S266305

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. JOSE DE JESUS DELGADILLO, Defendant and Appellant.	No. S_____

Following the unpublished Decision of the Court of Appeal of the State of California, Second Appellate District, Division Four Numbered B304441 dismissing Appellant's appeal

PETITION FOR REVIEW

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Under the California Appellate Project,
Independent Case Program

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE CANTIL-SAKAUYE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA: Appellant Jose Delgadillo respectfully seeks review in the above-captioned matter pursuant to rule 8.366 (b) and 8.500 (a)(1) and (b)(1) of the California Rules of Court from the unpublished opinion of the Court of Appeal, Second Appellate District, Division Four, filed on November 18, 2020, which involuntarily dismissed the appeal. A copy of the opinion is attached to this petition.

Question Presented

Whether the Court of Appeal is required to conduct a review of the appellate record when counsel files a no-issue brief pursuant to *People v. Wende* (1979) 25 Cal.3d 36 following the denial of a section 1170.95 petition for resentencing, and whether dismissal of the appeal without warning to the parties and without accepting briefing on the issue violates a defendant's due process right to appeal a final order within the meaning of Fourteenth Amendment.

Necessity of Review

Review is necessary in this case under Rule 8.500(b)(1) & (b)(2) of the California Rules of Court, to settle two related questions of law: (1) whether the Court of Appeal has the authority to dismiss an appeal, involuntarily, when counsel for a criminal appellant following the denial of a section 1170.95 petition files an Opening Brief pursuant to *People v. Wende* (1979) 25 Cal.3d 36 without first reviewing the record for arguable issues; and (2) whether a dismissal in these circumstances, without warning and without allowing briefing on the issue, violates a defendant's federal constitutional rights.

Statement of the Case

Following a jury trial, appellant was convicted on November 15, 2016 of second degree murder in violation of Penal Code section 187, subdivision (a) (count 1), and gross vehicular manslaughter while intoxicated in violation of section 191.5, subdivision (a). Allegations that appellant had suffered two prior convictions within the meaning of section 191.5, subdivision (d), and that he fled the scene of the accident within the meaning of Vehicle Code section 20001, subdivision (c) were found to be true. (C.T. 7-8.) On January 31, 2017, appellant was sentenced to a term of 15 years to life. (C.T. 11, 14.)

On June 3, 2019, appellant filed a petition for resentencing pursuant to section 1170.95, with a memorandum of points and authorities arguing that in the absence of actual malice under the newly amended statutes and upon conviction under a theory of natural and probable consequences, he falls within the scheme of the new law. (C.T. 16-24.) Appellant's petition was denied on December 19, 2019. (C.T. 147.)

Counsel for appellant filed a no-issues brief pursuant to *People v. Wende*, *supra*, and appellant was notified by the court that he could submit supplemental briefing. Appellant did not file a brief, and on November 18, 2020, the Court of Appeal filed its two-page decision dismissing the appeal. (Slip Op. attached, citing *People v. Cole* (2020) 52 Cal.App.5th 1023 (review granted, Oct. 14, 2020, No. S264278).)

Appellant filed a Petition for Rehearing on December 1, 2020, which was denied on December 16, 2020 (Order denying petition attached.)

Statement of Facts[1]

On the afternoon of May 27, 2015, appellant's Ford Explorer was involved in a head-on collision with a Mazda sedan driven by Gilbert McDonald. McDonald's wife, Maral McDonald, was a passenger in the front seat of the Mazda, and she died from injuries sustained in the accident. The driver of the Explorer, later identified as appellant, fled the scene on foot, and a police dog located him hiding in a building at a nearby construction site. Approximately two and a half hours after the accident, two breath tests showed a blood alcohol level of .13 and .14. Two hours later, appellant provided a blood sample that showed a blood alcohol level of .13. (C.T. 65.)

The jury was informed by stipulation that appellant pleaded guilty in 2004 and 2009 to driving under the influence. (C.T. 66.)

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[1] The Statement of Facts is taken from the Court of Appeal opinion in B281230, which is included in the appellate record as Exhibit 1 of the People's response to the section 1170.95 petition. (C.T. 65-70.)

Argument

This Court Should Grant Review To Consider Whether Appellate Courts Must Review The Record When The Appellant Files A No-Issue Brief (*Wende* Brief) Following Denial Of A Section 1170.95 Petition and Whether the Involuntary Dismissal of the Appeal Without Giving an Appellant the Opportunity to Brief the Issue Violates the Appellant's Right to Due Process Pursuant to the Fourteenth Amendment

A. Introduction

Appellant appealed from the denial of his petition for resentencing that was filed pursuant to section 1170.95. Appointed counsel filed a *Wende* brief on July 6, 2020, and the Court of Appeal sent appellant a letter informing him that he could file a supplemental brief. Mr. Delgadillo did not submit any briefing, and on November 18, 2020, the appellate court filed an opinion adopting the rationale of *People v. Cole,* which found the "procedures set forth in *Wende* are not constitutionally compelled if a criminal defendant's appeal is not his or her initial appeal of right. (*Cole*, *supra*, 52 Cal.App.5th at p. 1038.) The appeal was involuntarily dismissed.

B. Review Should be Granted to Settle an Important Question of Law and Secure Uniformity of Decision

1. The issue here has not been decided by either this Court or the United States Supreme Court

In 1979 the U.S. Supreme Court held that in an appeal taken by an indigent criminal defendant, *Anders v. California* (1967) 386 U.S. 738 "requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues …." (*People v. Wende*, *supra*, 25 Cal.3d 436, 441.) The point of such a review: determining whether the record suggests "an issue which [the court] deems reasonably arguable." (*Id.* at 442, fn. 3.) And that "determination and concomitant review of the entire record must be made regardless of whether the defendant has availed himself of the opportunity to submit a brief." (*Id.* at 441.)

The question here – in an appeal from the denial of resentencing relief under section 1170.95 – is to what extent *Wende* review is applicable. Appellant submits the circumstances are sufficiently analogous to a direct criminal appeal that *Wende's* procedures should bind the appellate courts.

As noted above, courts recognize the due process right to appellate "review of the entire record whenever appointed counsel submits a brief which raises no specific issues …." (*People v. Wende*, *supra*, 25 Cal.3d 436, 441; *Anders v. California*, *supra*, 386 U.S. 738, 744 ["a full examination of all

the proceedings"].) The *Anders-Wende* procedure is designed both "to ensure an indigent criminal defendant's right to effective assistance of counsel" (*People v. Kelly* (2006) 40 Cal.5th 106, 118; *Smith v. Robbins* (2000) 528 U.S. 259, 264 ["to protect indigent defendants' constitutional right to appellate counsel"]) and "to afford indigents the adequate and effective appellate review that the Fourteenth Amendment requires" (*Id.* at 278-279 [relying on due process and equal protection clauses]).

The problem is that, at least as announced by the United States Supreme Court, an appellate due process right to effective assistance and review exists where the defendant brings "a first appeal from a criminal conviction" (*Anders v. California*, *supra*, 386 U.S. 738, 739); and appellant concedes this isn't such a case.

On the other hand, the U.S. Supreme Court has left open the possibility that such a right may indeed exist in at least one other criminal-case context: where the state provides a judicial avenue that "is the first place a prisoner can present a challenge to his conviction." (*Coleman v. Thompson* (1991) 501 U.S. 722, 755; *Martinez v. Ryan* (2012) 566 U.S. 1, 8-9.)

Initially, *Pennsylvania v. Finley* (1987) 481 U.S. 551 held there is no federal constitutional right to counsel in a "collateral attack[]" on a conviction. (*Id.* at 555.) *Finley* explained that such postconviction review "is not part of the criminal proceeding"; "normally occurs only after the defendant has failed to secure relief through direct review of

his conviction"; and "is in fact considered to be civil in nature. [Citation.]" (*Id.* at 556-557.) So a state may – but has no obligation to – provide what's essentially a second shot at attacking a conviction, after the first one (direct appeal) has failed. (*Ibid.*)

Four years later, the U.S. Supreme Court reiterated *Finley's* holding that "there is no right to counsel in state collateral proceedings." (*Coleman v. Thompson*, *supra*, 501 U.S. 722, 755.) But as to whether there might be "an exception to the rule … in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction[,]" *Coleman* found the question unnecessary to answer in that case. (*Ibid.*, italics added.) And much more recently, the Court again acknowledged – and again chose not to address – the constitutional question of "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." (*Martinez v. Ryan*, *supra*, 566 U.S. 1, 8-9 [referring to such proceedings as "'initial-review collateral proceedings'"].) While grounding its federal habeas procedural holding on "equitable" rather than constitutional concerns (*id.* at 16), the Court noted that "[w]here … the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." (*Id.* at 11.)

Relying on the civil/criminal distinction noted in *Finley*, this Court has held that conservatees and indigent parents appealing child custody or parental status decisions aren't entitled to *Anders-Wende* review. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 537 ["'civil in nature and not criminal'"]; *In re Sade C.* (1996) 13 Cal.4th 952, 982.) But this Court has not yet weighed in on the application of *Anders-Wende* where a criminal defendant challenges his or her conviction in an "initial-review collateral proceeding" (*Martinez v. Ryan*, *supra*, 566 U.S. 1, 9). (*People v. Serrano* (2012) 211 Cal.App.4th 496, 501.)

Appellant submits Senate Bill 1437 and section 1170.95 creates that kind of proceeding, and it merits the due process protection of the ordinary appellate process.

2. *People v. Cole* mistakenly found it was bound by this Court's authority

In an opinion apparently issued without the benefit of relevant briefing, Division Two of the Second District Court of Appeal held that *Anders-Wende* requirements don't apply to an appeal from denial of section 1170.95 relief. (*People v. Cole*, *supra*.) But the *Cole* court relied on an erroneously broad premise: "our Supreme Court has steadfastly held that 'there is no constitutional right to the effective assistance of counsel' in state *postconviction proceedings* [citations]." (*Cole*, *supra*, 52 Cal.App.5th at p. 1032, emphasis added.) As authority, *Cole* cited three decisions by this Court – none of which went that far: "[T]here is no constitutional right to the effective assistance of counsel in state *habeas proceedings*.

[Citations.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 489, italics added, citing for the same principle *People v. Young* (2005) 34 Cal.4th 1149, 1232-1233 and *People v. Kipp* (2001) 26 Cal.4th 1100, 1139-1140.)

A postconviction petition for section 1170.95 relief is not a habeas proceeding. (See, e.g., *People v. Gomez* (2020) 52 Cal.App.5th 1, 18, review granted October 14, 2020, S264033 [noting "the different burdens of proof in a habeas proceeding and a proceeding under section 1170.95"]; *People v. Drayton* (2020) 47 Cal.App.5th 965, ["with respect to the overall structure of section 1170.95 and its shifting burdens, habeas corpus procedures provide an imperfect analogy to the statute"].)

Accordingly, the *Cole* court is mistaken in believing itself bound by previous decisions by this Court. This Court has not yet had occasion to consider *Wende's* requirements in the context of section 1170.95 or, for that matter, any other non-habeas postconviction proceeding. (*People v. Serrano*, *supra*, 211 Cal.App.4th 496, 501 ["the California Supreme Court has not specifically considered the availability of *Anders/ Wende* review in a postconviction collateral attack on a judgment"].)

Appellant recognizes that in the purely civil context, this Court has observed that "*Anders's* 'prophylactic' procedures are designed solely to protect an indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the assistance of appellate counsel appointed by the state in his first appeal as of right.

[Citations.]" (*In re Sade C.*, *supra*, 13 Cal.4th 952, 978, 982-983; *Conservatorship of Ben C.*, *supra*, 40 Cal.4th 529, 537.) But again, the quoted statement can't reasonably be deemed a holding as to the issue presented in this criminal appeal. (*People v. Serrano*, *supra*, 211 Cal.App.4th 496, 501.)

Moreover, as appellant explained above, the United States Supreme Court hasn't foreclosed the possibility that due process appellate rights might apply where the state provides a form of postconviction relief that "is the first place a prisoner can present a challenge to his conviction." (*Coleman v. Thompson*, *supra*, 501 U.S. 722, 755.) And even if not as a matter of federal due process, the California Constitution includes its own due process guarantee in criminal cases (Cal. Const., art. I, § 15) – one that the courts may construe as more protective of defendants' interests. (See, e.g., *People v. Batts* (2003) 30 Cal.4th 660, 689 [re state vs. federal double jeopardy].)

Appellant urges review to consider whether a defendant's due process rights – including full *Wende* review – are implicated here. Review of a section 1170.95 order, while occurring in the postconviction context, is much closer to a "'first appeal of right'" (*Cole*, at p. 6) than it is to a postjudgment habeas challenge: As a resentencing procedure, section 1170.95 is "part of the criminal proceeding; it's independent of whether or not "the defendant has failed to secure relief through direct review of his conviction"; and in no way is it "considered to be civil in nature." (*Pennsylvania v. Finley*, *supra*, 481 U.S. 551, 555-557.)

Indeed, far from being a second shot at attacking a conviction, section 1170.95 is designed to function as a first shot – again, whether or not the defendant originally appealed from the judgment. Through SB 1437, the Legislature materially redefined the crime of murder, such that a section 1170.95 petition may indeed be "the first place a prisoner can present a challenge to his conviction." (*Coleman v. Thompson*, *supra*, 501 U.S. 722, 755.) So it's "in many ways the equivalent of a prisoner's direct appeal" (*Martinez v. Ryan*, *supra*, 566 U.S. 1, 11) – not as to an ineffective assistance claim (*ibid.*), but as to one of the most fundamental constitutional questions of all: whether the state has even proved the defendant guilty of murder in the first place. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [due process violated where rational trier of fact couldn't have "found the essential elements of the crime beyond a reasonable doubt"]; *People v. Smith* (2020) 49 Cal.App.5th 85, 94, review granted July 22, 2020, S26835 [§ 1170.95 "is clearly designed to resolve the question of whether a murder conviction … is sufficiently supported"].)

3. The Court in *People v. Flores* Correctly Balanced an Appellant's Due Process Right to Review and Reviewed the Record in the Interests of Justice

Taking the opposing view to *Cole*, the Fourth District, Division Three has held that ["when an appointed counsel files a *Wende* brief in an appeal from a summary denial of a section 1170.95 petition, a Court of Appeal is not required to independently review the entire record, but the court can and

should do so in the interests of justice" (*Flores* (2020) 54 Cal.App.5th 266, 269.)

The *Flores* court decided that while there may be no legal requirement to independently review the record, the interests of justice demand it. The *Flores* court reasoned:

> When we weigh the paramount liberty interests of petitioner, the modest fiscal and administrative burdens to the courts, and the possible (while presumably low) risk of a petitioner's unlawful incarceration due to an unreviewed meritorious issue on appeal, we lean toward caution. That is, although it is not required under law, *we think an appellate court can and should independently review the record on appeal when an indigent defendant's appointed counsel has filed a Wende brief in a postjudgment appeal from a summary denial of a section 1170.95 petition (regardless of whether the petitioner has filed a supplemental brief).*

(*Flores*, *supra*, 54 Cal.App.5th at p. 274, emphasis added.)

The *Flores* court ultimately affirmed the judgment, but it did not dismiss the appeal. (*Ibid.*)

The California Constitution includes a guarantee of due process in criminal cases. (Cal. Const., art. I, § 15.) California courts can and should construe the state right as more protective of appellant's interests. (See, e.g., *People v. Batts* (2003) 30 Cal.4th 660, 689 [state vs. federal double jeopardy].) The state constitutional right includes the right to the assistance of appointed counsel for indigent defendants in

criminal cases. (*Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1003-1004.)

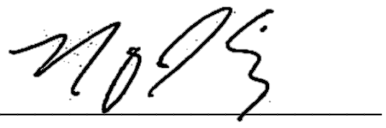
Thus, while the U.S. Supreme Court has held there is no right to counsel in state collateral proceedings, it left open the question whether there is an exception to that rule where state collateral review is the first place a prisoner can present a challenge to his conviction. (See *Martinez v. Ryan*, *supra*, 566 U.S. 1, 8-9.) Changes in the law of homicide and the new procedure for post-conviction relief raise unresolved issues. As the *Flores* court recognized, failing to independently review the record on appeal where a defendant may have been convicted of murder many years ago creates a risk of a defendant's continued unlawful incarceration due to an unreviewed meritorious issue on appeal. (*Flores*, *supra*, 54 Cal.App.5th at p. 274.)

Conclusion

Based on the importance of the question presented, as well as authorities discussed in the foregoing which show a need for consideration by this Court to secure uniformity of decision, appellant Delgadillo respectfully seeks review.

Dated: December 28, 2020

Respectfully submitted,



NANCY J. KING
Attorney for appellant Delgadillo

Certificate of Word Count

I certify that the word count of this computer-produced document, calculated pursuant to California Rules of Court, rule 8.504(d)(1), does not exceed 8,400 words, and that the actual count is: 2944 words.

Dated: December 28, 2020

Nancy J. King

EXHIBIT A

ORDER OF THE COURT OF APPEAL DISMISSING CASE NO. B304441

dated

November 18, 2020

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE DELGADILLO,

Defendant and Appellant.

B304441
(Los Angeles County
Super. Ct. No. BA436900)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Dismissed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Jose Delgadillo appeals from the trial court's denial of his petition for resentencing under Penal Code section 1170.95. The petition was denied following a hearing and briefing by the parties. The court found that there were no "grounds whatsoever for re-sentencing of [defendant]. . . . [D]efendant was the actual and only killer." (See *People v. Delgadillo* (July 17, 2018, B281230) [nonpub. opn.] [defendant convicted of second degree murder after driving his car under the influence of alcohol and colliding into a car, killing one of the passengers]; *People v. Roldan* (2020) __ Cal.App.5th __, __ [2020 WL 6375578] [petitioners convicted of second degree murder under actual implied malice are not entitled to relief as a matter of law under Penal Code section 1170.95].)

Defendant's appointed counsel found no arguable issues and filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), asking this court to independently review the record. On July 6, 2020, we directed counsel to send the record and a copy of the opening brief to defendant. Both his counsel and this court informed defendant that counsel had been unable to find any arguable issues. Defendant was invited to submit a supplemental brief or letter within 30 days raising any contentions he wished this court to consider. He did not do so.

As recently explained in *People v. Cole* (2020) 52 Cal.App.5th 1023 (review granted, Oct. 14, 2020, No. S264278) (*Cole*), the procedures set forth in *Wende* are not constitutionally compelled if a criminal defendant's appeal is not his or her initial appeal of right. (*Id.* at p. 1038.) We adopt the analysis in *Cole*, and apply the procedures

described therein for appeals from the denial of postconviction relief. Accordingly, if a defendant's counsel files a brief indicating she has been unable to identify any arguable appellate issues and, after notice, the defendant does not exercise his or her right to file a supplemental brief, we presume the order appealed from is correct and dismiss the appeal as abandoned. (*Id.* at pp. 1038–1040.) Appellate counsel complied with her obligations, and defendant was advised of his right to file a supplemental brief. Because he did not do so, we dismiss the appeal as abandoned in accordance with the procedures articulated in *Cole*.

DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.

EXHIBIT B

ORDER OF THE COURT OF APPEAL DENYING REHEARING

dated

December 16, 2020

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

DIVISION 4

THE PEOPLE,
Plaintiff and Respondent,
v.
JOSE DE JESUS DELGADILLO,
Defendant and Appellant.

B304441
Los Angeles County Super. Ct. No. BA436900

THE COURT:*

Appellant's petition for rehearing is denied.

* _____ _____ _____
WILLHITE, Acting P.J. COLLINS, J. CURREY, J.

Certificate of TrueFiling, Mailing, and Electronic Service

Case Name: ***People v. Delgadillo*** **B304441**

I, the undersigned, certify and declare:

I am over 18 years of age and not a party to this action. My business address is 1901 First Avenue, 1st Fl, San Diego, CA 92101. I served the APPELLANT'S PETITION FOR REVIEW by placing a true and correct copy thereof in a sealed envelope with postage affixed thereto in the United States mail addressed to:

Superior Court of California
Clerk of Court
Clara Foltz Criminal
Justice Center
210 West Temple St
Los Angeles, CA 90012

Jose Delgadillo
Appellant

I electronically served the PETITION FOR REVIEW to the following parties from my email address of njking51@gmail.com:

Office of the Attorney General at: docketinglaawt@doj.ca.gov

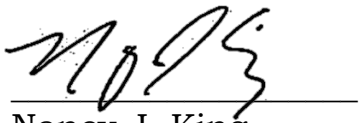
California Appellate Project at: capdocs@lacap.com

Office of the District Attorney at: truefiling@da.lacounty.gov

On this date I electronically filed the attached PETITION FOR REVIEW via Truefiling. The Second District Court of Appeal, Division Four was served per Supreme Court TrueFiling Policy.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 28, 2020



Nancy J. King