IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA S266305 Plaintiff and Respondent, v. JOSE DE JESUS DELGADILLO, Defendant and Appellant.	No. Court of Appeal No. B304441

Second Appellate District, Division Four
Los Angeles County Case No. BA436900
The Honorable Katherine Mader, Judge

APPELLANT'S BRIEF ON THE MERITS

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ISSUES PRESENTED FOR REVIEW

What procedures must appointed counsel and the Courts of Appeal follow when counsel determines that an appeal from an order denying postconviction relief lacks arguable merit, and are defendants entitled to notice of these procedures?

STATEMENT OF THE CASE

On November 15, 2016, appellant Jose Delgadillo was convicted by a jury of second degree murder in violation of Penal Code[1] section 187, subdivision (a) 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.) The judgement was affirmed by the Court of Appeal on July 17, 2018 in Case No. B281230.

On June 3, 2019, Mr. Delgadillo filed a petition for resentencing pursuant to section 1170.95, 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, and he timely filed a notice of appeal on January 21, 2020. (C.T. 147, 149.)

Appointed counsel filed a no-issues brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and Delgadillo was notified by the court that he could submit supplemental briefing. Delgadillo did not file a brief, and on November 18, 2020, the Court of Appeal

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[1] Subsequent statutory citations will be to the California Penal Code unless otherwise noted.

filed a two-page decision dismissing the appeal. Appellant filed a Petition for Rehearing on December 1, 2020, which was denied on December 16, 2020. This court granted review on February 17, 2021.

STATEMENT OF FACTS[2]

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 appellant's blood alcohol level to be .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.)

[2] 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

I

Pursuant To Principles of Due Process And Right To Counsel Consistent With The Fourteenth Amendment, Courts of Appeal Should Follow The Procedures Outlined in *People v. Wende* (1979) 25 Cal.3d 436 In Appeals From Orders Denying Post Judgment Relief Where Appointed Counsel Finds No Arguable Issues

A. Background

Appellant Delgadillo filed a petition for resentencing pursuant to section 1170.95. (C.T. 16-25.) The People filed a response to the petition and appointed counsel filed a reply. (C.T. 41, 101.) On December 9, 2019, the trial court denied Delgadillo's petition, stating in the minute order: "Resentencing pursuant to Penal Code section 1170.95 is denied as the defendant was the actual and only participant in this case." (C.T. 147.)

Delgadillo appealed, and counsel filed a "no issues" brief, in accordance with *People v. Wende* (1979) 25 Cal.3d 436, asking the Court of Appeal to independently review the record. Delgadillo was invited to personally submit supplemental briefing but did not do so. (*People v. Delgadillo* (B304441, Nov. 18, 2020) Slip Opn., p. 2 (Slip. Opn.).)

With no prior notice to the parties, the Court of Appeal dismissed Delgadillo's appeal as abandoned, relying on an earlier decision from Division Two of the same court:

> 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*.

(*Delgadillo*, Slip Opn., pp. 2-3.)

In *Cole*, the Court of Appeal explained, "*Wende* set forth the procedures to be followed during the defendant's 'first appeal of right' – that is, during the direct appeal of his judgment of conviction and sentence." (*Cole*, *supra*, at p. 1031, citing *Wende*, *supra*, 25 Cal.3d at pp. 438, 443.) The court then invoked its "inherent supervisory powers to prescribe the procedures to be followed in this court when appellate counsel determines that the appeal from the denial of postconviction relief lacks any reasonably arguable issues." (*Cole*, *supra*, 52 Cal.App.5th at p. 1034.) "At the same time," the *Cole*, court noted, "we reject the notion that the Constitution compels the adoption or extension of *Wende* procedures (or any subset of them) for appeals other than a criminal defendant's first appeal of right because, beyond that appeal, there is no right to the effective assistance of counsel."

(*Ibid.*) The *Cole* court then held that *Wende* procedures are not constitutionally required in appeals from postconviction proceedings. (*Id.* at pp. 1035-1040; but see *People v. Flores* (2020) 54 Cal.App.5th 266 ["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."].)

The discussion in *Cole*, as well as by this court in *Wende* and the United States Supreme Court in *Anders v. California* (1967) 386 U.S. 738 and related cases, revolves around the right to effective assistance of counsel. The question in this case, therefore, is not simply a procedural one. Rather, it involves a determination of whether, when a jurisdiction provides a statutory right of counsel in a postconviction proceeding, as California does for section 1170.95 proceedings, is a defendant entitled to due process and effective assistance of counsel? As discussed below, the answer is yes.

B. Senate Bill 1437 and Section 1170.95

Effective in 2019, SB 1437 made important revisions to the law of first degree felony murder in section 189, as well as to section 188's definition of malice. The bill's preamble made clear that the revisions were designed to reduce overcrowded prisons and bring sentences in line with "the culpability of the individual." (Stats. 2018, ch. 1015, § 1(e); see also (d): "It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of

individual culpability.") Now, as a general principle, "malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).)

Accordingly, under amended section 189, subdivision (e), first degree felony murder culpability is limited to "the actual killer," aiders and abettors who acted "with the intent to kill," and "major participant[s] in the underlying felony [who] acted with reckless indifference to human life[.]" And beyond the first degree felony murder rule, SB 1437 ushered in another – and even broader – significant change to state homicide law: It effectively eliminated the natural and probable consequences doctrine as applied to murder. (*People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103, fn. 9, rev. granted Nov. 13, 2019, S258175.)

Among the changes SB 1437 brought to California law, a new procedure affords retroactive relief even for sentenced prisoners – like appellant – whose cases are final. Under section 1170.95, a "person convicted of felony murder or murder under a natural and probable consequences theory" may petition the superior court to vacate that judgment if, under the amended statutes cited above, he or she could no longer be convicted of murder. (§ 1170.95, subd. (a).) Thus, even where a direct appeal is over, "those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions. [Citation.]" (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722.) Moreover, the statute makes it clear that its remedy is available not only to defendants convicted at trial, but also to

those who "accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder." (§ 1170.95, subd. (a)(2).)

Such a petition must allege that (1) a complaint, information, or indictment was filed against the petitioner "that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine"; (2) petitioner was convicted of first or second degree murder following a trial or plea; and (3) under sections 188 or 189, as amended by SB 1437, petitioner could not have been convicted of first or second degree murder. (§ 1170.95, subds. (a), (b)(1)(A).)

Under the applicable procedure, "[t]he court shall review the petition and determine if the petitioner has made a prima facie showing" that she or he is eligible for relief. (§ 1170.95 subd. (c).) If the counsel has been requested, "the court shall appoint counsel to represent petitioner." (*Ibid.*) The prosecutor has the right to file a response within 60 days, and petitioner may file a reply within 30 days thereafter. If the petitioner makes a prima facie showing that he or she is entitled to relief, the trial 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. (*Id.*, subds. (c), (d)(1); See, e.g., *In re Taylor* (2019) 34 Cal.App.5th 543, 561-562.)

C. Courts Recognize the Right to Appellate Review of the Entire Record When Appointed Counsel Submits a Brief Which Raises no Specific Issues

"The federal Constitution does not require a state to afford appellate review of a judgment of conviction (*McKane v. Durston* (1894) 153 U.S. 684), but every state has chosen to provide a right of appeal in criminal cases. (*In re Sade C.* (1996) 13 Cal.4th 952, 966; § 1235.) Having provided criminal defendants with an appeal as a matter of right, the states must provide indigent defendants with the assistance of counsel on appeal[.]" (*People v. Kelly* (2006) 40 Cal.4th 106, 117; *Douglas v. California* (1963) 372 U.S. 353, 356 [States must provide appointed counsel to indigent criminal defendants in their first appeal, granted as a matter of right].) The right to appeal must be conferred to the "rich and poor alike" and must "comport with fair procedure." (*Douglas*, at pp. 356-357, citing, inter alia, *Griffin v. Illinois* (1956) 351 U.S. 12, 18.)

"'"[T]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment and some from the Due Process Clause of that Amendment."' [Citations]. But our case law reveals that, as a practical matter, the two Clauses largely converge to require that a State's procedure 'affor[d] adequate and effective appellate review to indigent defendants[.]'" (*Smith v. Robbins* (2000) 528 U.S. 259, 276-277; *Evitts v. Lucey* (1985) 469 U.S. 387, 405 ["[D]ue process . . . [requires] States . . . to offer each defendant a

fair opportunity to obtain an adjudication on the merits of his appeal"].)

Griffin, supra, 351 U.S. 12, served as the foundation for the Supreme Court's decision in *Anders v. California*, *supra*, 386 U.S. 738, which considered the right of an indigent defendant to appellate counsel. (*Smith*, *supra*, 528 U.S. at pp. 273-274.) In *Anders*, the court held that where appointed counsel in a first appeal as a matter of right in a criminal case conscientiously concludes that there are no meritorious grounds that can be asserted, appointed counsel must nonetheless take certain steps to afford the client the advocacy that a nonindigent defendant would be able to obtain. (*Anders*, *supra*, 386 U.S. at pp. 744-745.) This includes preparing a brief to assist the court of appeal in understanding the facts and legal issues in the case and informing the defendant that he has a right to file a brief with the appellate court. (*Ibid*.) In *Pennsylvania v. Finley* (1987) 481 U.S. 551, the Supreme Court described the *Anders* procedure as "a prophylactic framework" established to vindicate the constitutional right to appellate counsel announced in *Douglas*. (*Id*. at p. 555; see also *Penson v. Ohio* (1988) 488 U.S. 75, 80.)

Anders invalided a pre-*Wende* California procedure whereby counsel could send a letter to the court advising it there was "no merit to the appeal" and the court could thereafter dismiss the appeal without finding it was frivolous. The problem with the old California procedure, said the United States Supreme Court, was that it "did not require either counsel or the court to determine that the appeal was frivolous; instead, the

procedure required only that they determine that the defendant was unlikely to prevail on appeal." (*Smith*, *supra* 528 U.S. at p. 269.) "An additional problem with the old California procedure was that it apparently permitted an appellate court to allow counsel to withdraw and thereafter to decide the appeal without appointing new counsel." (*Ibid.*; *Anders*, *supra*, 386 U.S. at p. 740, fn. 2.)

In *Penson*, the Supreme Court struck down a procedure that allowed counsel to withdraw before the court had determined whether counsel's evaluation of the case was accurate and allowed a court to decide the appeal without counsel even if the court found arguable issues. (*Smith*, *supra*, 528 U.S. at p. 280, citing *Penson*, *supra*, 488 U.S. at pp. 82-83 [stating that this flaw was the "[m]ost significan[t]" one].) "The *Penson* procedure permitted a basic violation of the *Douglas* right to have counsel until a case is determined to be frivolous and to receive a merits brief for a nonfrivolous appeal. (*Penson*, at p. 88 ["it is important to emphasize that the denial of counsel in this case left petitioner completely without representation during the appellate court's actual decisional process"].)

After *Anders* invalidated California's no-merit letter procedure, this court developed the *Wende* procedure, a modified *Anders* procedure, to afford indigent defendants the "fair procedure" and the equality demanded by the Fourteenth Amendment. This court interpreted *Anders* and the constitutional right to assistance of counsel to require the appellate court to conduct an independent review of the record

when counsel is unable to identify any arguable issue on appeal. (*Kelly*, *supra*, 40 Cal.4th at p. 119.)

The obligation is triggered by the receipt of such a brief from counsel and does not depend on the subsequent receipt of a brief from the defendant personally." (*Wende*, *supra*, 25 Cal.3d at pp. 441-442; *Smith*, *supra*, 528 U.S. at p. 265 ["The appellate court, upon receiving a 'Wende brief,' must 'conduct a review of the entire record,' regardless of whether the defendant has filed a pro se brief.) "If the appellate court, after its review of the record pursuant to *Wende*, also finds the appeal to be frivolous, it may affirm." (*Smith*, at p. 266.) However, if it finds arguable issue(s), it orders briefing. (*Ibid*.)

The Supreme Court approved the *Wende* procedure in *Smith*, *supra*, 528 U.S. 259, holding that California's procedure "does not violate the Fourteenth Amendment right, for it provides 'a criminal appellant pursuing a first appeal as of right [the] minimum safeguards necessary to make that appeal "adequate and effective[.]"'" (*Id*. at p. 276, citing *Evitts*, *supra*, 469 U.S. at p. 392, quoting *Griffin*, *supra*, 351 U.S. at p. 20.) A State's procedure must provide review that reasonably ensures an indigent's appeal will be resolved in a way that is related to the merit of that appeal. (*Smith*, at pp. 276-277.) *Wende* survives constitutional scrutiny because it "requires both counsel and the court to find the appeal to be lacking in arguable issues, which is to say, frivolous." (*Id*. at pp. 279-280.) Also, *Douglas* violations do not occur under the *Wende* procedure "both because counsel does

not move to withdraw and because the court orders briefing if it finds arguable issues." (*Id.* at p. 280.)

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*, *supra*, 528 U.S. at p. 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]).

As discussed below, an appeal from the denial of a section 1170.95 petition is the equivalent of a first appeal of right, and appellant has a constitutional right to appellate counsel. Moreover, fundamental fairness inherent in the right to due process dictates an extension of the *Anders/Wende* procedures to these appeals.

D. Even If the *Wende* Procedure is Limited for Some Post-Conviction Appeals, the Appeal From Denial of a Section 1170.95 Petition Is a First Appeal of Right on the Issues Presented and All Constitutional Safeguards Should be Preserved

In making the argument that due process does not require the *Wende* procedure for appeal from denial of a section 1170.95 petition, courts have relied largely on the United States Supreme Court opinion in *Pennsylvania v. Finley*, *supra*, 481 U.S. 551. (See, *Cole*, *supra*, 52 Cal.App.5th at pp. 1032, 1024; *People v. Freeman* (2021) 61 Cal.App.5th 126, 132; *People v. Figueras* (2021) 61 Cal.App.5th 108, 112.) The high court's decision in

Finley, however, does not stand for the proposition assumed in the section 1170.95 cases that cite it.

1. The United States Supreme Court Has Not Determined There is No Right to Counsel In All Postconviction Appeals

In *Finley*, it is true the Supreme Court held there is no federal constitutional right to counsel in a "collateral attack[]" on a conviction. (*Finley*, *supra*, 481 U.S. at p. 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 pp. 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*.)

The circumstances described in *Finley*, however, suggest a far narrower exception to the *Anders/Wende* procedures than assumed by recent California cases. In *Finley*, the defendant was convicted of second-degree murder, and the conviction was affirmed following a direct appeal in the Pennsylvania appellate courts. (*Finley*, *supra*, 481 U.S. at p. 553.) The defendant representing herself, filed for postconviction relief in the trial court, as allowed by Pennsylvania law, and raised the very same issues that were rejected on appeal. (*Ibid*; 42 Pa. Cons. Stat. Ann. § 9541.) The trial court denied relief, and on appeal of that decision the Pennsylvania court held the defendant should have had appointed counsel for her post-conviction proceedings. (*Ibid*.)

On remand, counsel was appointed, and found there were no arguable grounds for collateral relief. Counsel informed the trial court by letter, and the court dismissed the petition after independently reviewing the record. (*Finley*, *supra*, 481 U.S. at p. 553.) With another appointed attorney, Finley appealed the decision, and the Pennsylvania court held that counsel below was constitutionally required to follow the *Anders* procedure instead of simply notifying the court by letter, and the case was remanded yet again. (*Id.* at pp. 553-554.) The Supreme Court reversed, finding that merely because a state's laws provide for multiple collateral attempts by a defendant to overturn an affirmed judgment, there is no corresponding federal constitutional right to counsel. (*Id.* at pp. 554-559.)

Finley, however, did not ultimately close the door on Sixth and Fourteenth Amendment concerns in postconviction proceedings. Indeed, four years after *Finley*, the Supreme Court left open the possibility that *Anders* rights may 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.) *Coleman* found the question unnecessary to answer in that case. (*Ibid.*)

Even more recently, the Supreme 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* (2012) 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 p. 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 p. 11.)

2. This Court Has Never Contemplated the Denial of *Wende* Review in Criminal Cases Where Appointed Counsel Files a No-Issue Brief

In addition to reliance on *Finley*, the *Cole* court relied on an erroneously broad premise based on this court's prior decisions: "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.) As authority, *Cole* cited three of this court's decisions – none of which go 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, 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 isn't a habeas proceeding. (See, e.g., *People v. Gomez* (2020) 52 Cal.App.5th 1, 17, review granted Oct. 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, 980, ["with respect to the overall structure of section 1170.95 and its shifting burdens, habeas corpus procedures provide an imperfect analogy to the statute"].)

It is true that 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 are not 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., *supra*, 13 Cal.4th 952, 982.) Until now, however, this court hasn't 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. at p. 9; *People v. Serrano* (2012) 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"].)

Procedurally and substantively, an appeal from denial of a section 1170.95 petition is far from a postconviction habeas petition that seeks to relitigate previous issues, as occurred in *Finley*. Rather a section 1170.95 appeal has more in common with a first appeal of right. The petition presents a defendant's first opportunity to challenge his murder conviction under California's recently revised murder statutes, and is designed to function as a first challenge to the judgment, regardless of whether 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. at p. 755.) So, it is "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 could not 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, S262835 ["The statute is clearly designed to resolve the question of whether a murder conviction . . . is sufficiently supported."].)

Even if this is not 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].) The equities at play in section 1170.95 cases strongly favor such construction.

In *People v. Serrano*, *supra*, 211 Cal.App.4th 496, the Sixth District Court of Appeal relied on *Finley*, as well as this court's decisions in the civil context, to find where a defendant has been afforded all the constitutional protections of a first appeal of

right, including the right to *Wende* review where appropriate, he or she is not entitled to *Anders/Wende* procedures in subsequent appeals, including collateral attacks on the judgment. (*Id.*, at pp. 499-504.)

In *Serrano*, the defendant was facing deportation proceedings when he filed a motion in the trial court to vacate his 2006 conviction, arguing his guilty plea was not knowing and voluntary because he was unaware he was pleading to a deportable offense. The motion was denied, and appointed appellate counsel filed a brief pursuant to *People v. Wende*. (*Serrano*, *supra*, 211 Cal.App.4th at p. 499.) The appellate court sought briefing from the parties on whether appellant was entitled to an independent review, then dismissed the appeal after considering three factors balanced by this court in *Ben C.* and *Sade C.*: "'(1) the private interests at stake; (2) the state's interests involved; and (3) the risk that the absence of the procedures in question will lead to an erroneous resolution of the appeal.'" (*Serrano* at p. 502, quoting *Conservatorship of Ben C.*, *supra*, 40 Cal.4th at p. 539; *In re Sade C.*, *supra*, 13 Cal.4th at pp. 987–991.) In the dependency and conservatorship contexts, *Serrano* noted, "the court found that because of a '"panoply of safeguards' afforded to the appellants, the absence of the *Anders* procedures would not significantly raise the risk of an erroneous appellate resolution.'" (*Serrano*, at p. 502, quoting *Ben C.*, *supra*, 40 Cal.4th at p. 543.) The *Serrano* court found that balancing the interests "compels a similar result" in that case. (*Ibid.*)

Serrano acknowledged the collateral proceeding was criminal in context, and also that the consequences the defendant faced were "dire." (*Id.* at pp. 501-501, citing *Padilla v. Kentucky* (2010) 559 U.S. 356 [deportation is a particularly severe penalty directly related to the criminal process].) The other two factors, however, weighed against the defendant:

> On the other hand, defendant's conviction has long been final and his sentence served. Although he chose to dismiss his first appeal of right, he could have obtained a review of his conviction had he so chosen. In each appeal, he has been afforded the right to appointed counsel, and each of those counsel were supervised by this district's appellate project. (*In re Sade C.*, *supra*, 13 Cal.4th at p. 990.) Given the multitude of protections already afforded defendant, the risk of erroneous appellate resolution without *Wende* review for a collateral attack on the judgment is minute.
>
> Any such minute risk is also outweighed by important state interests, including securing a just appellate resolution, reducing procedural costs and burdens, and concluding the proceedings both fairly and expeditiously.

(*Id.* at pp. 502-503.)

If this court agrees with the reasoning in *Serrano*, it must also reach the opposite conclusion for appeals in section 1170.95 cases. The consequences for defendants in these cases are even more dire than deportation. For many, if not most, it means they will die in prison. For the rest, it means no way of knowing when, if ever, they will be released. And the risk of error is not minute by a long shot. SB 1437 represents a sea change in the law

related to vicarious liability and mental state in homicide cases, and there are innumerable unanswered questions. This significantly raises the risk of erroneous resolution on appeal if the *Wende/Anders* procedures are not required.

Appellant acknowledges the burden on the state is not insignificant. However, it is no more of a burden than with a first direct appeal and will often be far less. As this court resolves pending questions, the record that must be carefully reviewed will be culled down to enable courts to quickly hone in on the relevant portions to ensure a reliable outcome. Courts will likely be called upon to focus review on parts of the record that include jury instructions, verdict forms, counsels' arguments, and prior appellate decisions, with little necessity for review of matters unrelated to the central issue.

The right to appeal the issues presented by a section 1170.95 petition did not exist prior to the enactment of SB 1437. A petitioner under section 1170.95 did not have the benefit of counsel, briefing, or a decision from a Court of Appeal in regard to the issues that now exist by reason of SB 1437. The substantive changes brought about by S.B. 1437 in 2019 gave many defendants their first opportunity to have their murder convictions vacated on grounds that previously did not exist under the old law. Unlike *Finley*, where the discretionary appeals involved the same issues that were litigated in the first appeal of right, a petitioner under section 1170.95 has never before had the issues created by newly amended sections 188 and 189 litigated and decided by a Court of Appeal.

Once conferred, the right to counsel cannot be selectively implemented. When counsel is appointed, counsel must act an advocate, not as amicus counsel. (*Anders*, *supra*, 386 U.S. at p. 744 [the "'constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae'"].) To effectuate the right to counsel on appeal, California has implemented various requirements for appointed appellate counsel. For example, counsel appointed to represent a criminal defendant is required to act as a competent advocate. (*People v. Harris* (1993) 19 Cal.App.4th 709, 713-714.) To meet that obligation, counsel has other duties, including: "the duty to ensure a proper record is prepared [citation]; the duty to write a brief which discusses all of the material facts [citations]; the duty to prepare a brief containing citations to the appellate record and appropriate authority, and setting forth all arguable issues; and the further duty not to argue the case against a client. Citation]." (*People v. Scott* (1998) 64 Cal.App.4th 550, 564.) Through these procedures, "California has endeavored to secure full and fair appellate review of criminal convictions through competent appellate representation." (*Ibid.*) Separate rules cannot be crafted on the basis of whether conscientious counsel can find an arguable issue on appeal (e.g., that a defendant has the right to counsel for a merits brief but no right to counsel for a non-merits brief). (*People v. Totari* (2002) 28 Cal.4th 876, 884 [rejecting argument that would require appealability to be dependent on a resolution of the merits].)

Finally, the right to a direct appeal of a final judgment gives rise to a "cause" within the meaning of California Constitution article VI, section 14. (See *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 91, fn. 1 [right to "direct appeal" affords right to oral argument and written decision on the merits].) Therefore, when a Court of Appeal affirms a judgment in a *Wende* appeal, it is disposing of a "cause" within the meaning of article VI, section 14 of the California Constitution, and must do so "in writing with reasons stated." (*Kelly*, *supra*, 40 Cal.4th at p. 123.)

In sum, the *Anders/Wende* procedures directly apply here. The procedure under section 1170.95 is criminal in nature, it calls into question the validity of a criminal conviction through a direct appeal process. It is a first appeal of right because it involves the determination of issues that have never before been presented or resolved by a California Court of Appeal. The defendant has an underlying constitutional right to appointed appellate counsel (as conferred by statute), and the concomitant right to insist on the *Anders/Wende* procedures which were designed to protect that underlying constitutional right. The Fourteenth Amendment and California Constitution guarantee nothing less.

II

Principles Of Due Process Within The Meaning Of The Fourteenth Amendment Entitle Defendants To Notice Of The Procedures To Be Employed By The Courts Of Appeal In Any Statutory Appellate Procedure

Under Government Code section 68081, before a reviewing court "renders a decision … based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

In the instant case, the Court of Appeal sent appellant a generic letter after the *Wende* brief was filed informing him that he could file a supplemental brief. Counsel was not notified that involuntary dismissal was being considered, and briefing on the issue was not requested. After dismissal, counsel filed a petition for rehearing which was promptly denied by the Court of Appeal.

An appellate decision cannot be based on an unbriefed issue: Either supplemental briefing must be offered, or rehearing granted. (See *People v. Taylor* (1991) 6 Cal.App.4th 1084, 1090, fn. 5 ["The purpose behind section 68081 is to prevent decisions based on issues on which the parties have had no opportunity for input."].) And all doubts should be resolved in favor of the parties' right to brief an opinion-worthy issue. (*People v. Alice* (2007) 41 Cal.4th 668, 676, fn. 1.)

In criminal appeals, the state denies due process when it resolves a case without permitting counsel to "act[] in the role of an active advocate" (*Anders v. California*, *supra*, 386 U.S. 738, 744.) Counsel can't act as an active advocate when an issue first appears in the opinion. Only when counsel is able to act in that capacity can the court provide the "full consideration and resolution of the matter" required by the Constitution. (*Id*. at p. 743.) Even if counsel files a no-issues brief, the Court of Appeal, "upon finding an arguable issue, should inform counsel for both sides and provide them an opportunity to brief and argue the point" before resolving it. (*Wende*, *supra*, 25 Cal.3d 436, 442, fn. 3; *Smith v. Robbins*, *supra*, 528 U.S. 259, 280 [approving California's *Wende* procedure in part "because the court orders briefing if it finds arguable issues"]; *Penson v. Ohio*, *supra*, 488 U.S. 75, 83: "Most significantly, the Ohio court erred by failing to appoint new counsel to represent petitioner after it had determined that the record supported 'several arguable claims.'")

By dismissing appellant's appeal with no notice and without an opportunity to be heard on the matter, violated the Due Process Clause of the Fourteenth Amendment. (*Evitts v. Lucey*, *supra*, 469 U.S. 387, 393 ["procedures used in deciding appeals must comport with the demands of due process"]; *Cole v. Arkansas* (1948) 333 U.S. 196, 201 [procedural due process requires notice of a charge and "a chance to be heard in a trial of the issues raised by that charged"] see also *C.V.C. v. Superior Court* (1973) 29 Cal.App.3d 909, 915 [due process requires that prospective adoptive parents be given notice and an opportunity

to be heard before termination of status]; *Cole v. United States Dist. Court* (9th Cir. 2004) 366 F.3d 813, 821 [to sanction an attorney, court must afford notice and an opportunity to be heard]; *Pittsburg Unified School Dist. v. S.J. Amoroso Construction Co., Inc.* (2014) 232 Cal.App.4th 808, 823 [public entity cannot, consistent with due process, make a final decision about a contractor's right to payment without notice and an opportunity to be heard] pay].)

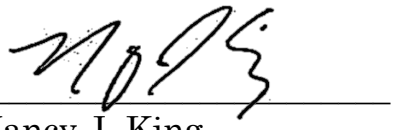
Where an appellant has no reason to anticipate an issue to be addressed by a reviewing court, he must be given an opportunity to address the issue. (*People v. Alice*, *supra*, 41 Cal.4th at pp. 678-679.) Common sense and principles of due process demand at least that much when the reviewing court is contemplating an involuntary dismissal of the appeal.

CONCLUSION

For the reasons stated above, Mr. Delgadillo respectfully asks this court to determine, consistent with the constitutional requirement of due process and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution, as well as the California Constitution, article I, section 15, that the Courts of Appeal must follow the procedures outlined in *People v. Wende*, *supra*, 25 Cal.3d 436 in appeals from orders denying relief pursuant to section 1170.95 where appointed counsel finds no arguable issue.

Dated: July 9, 2021

Respectfully submitted,



Nancy J. King
Attorney for appellant DELGADILLO

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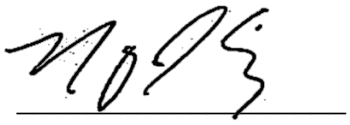

Nancy J. King

Proof Of Service By Mailing And Electronic Service

Re: *People v. Delgadillo* S266305

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, FL 1, San Diego, CA 92101. I served the APPELLANT'S BRIEF ON THE MERITS 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
Foltz Criminal Justice Center
210 West Temple St
Los Angeles, CA 90012

Jose Delgadillo
Appellant

I electronically served the APPELLANT'S BRIEF ON THE MERITS 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
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On this date I electronically filed the attached APPELLANT'S BRIEF ON THE MERITS 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: July 9, 2021

NANCY J. KING

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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7/9/2021
Date

/s/Nancy King
Signature

King, Nancy (163477)
Last Name, First Name (PNum)

Nancy J. King, Attorney at Law
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