, the record demonstrates as a matter of law that defendant is ineligible for

relief. Both appellate defense counsel and defendant personally acknowledge in briefing to this court that defendant was convicted of felony murder. Because defendant was convicted under the felony-murder rule, in order to deny defendant's petition at the prima facie stage, the record of conviction must clearly establish that defendant meets one of three categories: (1) he was "the actual killer"; (2) he, "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"; or (3) he "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).). Defendant's special circumstance findings establish that he acted with intent to kill, and therefore he is ineligible for relief under section 1172.6.

Defendant's torture-murder special circumstance finding required proof that "[t]he murder was intentional and involved the infliction of torture." (§ 190.2, subd. (a)(18).) To prove a torture-murder special circumstance, "the prosecution had to establish that 'defendant intended to kill and had a torturous intent, i.e., an intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose.' [Citation.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 65.) The California Supreme Court held soon after defendant's trial that a true finding on a torture-murder special circumstance required "proof of first degree murder, [citation], proof the defendant intended to kill and to torture the victim [citation], and the infliction of an extremely painful act upon a living victim. [Citation.]" (*People v. Davenport* (1985) 41 Cal.3d 247, 271, superseded by statute on another ground as stated in *People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14.) In addition, as the Attorney General notes, before the time of defendant's conviction, the California Supreme Court held that a felony-murder special circumstance finding (such as defendant's arson-murder finding) required the prosecution to prove that the defendant intended to kill the victim. (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 136 (*Carlos*) [concluding that 1978 amendments

to felony-murder law "impel an interpretation which finds an intent to kill requirement in the felony murder provision of the 1978 initiative."].)[5] Thus, both the torture-murder and the arson-murder special circumstance findings demonstrate as a matter of law that defendant intended to kill his victim. The arson-murder special-circumstance finding also required the trial court to conclude that the murder was committed while defendant "was engaged in or was an accomplice in the commission of, attempted commission or the immediate flight after committing or attempting to commit" the arson. (*Carlos*, *supra*, at p. 135, fn. 2.) The true findings on the arson-murder and torture-murder special circumstance allegations thus demonstrate that defendant, with intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. As a result, he remains liable for murder under section 189, subdivision (e)(2). (See *People v. Jenkins* (2021) 70 Cal.App.5th 924, 934 ["Ordinarily, a defendant is ineligible for relief if the trier of fact found beyond a reasonable doubt that the defendant intended to kill."].)

The true findings on the special circumstance allegations standing alone demonstrate that defendant is ineligible for relief as a matter of law. The augmentation to the record supplied by the Attorney General further solidifies this position, as the testimony from a minor who described herself as a friend of defendant establishes that defendant had an active role in planning and carrying out the arson that led to his wife's death. At the preliminary hearing, this minor testified that defendant was upset at his wife because he believed she vandalized defendant's house when leaving, that defendant said before the killing that he was going to "[f]uck her up a little" (referring to

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[5] The California Supreme Court later overturned this holding, concluding 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 abetter 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.)

defendant's wife), and that defendant pumped the gas used in the charged offenses into a gas can and then brought the gas can to his wife's house.

Because we conclude that the record of conviction demonstrates as a matter of law that defendant acted with intent to kill, we need not address the impact of *Strong*, *supra*, in which the California Supreme Court determined that felony-murder special circumstance findings did not, as a matter of law, demonstrate that the defendant was a major participant who acted with reckless indifference to human life. (*Strong*, *supra*, 13 Cal.5th at p. 703.) *People v. Wilson* (2023) 14 Cal.5th 839 (*Wilson*) is similarly inapplicable to the instant case. In *Wilson*, the defendant alleged on appeal of his death penalty sentence that he was entitled to relief under section 1172.6. (*Wilson*, *supra*, at p. 870.) Our Supreme Court accepted the Attorney General's concession that a jury's true finding on an allegation that the murder " 'was intentional and did involve the infliction of torture' " did not "render defendant categorically ineligible for relief." (*Id.* at p. 874 & fn. 13.) However, the court's analysis on this point centered on whether the defendant was a major participant in an underlying felony who acted with reckless indifference to human life, not whether the defendant acted with intent to kill. (*Id.* at p. 874.) In addition, the California Supreme Court noted that "defendant's jury was not instructed that it had to find defendant *personally* harbored an intent to kill. Because defendant and [a co-actor] were tried together, although to separate juries [citation], it would have been possible for the jury to find the torture special circumstance true without agreeing that defendant, as opposed to [the co-actor], intended to kill [the victim]." (*Id.* at p. 874, fn. 13.) Here, however, the trial court sitting as factfinder would have had to find that defendant personally harbored an intent to kill based on the special circumstance findings. Thus, *Wilson* does not control this situation.

The remaining issues defendant personally raises are not cognizable arguments in this appeal. Defendant contends that he was foreclosed from presenting evidence in support of his petition to the sentencing court because defense counsel did not make him

aware of the hearing on his petition in a timely manner. However, the court denied defendant's petition at the prima facie stage without issuing an order to show cause. The right to present evidence in support of a resentencing petition arises only when the sentencing court issues an order to show cause. (§ 1172.6, subds. (c) & (d); *People v. Basler* (2022) 80 Cal.App.5th 46, 57–58.) Thus, defendant was not foreclosed from presenting evidence to the court based on any failure by defense counsel to inform defendant of the hearing date.

Defendant also challenges the trial court's special circumstance findings and its verdict that defendant was guilty of three counts of assault. In defendant's first supplemental brief in the appeal from the sentencing court's denial of his section 1172.6 petition, defendant raised a similar argument. This court concluded this argument was not cognizable, as defendant's judgment of conviction is final. (*People v. Windham* (May 21, 2020, H047278) [nonpub. opn.].) Defendant now argues that this court erred in its conclusion, asserting that the question of whether substantial evidence supports the trial court's special circumstance findings directly relates to his section 1172.6 petition. However, he cites no authority for this proposition. "The mere filing of a [section 1172.6] petition does not afford the petitioner a new opportunity to raise claims of trial error or attack the sufficiency of the evidence supporting the jury's findings." (*People v. Farfan* (2021) 71 Cal.App.5th 942, 947.) Defendant's judgment of conviction is final. He is therefore barred from bringing claims related to the sufficiency of the evidence supporting the factfinder's verdict in this appeal.

Finally, defendant asserts that the procedures outlined in *Wende* and *Serrano*, *supra*, should apply to his appeal from the trial court's order of his section 1172.6 petition. He acknowledges that these procedures apply to a defendant's first appeal of right from a criminal conviction, but he argues that these procedures should apply to him as a matter of policy to further the legislative purpose behind section 1172.6.

"In *Wende*, the California Supreme Court 'approved a modified procedure to ensure an indigent criminal defendant's right to effective assistance of counsel' " that "require[s] the appellate court to conduct an independent review of the record 'when counsel is unable to identify any arguable issue on appeal.' [Citation.]" (*Serrano*, *supra*, 211 Cal.App.4th at p. 500.) However, as *Serrano* explained, *Wende* review is limited to a defendant's first appeal of right from a criminal conviction. (*Serrano*, *supra*, at p. 503.)

In *Delgadillo*, *supra*, the California Supreme Court prescribed the following procedures to be used on appeal from the denial of a section 1172.6 petition: "When appointed counsel finds no arguable issues to be pursued on appeal: (1) counsel should file a brief informing the court of that determination, including a concise recitation of the facts bearing on the denial of the petition; and (2) the court should send, with a copy of counsel's brief, notice to the defendant, informing the defendant of the right to file a supplemental letter or brief and that if no letter or brief is filed within 30 days, the court may dismiss the matter. [Citations.] [¶] If the defendant subsequently files a supplemental brief or letter, the Court of Appeal is required to evaluate the specific arguments presented in that brief and to issue a written opinion. The filing of a supplemental brief or letter does not compel an independent review of the entire record to identify unraised issues. [Citations.] If the defendant does not file a supplemental brief or letter, the Court of Appeal may dismiss the appeal as abandoned. [Citation.] If the appeal is dismissed as abandoned, the Court of Appeal does not need to write an opinion but should notify the defendant when it dismisses the matter. [Citation.] While it is wholly within the court's discretion, the Court of Appeal is not barred from conducting its own independent review of the record in any individual section 1172.6 appeal. [Citations.]" (*Delgadillo*, *supra*, 14 Cal.5th at pp. 231–232.)

Initially in defendant's appeal from the sentencing court's denial of his section 1172.6 petition, defendant's counsel filed a brief informing this court of counsel's determination that no arguable issues were found to be pursued on appeal, and this court

received and addressed defendant's personal submission asserting errors. Following the California Supreme Court's transfer of this matter, defendant's counsel notified this court that counsel did not intend to submit a supplemental brief. This court then provided defendant an opportunity to personally file a supplemental brief. This court has evaluated the specific arguments presented in that brief and has issued this written opinion. In addition, this court has reviewed the record in this section 1172.6 appeal, and we requested supplemental briefing. Having reviewed the record and having considered both defendant's brief and the supplemental briefing requested in this case, we find no error in the sentencing court's ruling.

IV. DISPOSITION

The sentencing court's order denying defendant's petition for relief under Penal Code section 1172.6 is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

DANNER, J.

WILSON, J.

People v. Windham
H047278

Filed 5/21/20

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. SAMUEL WINDHAM, Defendant and Appellant.	H047278 (Monterey County Super. Ct. No. MCR4493)

I. INTRODUCTION

Defendant Samuel Windham appeals from a postjudgment order denying his petition for resentencing pursuant to Penal Code section 1170.95,[1] which allows individuals convicted of felony murder to petition the sentencing court to vacate the conviction under recent changes to the law.

For reasons that we will explain, we will dismiss the appeal.

II. PROCEDURAL BACKGROUND

On April 17, 1985, a trial court found defendant guilty of first degree murder (§ 187), three counts of assault (§ 245, subd. (a)(1)), burglary (§ 459), and arson (§ 451a). The court also found true the special circumstances allegations that defendant committed the murder during the commission of arson (§ 190.2, subd. (a)(17)(viii)) and that the

17

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

APPENDIX A

murder was intentional and involved the infliction of torture (§ 190.2, subd. (a)(18)). The court sentenced defendant to 25 years to life for murder consecutive to life without the possibility of parole for the special circumstances. The court imposed concurrent terms for the remaining offenses.

Defendant appealed, and in case No. H000726, this court modified the judgment to strike the 25 years to life term imposed for murder and stay the concurrent term imposed for burglary. This court affirmed the judgment as modified.

On April 22, 2019, defendant filed a petition for resentencing pursuant to section 1170.95. The sentencing court appointed defendant counsel. The prosecution filed an opposition to the petition and attached this court's opinion in case No. H000726 as an exhibit. Defense counsel filed a response, arguing that defendant's murder conviction should be vacated because defendant was not the actual killer and requesting the court to issue an order to show cause for the determination of whether defendant was a major participant in the offense who acted with reckless disregard for human life.

The sentencing court heard the matter on August 21, 2019. The court denied the petition, stating that it had reviewed the parties' papers and determined that defendant had not made a prima facie showing for relief. The court found: "The facts underlying this case are remarkable in their tragedy. It is a situation where the defendant went to the home of the victim where she had . . . escaped him, and along with a friend broke into the home, poured gasoline on her during a struggle, and ignited her. She had burns over . . . 95 percent of her body and died within hours, leaving children in the home who were unconscious, but did survive." The court also quoted this court's opinion in case No. H00726 as follows: " 'We fully agree with the trial [c]ourt's observation that where one holds another down, saturates her with gas, threatens her with death, and asks for a match, the only reasonable conclusion is that the actor intends and desires to cause both intense pain and death by burning her.' "

Defendant timely filed a notice of appeal. This court appointed counsel to represent defendant. On December 3, 2019, appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *People v. Serrano* (2012) 211 Cal.App.4th 496 (*Serrano*), stating the case and facts but raising no issues. On December 10, 2019, we notified defendant of his right to submit written argument on his own behalf within 30 days. On December 23, 2019, defendant filed a letter brief on his own behalf, which he submitted "in anticipation" of filing a formal supplemental brief. On January 6, 2020, defendant filed a supplemental brief.

III. DISCUSSION

A. *Statutory Background*

Senate Bill No. 1437, effective January 1, 2019, amended sections 188 and 189, which pertain to the definition of malice and the degrees of murder. (Stats. 2018, ch. 1015, §§ 2-3.) As amended, section 188 provides: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (Stats. 2018, ch. 1015, § 2; § 188, subd. (a)(3).) "New section 189, subdivision (e), in turn, provides with respect to a participant in the perpetration or attempted perpetration of a felony listed in section 189, subdivision (a), in which a death occurs—that is, as to those crimes that provide the basis for the charge of first degree felony murder—that the individual 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.' " (*People v. Lopez* (2019) 38 Cal.App.5th 1087, 1099, fn. omitted, review granted Nov. 13, 2019, S258175.)

"Additionally, Senate Bill No. 1437 added section 1170.95, which permits a person with an existing conviction for felony murder or murder under the natural and probable consequences doctrine to petition the sentencing court to have the murder conviction vacated and to be resentenced on any remaining counts if he or she could not have been convicted of murder as a result of the other legislative changes implemented by Senate Bill No. 1437. (§ 1170.95, subd. (a).)" (*People v. Flores* (2020) 44 Cal.App.5th 985, 992 (*Flores*).) A petition for relief under section 1170.95 must include: "(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner's conviction. [¶] (C) Whether the petitioner requests the appointment of counsel." (§ 1170.95, subd. (b)(1).) "If the petitioner makes a prima facie showing of entitlement to relief, the court must issue an order to show cause and, absent a waiver and stipulation by the parties, hold a hearing to determine whether to vacate the murder conviction, recall the sentence, and resentence the petitioner. ([§ 1170.95], subds. (c) & (d)(1).)" (*Flores*, *supra*, at p. 992.)

B. *Analysis*

Defendant raises several claims in his supplemental brief. First, defendant contends that the sentencing court erred when it denied the petition by "relying solely on the prosecution['s] allegations" and failing to issue an order to show cause after he demonstrated entitlement to relief. The record belies defendant's initial assertion. The sentencing court explicitly stated that it had reviewed defendant's petition, the prosecution's opposition, and defendant's response to the prosecution's opposition. Moreover, the court did not rely on the prosecution's allegations, but rather premised its decision on the record of conviction, including this court's decision in case No. H000726. (See *People v. Woodell* (1998) 17 Cal.4th 448, 455 [record of conviction includes appellate court opinion].)

Regarding defendant's claim that an order to show cause should have been issued because he demonstrated entitlement to relief, defendant argues that his petition "satisfied all three requirements of section 1170.95, subdivision (b)(1)" because it included his name, superior court case number, conviction date, and the date the information was filed and that defendant "averred in his declaration that he could not have been convicted of murder under the changes to [the] felony murder rule."

Although defendant properly included in his petition the information required under section 1170.95, subdivision (b), a greater showing is required for the sentencing court to issue an order to show cause. (See § 1170.95, subd. (c); *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328 (*Verdugo*).) If the petition contains all the required information, section 1170.95, subdivision (c) "then prescribes two additional court reviews before an order to show cause may issue, one made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo*, *supra*, at p. 328.) A court may rely on the record of conviction to determine a petitioner's entitlement to relief. (See *People v. Drayton* (2020) 47 Cal.App.5th 965, 975.) Although the court must generally accept the petition's allegations as true, "if the record, including the court's own documents, 'contain[s] facts refuting the allegations made in the petition,' then 'the court is justified in making a credibility determination adverse to the petitioner.' " (*Id.* at p. 979.)

Here, the record of conviction established that defendant was convicted of felony murder and that the circumstances of the offense included the following. Defendant, angry at the victim, broke into the victim's house with his friend R.J. After defendant beat the victim and pushed her to the floor, he urged R.J. to pour gasoline on her. Defendant had brought the gasoline into the house. The victim could be heard screaming, " '[s]top' " on a 911 call as a man says, " 'Pour it, R.J.! Pour it' " several times. The

21

victim was also heard exclaiming, " 'R.J., stop!' " After a pause in the victims screams, an explosion sounded and the phone went dead. The victim's family members testified that "[t]hey heard defendant say pour it and the sound of liquid spilling. Defendant then asked for a match and told [the victim], 'You can come with me or you can die here.' " The victim died a few hours later of severe burns. Gasoline was present on her clothes. Arson investigators concluded that the fire was intentional and occurred after a large amount of gasoline had been poured in the kitchen, where the fire started.

Based on the facts contained in the record of conviction, we conclude that defendant has not presented an arguable issue on appeal regarding the sentencing court's denial of defendant's petition absent the issuance of an order to show cause.

Second, defendant asserts that he is entitled to *Wende* review of the sentencing court's decision because this is his " 'first petition under the new . . . law.' " "In *Wende*, the California Supreme Court 'approved a modified procedure to ensure an indigent criminal defendant's right to effective assistance of counsel' " that "require[s] the appellate court to conduct an independent review of the record 'when counsel is unable to identify any arguable issue on appeal.' [Citation.]" (*Serrano*, *supra*, 211 Cal.App.4th at p. 500.) However, as *Serrano* explains, *Wende* review is limited to a defendant's first appeal of right from a criminal conviction. (*Serrano*, *supra*, at p. 503.) The instant appeal originates from a postconviction proceeding and not a first appeal of right, and therefore defendant is not entitled to *Wende* review. (See *Serrano*, *supra*, at pp. 503-504.)

Third, defendant challenges the trial court's special circumstances findings and its determination that defendant was guilty of three counts of assault. Defendant's contentions regarding the validity of his convictions are not cognizable arguments in this appeal. This court affirmed defendant's convictions in 1987. That decision has long been final. Defendant cannot now raise any issues related to the judgment.

Fourth, defendant contends that he was not the actual killer or a major participant in the underlying felonies, which renders the revised felony murder statute inapplicable to him and entitles him to relief. Defendant asserts that the record shows that his "only actions [were] arguing and fighting on the kitchen floor with [the victim]." We are not persuaded. As we stated above, based on the facts contained in the record of conviction, we conclude that defendant has not presented an arguable issue on appeal regarding the sentencing court's denial of defendant's petition.

Fifth, defendant contends that his due process rights were violated during the trial on his guilt based on a witness' absence that prevented his presentation of a defense. As we stated above, however, defendant's convictions are final. He is therefore barred from bringing claims related to the judgment in this appeal.

Sixth, defendant asserts that the prosecution's opposition to his section 1170.95 petition contained factual misstatements. In light of the sentencing court's decision, which denied the petition based on facts in the record of conviction, and the factual circumstances established by the record of conviction, we conclude that defendant's contentions regarding the prosecution's opposition do not raise an arguable issue on appeal.

Seventh, defendant contends that he was foreclosed from presenting evidence in support of his petition to the sentencing court because defense counsel did not make him aware of the hearing on his petition in a timely manner. Defendant states, "I received correspondence from appointed counsel . . . that [the] petition was 'denied' at a hearing held in July 2019." However, the sentencing court denied defendant's petition on August 21, 2019, not in July 2019, and it did so without issuing an order to show cause. The right to present evidence in support of the resentencing petition arises only when the sentencing court issues an order to show cause. (§ 1170.95, subd. (d)(1), (3).) Thus, defendant was not foreclosed from presenting evidence to the court based on any failure by defense counsel to apprise defendant of the hearing date.

As nothing in defendant's supplemental brief raises an arguable issue on appeal from the order denying the petition for resentencing, we must dismiss the appeal.[2] (*Serrano*, *supra*, 211 Cal.App.4th at pp. 503-504.)

IV. DISPOSITION

The appeal is dismissed.

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[2] We have also reviewed the letter brief filed by defendant on his own behalf on December 23, 2019. Although the letter brief includes some additional factual allegations, no additional claims are raised. The letter brief does not raise an arguable issue on appeal.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

PREMO, ACTING P.J.

ELIA, J.

People v. Windham
H047278

Court of Appeal, Sixth Appellate District - No. H047278

S282620

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

SAMUEL WINDHAM, JR., Defendant and Appellant.

The petition for review is denied.

GUERRERO

Chief Justice

155

Additional material from this filing is available in the Clerk's Office.