No. 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.

Second Appellate District, Case No. B304441
Los Angeles County Superior Court, Case No. BA436900
The Honorable Katherine Mader, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROB BONTA (SBN 202668)
Attorney General of California
MICHAEL J. MONGAN (SBN 250374)
Solicitor General
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
JANILL L. RICHARDS (SBN 173817)
Principal Deputy Solicitor General
JULIE L. GARLAND (SBN 179657)
Senior Assistant Attorney General
SAMUEL P. SIEGEL (SBN 294404)
Deputy Solicitor General
LYNNE G. MCGINNIS (SBN 101090)
Deputy Attorney General
*AMARI L. HAMMONDS (SBN 329087)
Associate Deputy Solicitor General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3917
Fax: (415) 703-2552
Amari.Hammonds@doj.ca.gov
Attorneys for the People of the State of California

September 8, 2021

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INTRODUCTION

Appellant asks this Court to find error in the Court of Appeal's failure to follow *Wende* procedures to the letter in the context of an appeal from the denial of a petition for resentencing under Penal Code section 1170.95.[1] That law provides a process for retroactive, postconviction relief where a conviction of first or second degree murder was based on the natural and probable consequences doctrine or the felony murder rule. Appellant's main contention is that the appellate court improperly declined to conduct an independent review of the entire record on receipt of appointed counsel's "no-issue" brief, which recounted the trial court's determination that appellant was the actual and only participant in the offense—a fact that made appellant ineligible for relief under section 1170.95 as a matter of law.

Appellant's argument suffers from a fundamental flaw: *Wende*'s procedures—which are ultimately grounded in the constitutional right to assistance of counsel in defending against criminal charges—apply only to a criminal defendant's first appeal as of right. There is no precedent or clear justification for extending these prophylactic procedures, including independent judicial review, to collateral proceedings occurring after trial and exhaustion of the criminal appellate process.

General due process principles requiring fundamental fairness do not yield a different result. It must be presumed that

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[1] *People v. Wende* (1979) 25 Cal.3d 436. All further statutory references are to the Penal Code unless otherwise noted.

counsel appointed to pursue a postconviction relief appeal will examine the record with the eye of a zealous and competent advocate, making it unlikely that viable bases for relief will be overlooked. If the reviewing court has concerns on that score after reading a no-issue brief, the court may order counsel to prepare additional briefing or appoint new counsel to do so. Since there was no constitutional error here, the Court should affirm the judgment.

Where an appeal implicates parties' liberty interests, this Court and the Courts of Appeal have at times exercised their inherent authority to declare rules of appellate procedure for future cases. Imposing reasonable procedures for postconviction appeals short of independent judicial review of the record would ensure that counsel fulfill their ethical and professional duties to appellants, that appellants have an opportunity to raise points for consideration, and that courts can assess whether counsel have adequately represented appellants while responsibly allocating judicial resources.

LEGAL BACKGROUND

A. Penal Code section 1170.95 and other vehicles for postconviction relief

In this brief, the People use the term "postconviction relief" to refer to processes for challenging criminal convictions or sentences after the exhaustion of the criminal appellate process—synonymous with "collateral relief." (See, e.g., *In re Barnett* (2003) 31 Cal.4th 466, 474, fn. 4 ["'postconviction relief'" refers to "collateral relief" from a conviction through means "other than by direct appeal or discretionary direct review"].) California has

afforded persons convicted of criminal offenses a variety of mechanisms to obtain relief. The appeal here arose from one such postconviction relief statute—section 1170.95.

Senate Bill 1437 (2017-2018 Reg. Sess.), effective January 1, 2019, "'amend[ed] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, 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.'" (*People v. Lewis* (2021) 11 Cal.5th 952 [281 Cal.Rptr.3d 521, 526], quoting Stats. 2018, ch. 1015, § 1, subd. (f).) In addition to amending the statutes defining murder (§§ 188, 189, as amended by Stats. 2018, ch. 1015, §§ 2, 3), Senate Bill 1437 also added section 1170.95, which establishes a procedure for previously convicted defendants "who could not be convicted" under the amended law to "retroactively seek relief." (*Lewis*, at p. 526; see also Stats. 2018, ch. 1015, § 4.) A successful petition results in the petitioner's murder conviction being vacated; the petitioner is then resentenced on any remaining counts. (§ 1170.95, subd. (a).) If the target offense underlying the invalid theory of murder was not charged, the conviction "shall be redesignated as the target offense or underlying felony for resentencing purposes." (§ 1170.95, subd. (e).) There is no retrial. (See § 1170.95, subds. (a), (d)(3).)

To initiate a section 1170.95 proceeding, the petitioner files a petition in the sentencing court alleging entitlement to relief under the statute. (§ 1170.95, subd. (b)(1).) The petition must

allege that (1) charges were filed against the petitioner under a theory of felony murder or murder under the natural and probable consequences doctrine; (2) the petitioner was convicted of first or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of first or second degree murder; and (3) the petitioner could not now be convicted of first or second degree murder because of the changes to sections 188 or 189. (§ 1170.95, subds. (a)(1)-(3), (b)(1)(A).) Section 1170.95 does not explicitly provide for appeal from the denial or dismissal of a resentencing petition. However, convicted defendants may generally appeal from any order made after a final judgment of conviction "affecting the substantial rights of the party." (§ 1237, subd. (b); see, e.g., § 1473.7, subd. (f) [expressly identifying orders under section 1473.7 as appealable under section 1237, subdivision (b)].)

Section 1170.95 is one of several postconviction relief statutes the Legislature has enacted in recent years. Some postconviction relief statutes, like section 1170.95, give persons with already final convictions the opportunity to "avail themselves" of "ameliorative provisions" that prospectively reduce or eliminate the possible punishment for a class of persons. (*People v. Gentile* (2020) 10 Cal.5th 830, 847; see also *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308.)[2]

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[2] The ameliorative aspects of section 1170.95 provide relief that differs from what is available in habeas under the ruling in *People v. Chiu* (2014) 59 Cal.4th 155, superseded by statute on other grounds as stated in *People v. Lewis*, *supra*, 281

These types of statutes typically allow offenders to reduce their sentences, redesignate felonies as misdemeanors, or vacate their convictions. Examples of ameliorative postconviction statutes include Penal Code section 1170.126 (petition to reduce "three strikes" sentence if third offense would no longer qualify as strike); Penal Code section 1170.18 (petition to redesignate certain felonies as misdemeanors and to be resentenced); and Health and Safety Code section 11361.8 (petition to recall or dismiss sentence for certain cannabis-related offenses).[3]

Unlike section 1170.95 and the statutes described above, other postconviction relief mechanisms permit an offender to challenge a conviction or sentence based on errors in the original

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Cal.Rptr.3d 521. *Chiu* held that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Id.* at pp. 158-159.) Habeas relief premised on *Chiu* error is based on a finding of instructional error and, after the court vacates the conviction, permits the government to retry the first degree murder charge or accept reduction of the conviction to second degree murder. (*In re Martinez* (2017) 3 Cal.5th 1216, 1227.) In contrast, section 1170.95, where it applies, is an act of lenity that vacates the petitioner's murder conviction without providing for retrial on that charge. In addition, section 1170.95 can serve to vacate a second degree murder conviction based on the natural and probable consequences doctrine, which *Chiu* did not invalidate. (See *Gentile*, *supra*, 10 Cal.5th at pp. 851-852.)

[3] Penal Code section 1170.126 was added by an initiative in November 2012 (Prop. 36 or the Three Strikes Reform Act of 2012). Penal Code section 1170.18 was added by an initiative in November 2014 (Prop. 47 or the Safe Neighborhoods and Schools Act). Health and Safety Code section 11361.8 was added by an initiative in November 2016 (Prop. 64 or the Control, Regulate and Tax Adult Use of Marijuana Act).

proceeding. The writ of habeas corpus has long been the "last safeguard" for an "unjustly imprisoned inmate." (*In re Clark* (1993) 5 Cal.4th 750, 804 (conc. & dis. opn. of Kennard, J.), superseded by statute on other grounds as stated in *In re Friend* (2021) 11 Cal.5th 720; see also Cal. Const., art. VI, § 10; Pen. Code, § 1473; *Friend*, at pp. 736-737.) And the writ of error coram nobis, available to those no longer in custody, allows vacatur of a conviction based on newly discovered facts that "would have prevented the rendition of the judgment." (*People v. Shipman* (1965) 62 Cal.2d 226, 230, quoting *People v. Mendez* (1946) 28 Cal.2d 686, 688.) The Legislature has created additional error-correction vehicles, often by extending availability to those out of custody or specifying certain bases for challenging a conviction as legally invalid. Section 1473.7, for example, permits a person no longer in custody to file a motion to vacate a conviction or sentence based on prejudicial error that prevented the person from understanding the immigration consequences of a plea; newly discovered evidence of actual innocence; or a conviction or sentence obtained through racial bias in violation of section 745, subdivision (a). (§ 1473.7, subd. (a); see also *People v. Vivar* (2021) 11 Cal.5th 510, 525.)

Additional examples abound. (*People v. Scott* (2020) 58 Cal.App.5th 1127, 1134, fn. 6 [more than 20 examples of postconviction relief statutes], review granted Mar. 17, 2021, S266853.) Postconviction relief statutes vary in their key features, including: whether the statute operates through sentencing modification or through redesignation, expungement

(dismissal), or vacatur of the conviction; whether the statute has a leniency, rehabilitation, or error-correction purpose; whether the proceedings are initiated by the convicted party, the court, or a government official; the breadth of convictions eligible for relief; and the court's level of discretion in granting relief.[4] The Legislature has also enacted statutes that facilitate discovery of materials relevant to postconviction claims, such as section 1054.9 (discovery of relevant materials in cases where court imposed sentence of 15 years or more) and section 1405 (motion for postconviction DNA testing).

In some of these postconviction proceedings—including the one that gave rise to this appeal—the Legislature affords petitioners a statutory right to the assistance of counsel. Section 1170.95 provides that "[i]f the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner." (Subd. (c).) As this Court recently held in *Lewis*, *supra*, 281 Cal.Rptr.3d 521, a court must grant a request for counsel upon the filing of a facially sufficient section 1170.95 petition; no prima facie showing is required. (*Id.* at p. 524.) And on appeal from

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[4] See generally Wilkes, State Postconviction Remedies and Relief Handbook, Chapter 7: California <https://postconviction.org/wp-content/uploads/2019/06/CALIFORNIA-ATTORNEY-POST-CONVICTION-MANUAL.pdf> (as of Sept. 7, 2021); MacKay & Prison Law Office, The California Prison and Parole Law Handbook (2019) <https://prisonlaw.com/the-california-prison-and-parole-law-handbook> (as of Sept. 7, 2021); Brady & Cahn, Helping Immigrant Clients with Proposition 47 and Other Post-Conviction Legal Options (2016) Immigrant Legal Resource Center <https://www.ilrc.org/sites/default/files/resources/csj-immigrationtoolkit-final-online.pdf> (as of Sept. 7, 2021).

section 1170.95-related orders, courts of appeal routinely appoint counsel as a matter of court practice. (See, e.g., *People v. Cole* (2020) 52 Cal.App.5th 1023, 1029, review granted Oct. 14, 2020, S264278; *People v. Allison* (2020) 55 Cal.App.5th 449, 456; *People v. Flores* (2020) 54 Cal.App.5th 266, 269.) The People's survey of postconviction statutes identified 33 total, with three expressly providing for appointment of counsel in postconviction proceedings. In addition to Penal Code section 1170.95, Government Code section 68662 entitles indigent petitioners with capital sentences to appointed habeas corpus counsel (see *In re Morgan* (2010) 50 Cal.4th 932, 937); and Penal Code section 1405 guarantees indigent convicted persons counsel for preparing a motion for DNA testing as long as the request for counsel meets certain basic requirements (*In re Kinnamon* (2005) 133 Cal.App.4th 316, 320-321). The California Judicial Council also provides standardized forms for seeking many types of postconviction relief, simplifying the process for represented and unrepresented petitioners alike.[5]

B. The origins, definition, and application of *Wende* procedures

Because appellant asserts he is entitled to the full suite of *Wende* procedures on appeal from denial of his postconviction petition, it is necessary to summarize what those procedures require of appointed counsel in a first appeal from a criminal

[5] See generally Judicial Council of Cal., *Find Your Court Forms* <https://www.courts.ca.gov/forms.htm?filter=CR> (as of Sept. 7, 2021).

conviction as a matter of right, as well as the history and purposes of those procedures.

The federal Constitution does not guarantee criminal defendants the right to an appeal. (*McKane v. Durston* (1894) 153 U.S. 684, 687-688.) But if a State chooses to provide defendants a nondiscretionary appeal from a criminal conviction, then it must appoint counsel in their "one and only appeal" as a matter of right. (*Douglas v. California* (1963) 372 U.S. 353, 357 [criminal defendants have unconditional right to assistance of counsel on first appeal as of right under Fourteenth Amendment].) In *Anders v. California* (1967) 386 U.S. 738, the U.S. Supreme Court addressed "the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." (*Id.* at p. 739.) The high court began its analysis by recognizing that "a continuing line of cases has reached [the] Court concerning discrimination against the indigent defendant on his first appeal." (*Id.* at p. 741.) It held that the process used in California at that time did not "comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment" (*ibid.*) because it allowed counsel representing a defendant on direct appeal to simply inform the appellate court that counsel found the appeal to be meritless (*id.* at pp. 742-743). "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." (*Id.* at p. 744.)

The *Anders* Court then described what should occur: If counsel finds after "conscientious examination" of the case that it is "wholly frivolous," counsel should advise the court and request permission to withdraw, accompanying that request with "a brief referring to anything in the record that might arguably support the appeal." (*Anders*, *supra*, 386 U.S. at p. 744.)[6] The brief should be provided to the defendant, and the defendant should be allowed to raise issues for appeal. (*Ibid.*) "[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." (*Ibid.*) If the court "finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." (*Ibid.*)

Anders has been described as a "prophylactic framework" designed to protect the constitutional right to counsel that applies on a first appeal as of right from a criminal conviction. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 555; see also *Evitts v. Lucey* (1985) 469 U.S. 387, 394 ["right to counsel is limited to the first appeal as of right"].) It thus allowed States some flexibility to develop their own procedures to protect the right to effective counsel on direct appeal. (*In re Sade C.* (1996) 13

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[6] "Under *Anders*, . . . a no-merit letter will not suffice. Counsel must prepare a brief to assist the court in understanding the facts and the legal issues in the case." (*People v. Feggans* (1967) 67 Cal.2d 444, 447.)

Cal.4th 952, 972; see generally Warner, Anders *in the Fifty States* (1996) 23 Fla. St.U. L.Rev. 625.)

In *Wende*, *supra*, 25 Cal.3d 436, this Court "approved a modified [*Anders*] procedure" for California courts. (*People v. Kelly* (2006) 40 Cal.4th 106, 118.) *Wende* clarified that where appointed counsel on direct appeal finds no arguable issues, counsel need not characterize the appeal as frivolous in the required no-issue brief or ask to withdraw. (*Wende*, at p. 442.) The Court noted that "[i]ndeed, there may be practical benefits to the court and the client from counsel's remaining on the case[.]" (*Ibid.*) The Court further held that regardless of whether the defendant personally files a supplemental brief raising issues, *Anders* required the court to conduct an independent review of the record on receipt of counsel's no-issue brief—the court "itself must expressly determine whether the appeal is wholly frivolous." (*Id.* at p. 441.) "If the court in its review finds an issue which it deems reasonably arguable, . . . the court must appoint new counsel if previous counsel was allowed to withdraw. [Citations.] Where counsel has remained in the case . . . the court may, of course, allow [counsel] to continue. In any event, the court, upon finding an arguable issue, should inform counsel for both sides and provide them an opportunity to brief and argue the point." (*Id.* at p. 442, fn. 3.)

The U.S. Supreme Court has held that *Wende*'s procedures comport with the federal Constitution. (*Smith v. Robbins* (2000) 528 U.S. 259, 265.) The process prescribed by *Wende* "both ensures that a trained legal eye has searched the record for

arguable issues" on a first appeal as of right "and assists the reviewing court in its own evaluation of the case." (*Id.* at p. 281.) The appellate court's obligations provide a second "tier[] of review." (*Ibid.*) *Wende* also helps address some of the "criticisms" of the *Anders* procedures. (*Ibid.*) For example, by permitting appellate counsel to refrain from characterizing the appeal as frivolous, the California procedure mitigates the "tension" between counsel's ethical duties as an officer of the court and duties to further the client's interests. (*Id.* at p. 281; see also *Feggans*, *supra*, 67 Cal.2d at p. 447 [appellate counsel "must not argue the case against his client"].) And *Wende* arguably improved upon existing permissible procedures by requiring "a more thorough treatment of the record by both counsel and court." (*Smith*, *supra*, 528 U.S. at p. 283; see also *ibid.* [describing Wisconsin procedure upheld in *McCoy v. Court of Appeals of Wisconsin* (1988) 486 U.S. 429, where appellate court reviews only parts of the record cited by counsel].)

STATEMENT OF THE CASE

In November 2016, a jury convicted appellant of second degree murder, in violation of section 187, subdivision (a), and gross vehicular manslaughter while intoxicated, in violation of section 191.5. (CT 7-8.) It found true allegations that he had two prior convictions for driving under the influence within the meaning of section 191.5, subdivision (d), and had fled the accident scene. (CT 7-8.) The court sentenced appellant to a term of 15 years to life on the murder count and imposed a stayed sentence on the manslaughter count. (CT 11-13.) The Court of

Appeal affirmed the judgment in July 2018. (CT 65-70 [opinion in B281230].)

After Senate Bill 1437 took effect, appellant filed a complying petition for resentencing under section 1170.95. (CT 16.) On the form petition, he checked a box indicating that he was convicted of second degree murder under the natural and probable consequences doctrine or the felony murder doctrine and could not now be so convicted because of the Legislature's changes to section 188. (CT 17.) Appellant also checked a box requesting the assistance of counsel. (CT 17.) The court set a hearing date to determine whether appellant had made a prima facie showing for relief and appointed counsel before that date. (See CT 40, 99.) The prosecution filed an opposition to the petition (CT 41-63), and the court ordered appellant's counsel to file a reply (CT 99). Counsel in the reply defended the constitutionality of Senate Bill 1437 (CT 101-132), but made only a cursory request that appellant be granted relief, without supporting citation or analysis (CT 132-133).

After a hearing, the trial court denied the petition in a written order. (RT 17-18; CT 147-148.) It concluded appellant "was the actual and only killer" and so was ineligible for relief as a matter of law. (Opn. 2; CT 147; RT 18.)

On January 21, 2020, appellant's appointed counsel filed a form notice of appeal and checked the box requesting counsel on appeal. (CT 149.) The Court of Appeal appointed appellate

counsel on May 3, 2020. (Court of Appeal docket, B304441.)[7] Appellate counsel filed a no-issue brief "under *People v. Wende*" raising no specific issues for appeal. (Opn. 2; see Appellant's Opening Br. 8, B304441 (July 6, 2020) ["C.A. Br."].) The brief included a statement of the case and statement of facts explaining the section 1170.95 proceedings below and the original criminal case. (C.A. Br. 5-7.) The brief also contained an "Argument" section that simply summarized the trial court's conclusion and requested "that [the] Court conduct a review of the record in accordance with *People v. Wende*." (*Id.* at pp. 8-9.)

In an accompanying declaration, counsel stated she had advised appellant by letter "that a brief on his behalf would be filed according to the procedures outlined" in *Wende* and that he would receive a copy of the brief. (C.A. Br. 10.) Counsel further stated she had also advised appellant that "he may personally file a supplemental brief" raising "any points which he chooses to call to the court's attention" and that she had provided him with the record. (*Ibid.*) Counsel stated she was not moving to withdraw and "remain[ed] available to submit additional briefing upon the Court's invitation." (*Ibid.*)

The court, too, advised appellant by letter that his counsel had found no arguable issues. (Opn. 2; see also Court of Appeal docket, B304441.) The court invited appellant to submit a

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[7] <https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2313251&doc_no=B304441&request_token=NiIwLSEmTkw2WzBBSSM9VEJIUFg6USxXIyNeVz5TICAgCg%3D%3D> (as of Sept. 7, 2021).

supplemental brief or letter within 30 days. (Opn. 2.) Appellant did not do so. (*Ibid.*)

The court then dismissed the appeal in a short, unpublished decision. Relying on *Cole*, *supra*, 52 Cal.App.5th 1023, the court explained that *Wende* procedures "are not constitutionally compelled" in appeals other than a defendant's "initial appeal of right." (Opn. 2.) The court adopted the procedures outlined in *Cole*; specifically, it concluded that because appellant's counsel filed a no-issue brief, and appellant after notice did not file a supplement brief, the court would "presume the order appealed from is correct and dismiss the appeal as abandoned" without conducting an independent review of the record. (Opn. 3; see also *Cole*, at pp. 1038-1040.)

The Court of Appeal denied appellant's petition for rehearing on December 16, 2020.

This Court granted appellant's petition for review on February 17, 2021.

SUMMARY OF ARGUMENT

Appellant asserts error in the dismissal of his appeal from denial of his petition for postconviction relief under section 1170.95, and the Court has requested that the parties address more generally what procedures both appointed counsel and the Courts of Appeal must follow when counsel determines that an appeal from an order denying postconviction relief lacks arguable merit; and whether petitioner-appellants are entitled to notice of these procedures.

Appellant assumes that every procedure set out in *Wende*—which addresses a defendant's due process and equal protection rights in an initial appeal as of right from a criminal conviction—applies in an appeal from denial of relief under section 1170.95. (OBM 20-30.) As most of the procedures described in *Wende* took place in appellant's case, he primarily takes issue with the absence of an independent judicial review of the record before dismissal. (See OMB 16, 27-28.) Appellant's assumption and his claim of error are incorrect.

Both the U.S. Supreme Court and this Court have repeatedly made clear that the procedures set out in *Anders*, *Wende*, and related cases are designed to protect only the indigent criminal defendant's constitutional right to counsel on direct appeal from a criminal conviction where the State grants an appeal as of right. (See, e.g., *Finley*, *supra*, 481 U.S. at pp. 554-557; *Sade C.*, *supra*, 13 Cal.4th at p. 983.) A section 1170.95 proceeding and any subsequent appeal are collateral postconviction proceedings, not direct appeals from conviction. Whereas on direct appeal a defendant has an unconditional right to counsel (and effective assistance of that counsel) under the Fourteenth Amendment (see *Douglas*, *supra*, 372 U.S. at pp. 356-357; *Evitts*, *supra*, 469 U.S. at pp. 394-397), as this Court recently reiterated, "[t]here is no unconditional state or federal constitutional right to counsel to pursue collateral relief from a judgment of conviction." (*Lewis*, *supra*, 281 Cal.Rptr.3d at p. 536.) The reasoning that led the courts to the "'prophylactic'"

procedures set out in *Wende* (*Sade C.*, at p. 982) therefore does not apply in the postconviction context.

Appellant resists this conclusion, arguing that U.S. Supreme Court precedent suggests that where a postconviction proceeding is the first place a convicted offender can raise a particular challenge, that may trigger a constitutional right to counsel, and, according to appellant, all *Wende* procedures applicable to counsel and the court. (OBM 22-25, citing *Coleman v. Thompson* (1991) 501 U.S. 722 and *Martinez v. Ryan* (2012) 566 U.S. 1.) But that argument is not supported. *Coleman* and *Martinez* left open the possibility of a postconviction constitutional right to counsel in only one narrow circumstance: where such proceedings "provide the first occasion to raise a claim of *ineffective assistance [of counsel] at trial*." (*Martinez*, at p. 8, italics added.) Section 1170.95—and most postconviction relief statutes—do not implicate this claim. And, in any event, *Coleman* made clear that there would still be no right to counsel on *appeal* from such a proceeding—the relevant posture here.

Alternatively, appellant contends that under general due process principles requiring procedural fairness, a full set of *Wende*-type procedures is constitutionally mandated for appeals from denial of section 1170.95 relief. (OBM 25-28.) Here again, appellant takes issue with the Court of Appeal's decision not to conduct an independent review of the record. (See *ibid.*) He also asserts that even though neither he nor his counsel raised any claims of reversible error for the court to decide, the court should not have dismissed his appeal on its own motion. Instead,

appellant argues, the court should have notified counsel of this possibility and requested briefing on whether it could dismiss. (OMB 31-33.) These arguments, too, are unsupported.

This Court has recognized that due process is a flexible concept calling for such protections as the particular situation, on balance, demands. (*People v. Tilbury* (1991) 54 Cal.3d 56, 68.) Here, appellant received all process he was due. The trial court—after appointment of counsel, briefing, and hearing—had already concluded appellant was ineligible for relief as a matter of law because the record clearly showed he was the actual and sole killer. On appeal from that determination, appellant likewise had the assistance of appointed counsel, who conscientiously examined the record and determined there were no arguable issues for appeal. His counsel filed a no-issue brief, and appellant received notice of his right to file a supplemental brief raising issues for appeal. He declined to do so. Only then did the Court of Appeal dismiss his appeal, doing so by written order. In these circumstances, the chances that an arguable issue was overlooked and appellant is actually eligible for relief under section 1170.95 are vanishingly small. Even where the liberty interest may be "weighty," due process does not require imposition of "[p]rocedures that are practically 'unproductive[.]'" (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 539, quoting *Sade C.*, *supra*, 13 Cal.4th at pp. 990-991.)

Indeed, it is highly unlikely that due process would require independent judicial review of the record in any postconviction context: The Legislature has carefully tailored the procedures in

each postconviction proceeding in light of the competing interests at stake and any legal or factual complexities at play, and appellant presents no evidence these procedures have sometimes, or ever, resulted in erroneous determinations on appeal where counsel files a no-issue brief. And independent court review is not without cost. Requiring courts of appeal to review the sometimes voluminous records of hundreds of postconviction appeals where appointed counsel has found no issue would reduce these courts' ability to timely process other appeals, to no productive end.

The procedures below complied with the Constitution, and this Court should affirm the judgment. Nonetheless, where appeals implicate parties' liberty interests, this Court and the Courts of Appeal have at times exercised their inherent authority to declare rules of appellate procedure for future cases and to control the cases before them. (See, e.g., *Ben C.*, *supra*, 40 Cal.4th at pp. 543-544; *People v. Serrano* (2012) 211 Cal.App.4th 496, 503.) Below, the People propose procedures for section 1170.95 appeals that would require, among other things, that counsel file a no-issue brief that has sufficient content to be helpful to the court without arguing against the client-appellant's appeal; that the appellant be given an opportunity to file a supplemental brief raising issues for appeal; and that the appellant receive clear notice that the appeal will be dismissed if no such brief is filed. For appeals from denial of many types of postconviction relief, these proposed procedures would adequately ensure that counsel fulfill their ethical and

professional duties; that petitioner-appellants have an opportunity to raise their points for consideration; and that courts can determine whether counsel have adequately represented postconviction appellants while avoiding the expenditure of limited judicial resources on unproductive record reviews.

ARGUMENT

I. *WENDE* PROCEDURES DO NOT APPLY ON APPEAL FROM DENIAL OF POSTCONVICTION RELIEF

A. *Wende* procedures apply solely to protect a defendant's federal constitutional right to counsel on direct appeal from conviction

Appellant asserts that the Court of Appeal violated his constitutional rights by failing to follow all procedures described in *Wende*—in particular, by deciding not to conduct an independent review of the entire record before dismissing the appeal. (OBM 16, 18-19, 25-28, 30.) He argues that he had a constitutional right to counsel in his appeal from denial of postconviction relief under section 1170.95, and so *Wende* procedures applied with full force to protect that right. (OBM 30.) But appellant is wrong about the source of any right to counsel he had on appeal and, moreover, misunderstands the very particular right to counsel on direct appeal from conviction that *Wende* is designed to serve.

There is no right to *Wende* procedures on appeal from denial of postconviction relief. As the U.S. Supreme Court noted in *Finley*, *supra*, 481 U.S. 551, the requirements of *Anders* (and *Wende*) were "based on the underlying constitutional right to appointed counsel established in *Douglas v. California*[.]" (*Id.* at

p. 554.)[8] In *Douglas*, the high court held that the Fourteenth Amendment guarantees all criminal defendants the appointment of counsel on a first appeal as of right. (*Douglas*, *supra*, 372 U.S. at pp. 357-358.) The state court of appeal had rejected the indigent defendants' requests for counsel on appeal, based on a California rule of criminal procedure that at the time instructed the court to deny the appointment of counsel if, after reviewing the record, the court determined that appointing counsel "would be of no value[.]" (*Id.* at p. 355.) The Court concluded this practice violated the federal Constitution's equal protection and due process guarantees. "Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (*Id.* at p. 357.) Counsel must be afforded on appeal without conditions: "When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." (*Ibid.*)

Finley explained that *Wende-Anders* applies "when, and only when, a litigant has [this] previously established constitutional right to counsel" on direct appeal from a criminal conviction. (*Finley*, *supra*, 481 U.S. at p. 555.) In rejecting a prisoner's claim that his appointed habeas counsel's conduct violated *Anders*, the *Finley* Court observed that it had "never held that prisoners have a constitutional right to counsel when mounting collateral

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[8] Where appropriate, this brief will subsequently use "*Wende-Anders*" to discuss U.S. Supreme Court and California Supreme Court decisions analyzing *Anders*.

attacks upon their convictions." (*Ibid.*) Such a right "extends to the first appeal of right" addressed in *Douglas* "and no further." (*Ibid.*; see also *Coleman*, *supra*, 501 U.S. at p. 752.) Without that federal constitutional right to counsel, the prisoner had "no constitutional right to insist on the *Anders* procedures[.]" (*Finley*, at p. 557.)

This Court has reiterated that *Wende-Anders* procedures "are designed solely to protect" that very specific right, "under the Fourteenth Amendment's due process and equal protection clauses, to the assistance of appellate counsel appointed by the state," which is present "only in [a] first appeal as of right." (*Sade C.*, *supra*, 13 Cal.4th at p. 983.) The additional protections that *Wende-Anders* procedures offer to safeguard the right to assistance of counsel on direct appeal make functional sense in that particular and distinct context. On direct appeal from a conviction, the defendant aims to show that his confinement, "with its consequent drastic loss of liberty, is unlawful." (*Id.* at p. 971, quoting *Evitts*, *supra*, 469 U.S. at p. 396.) Direct appeals implicate "a range of potential issues as wide as the criminal law, and typically it is not immediately obvious whether a defendant has received adequate representation from an appellate lawyer who raises the white flag." (*Scott*, *supra*, 58 Cal.App.5th at p. 1135.) Errors may have occurred "in a prejudgment ruling; during jury selection; through trial errors; by closing argument misconduct; or in jury instructions." (*Ibid.*) And on direct appeal, the reviewing court provides a critical check on any errors that may have occurred at trial, ensuring that "only those who are

validly convicted have their freedom drastically curtailed." (*Evitts*, at pp. 399-400.)

The U.S. Supreme Court and this Court have clearly and repeatedly declined to extend the "'prophylactic'" procedures of *Wende-Anders* to other contexts (*Sade C.*, *supra*, 13 Cal.4th at p. 982)—with one possible, narrowly defined exception for claims of ineffective assistance of counsel at trial discussed *post*, in Section I.B. In *Finley*, as noted, the U.S. Supreme Court held it was error to extend *Wende-Anders* procedures to habeas corpus proceedings. (*Finley*, *supra*, 481 U.S. at p. 554.) The high court reasoned that postconviction proceedings are different because they are "removed from the criminal trial"; they are "not part of the criminal proceeding itself" and are, in fact, "civil in nature." (*Id.* at pp. 556-557.) States have "no obligation" to provide such avenues for relief, nor to provide counsel to pursue it. (*Id.* at p. 557.) Beyond the first appeal from conviction, such "state-created right[s]" do not "put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines" of *Wende-Anders*. (*Id.* at pp. 556, 559.)

Similarly, in *Sade C.*, *supra*, 13 Cal.4th 952, this Court held that indigent parents appealing adverse juvenile court determinations had no right to *Wende-Anders* procedures, regardless of any right to counsel they had under state or federal law. (*Id.* at pp. 984-985.) And in *Ben C.*, *supra*, 40 Cal.4th 529, this Court declined to extend *Wende-Anders* procedures to appeals from conservatorship proceedings under the Lanterman-Petris-Short Act, reiterating that "'the right to appointed

counsel'" that *Wende-Anders* procedures protect extends only to the "first appeal of right" from a criminal conviction, "and no further." (*Id.* at p. 537, quoting *Finley*, *supra*, 481 U.S. at p. 555.) Although *Sade C.* and *Ben C.* were civil and not criminal cases (OBM 24), this Court could not have been clearer that *Wende-Anders* procedures "do not reach collateral postconviction proceedings." (*Sade C.*, at p. 978.) And since *Ben C.* was decided, courts of appeal starting with *Serrano*, *supra*, 211 Cal.App.4th 496 have "uniformly" held that *Wende* procedures do not apply where an offender appeals a denial of postconviction relief, including in the section 1170.95 context. (*People v. Freeman* (2021) 61 Cal.App.5th 126, 133 & fn. 1 [collecting authorities so holding].)

More recently, this Court in *Lewis*, *supra*, 281 Cal.Rptr.3d 521, reaffirmed that "[t]here is no unconditional state or federal constitutional right to counsel to pursue collateral relief from a judgment of conviction"—a necessary predicate for *Wende*'s application. (*Id.* at p. 536; see also *Barnett*, *supra*, 31 Cal.4th at pp. 474-475 [no such right on habeas]). *Lewis*, which involved a section 1170.95 petition, contrasted an unconditional constitutional right to counsel with a right to counsel, present in certain postconviction settings, that is conditioned on the petitioner making a threshold showing that he is entitled to relief. (*Lewis*, at pp. 536-537.) For example, in *Shipman*, *supra*, 62 Cal.2d 226, the Court held that in coram nobis, as "a condition to [the court] appointing counsel," a petitioner must file "adequately detailed factual allegations stating a prima facie

case" that the judgment of conviction should be overturned. (*Id.* at p. 232; see also *Clark*, *supra*, 5 Cal.4th at p. 780 [same for habeas]; *Lewis*, at pp. 536-537 [discussing these cases].) While *Shipman* based its conclusion on *Douglas*, after *Finley*, *Shipman* is best understood as conferring the kind of conditional, "case by case" right to counsel that would not support *Wende*'s application any more than would a right to counsel created by state statute, rules of court, the California Constitution, or any other federal constitutional right to counsel beyond a direct appeal from conviction. (*Sade C.*, *supra*, 13 Cal.4th at p. 984; see also *Finley*, *supra*, 481 U.S. at pp. 555-556; *Lewis*, at pp. 536-537; *ante*, pp. 31-34.)

These cases dispose of appellant's argument. A section 1170.95 proceeding and any subsequent appeal are postconviction proceedings that afford convicted defendants "collateral relief" from a judgment. (*Lewis*, *supra*, 281 Cal.Rptr.3d at p. 536.) The State may provide such avenues, including the "statutory right of counsel" in trial-level section 1170.95 proceedings (OBM 13; see also OBM 29), without being constitutionally compelled to implement the *Wende* procedures required in a direct appeal. (*Finley*, *supra*, 481 U.S. at p. 559.) Indeed, unlike a first appeal as of right, a section 1170.95 petition does not challenge the lawfulness of the original murder conviction. The Legislature did not design section 1170.95 to contest "whether the state has even proved the defendant guilty of murder in the first place" (OBM

25), or otherwise attack the validity of the original judgment.[9] Instead, like several other postconviction vehicles the Legislature has enacted in recent years, section 1170.95 is an "act of lenity" by the Legislature "intended to give inmates serving otherwise final sentences the benefit of ameliorative changes" to applicable criminal laws. (*People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064 [Sixth Amendment jury trial right does not apply to Prop. 36 resentencing]; see also *People v. Gentile* (2020) 10 Cal.5th 830, 847 [discussing section 1170.95]; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156-1157 [section 1170.95 is an act of lenity]; *People v. Howard* (2020) 50 Cal.App.5th 727, 735 [same]; *Cole*, *supra*, 52 Cal.App.5th at p. 1036 [Senate Bill 1437's changes to the law of murder apply to a section 1170.95 petitioner "by legislative grace rather than constitutional imperative"].)[10]

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[9] Appellant's argument presumes that if a postconviction motion serves an error-correction function, there is a right to counsel and to *Wende* procedures. (See OBM 24-25.) But under *Finley*, *Sade C.*, and *Ben C.*, it is the postconviction nature of the section 1170.95 proceeding that controls whether *Anders* and *Wende* apply to appellant's appeal. And considering *Finley*'s holding that even a habeas proceeding challenging the lawfulness of the petitioner's confinement is too far removed from the criminal trial to mandate *Wende-Anders* procedures (*Finley*, *supra*, 481 U.S. at pp. 556-557), *a fortiori* those procedures would not attend a postconviction appeal from denial of a section 1170.95 petition that does not attack the validity of the original conviction.

[10] Federal circuit courts have repeatedly concluded that there is no constitutional right to counsel in analogous resentencing proceedings under 18 U.S.C. § 3582(c)(2), which authorizes a district court to reduce an otherwise final sentence

Moreover, a section 1170.95 petitioner does not "face[] the danger" of an unlawful conviction. (*Hamilton v. Alabama* (1961) 368 U.S. 52, 54.) As noted, the filing of a petition constitutes a request for lenity and does not amount to a claim of error or infirmity in the existing conviction. And unless and until a section 1170.95 petition is granted, the original conviction remains valid. (*People v. Burhop* (2021) 65 Cal.App.5th 808 [280 Cal.Rptr.3d 253, 259].) Denial of section 1170.95 relief "simply leaves the original sentence intact" without in any way undermining the conclusion that the State lawfully convicted the person of murder in the original criminal proceedings. (*Perez*, *supra*, 4 Cal.5th at p. 1064; see also *Cole*, *supra*, 52 Cal.App.5th at p. 1036; *People v. Lopez* (2020) 56 Cal.App.5th 936, 957-958, review granted Feb. 10, 2021, S265974.) And if a section 1170.95 petition is ultimately granted, the new sentence may not exceed the original (§ 1170.95, subd. (d)(1)), meaning the petitioner does

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pursuant to a subsequent Sentencing Guidelines amendment if the reduction is consistent with applicable U.S. Sentencing Commission policy statements. (See, e.g., *United States v. Townsend* (9th Cir. 1996) 98 F.3d 510, 512-513; *United States v. Whitebird* (5th Cir. 1995) 55 F.3d 1007, 1011.) As the high court explained in *Dillon v. United States* (2010) 560 U.S. 817, that procedure is "a congressional act of lenity intended to give prisoners the benefit of later enacted" sentencing guidelines. (*Id.* at p. 828 [holding that convicted persons seeking 18 U.S.C. § 3582(c)(2) resentencing do not have a Sixth Amendment right to have a jury find the essential facts supporting the modified sentence].)

not "risk any increase in the maximum terms of confinement" (*In re Eddie M.* (2003) 31 Cal.4th 480, 504).[11]

All of this makes a section 1170.95 proceeding and others like it "constitutionally distinct" from a criminal prosecution, including the direct appeal from conviction, and the interests justifying the right to counsel there. (*Eddie M.*, *supra*, 31 Cal.4th at p. 504.) As *Finley* explained, such collateral attacks on the conviction are "removed from the criminal trial" and normally occur "only after [a convicted] defendant has failed to secure relief through direct review[.]" (*Finley*, *supra*, 481 U.S. at pp. 556-557.) Accordingly, appellant's appeal from the denial of his section 1170.95 petition was "simply not" a first appeal—the "only" context in which *Wende* applies. (*Sade C.*, *supra*, 13 Cal.4th at p. 982.)[12]

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[11] As noted above (*ante*, p. 14, fn. 2), section 1170.95 does not permit the prosecution to retry the petitioner for murder.

[12] To be sure, if a *successful* postconviction motion or petition were to effectively reopen the original criminal proceedings, that could present closer questions about whether there might be an unconditional constitutional right to counsel in the reopened proceeding or on any appeal challenging the particulars of the relief afforded, and whether *Wende* would apply to that appeal. (See, e.g., *People v. Frazier* (2020) 55 Cal.App.5th 858, 866 [suggesting Sixth Amendment right to counsel might be implicated upon "actual recall of sentence" in a section 1170, subdivision (d)(1) proceeding]; *People v. Rouse* (2016) 245 Cal.App.4th 292, 301 [petitioner has a right to counsel at resentencing stage of section 1170.18 proceeding when the court has discretion to restructure the sentence on all counts].) Because the issues presented here concern only appeals from *denial* of postconviction relief, this case does not require the

B. Any narrow extension of *Wende* to a petitioner's "first occasion" to raise a claim of ineffective assistance of trial counsel would not apply here

Appellant resists the clear import of *Finley*, *Sade C.*, *Ben C.*, and now *Lewis*: that *Wende* procedures apply only to a first appeal as of right from a criminal conviction. Seeking an exception, he argues that in *Coleman*, *supra*, 501 U.S. 722 and *Martinez*, *supra*, 566 U.S. 1, the U.S. Supreme Court suggested that an offender may have a constitutional right to postconviction counsel, including *Wende* procedures, in circumstances "where the state provides a judicial avenue that 'is the first place a prisoner can present a [particular] challenge to his conviction.'" (OBM 22, quoting *Coleman*, at p. 755.) He argues that a section 1170.95 proceeding fits that definition because it presents an appellant'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[.]" (OBM 24.) This, he says, makes a section 1170.95 petition "the equivalent of a prisoner's direct appeal" on whether the State could prove him guilty of murder under the amended statutes. (OBM 25, quoting *Martinez*, at p. 11.)

Appellant's argument, if accepted, would seem to require appointment of counsel in all postconviction proceedings where the Legislature has chosen to exercise its powers of lenity and create a new avenue for relief. These proceedings necessarily involve new legal and sometimes new factual questions, related

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Court to resolve how *Finley* might apply in those distinct and unusual contexts.

to the ameliorative changes in the law, that have "never" been "litigated and decided by a Court of Appeal." (OBM 28.)

But appellant's argument is not supported. As a threshold matter, the potential exception to *Finley* appellant relies on is narrow. The high court left open the possibility of a postconviction constitutional right to counsel only where such proceedings "provide the first occasion to raise a claim of *ineffective assistance [of counsel] at trial*." (*Martinez*, *supra*, 566 U.S. at p. 8, italics added; see also *Coleman*, *supra*, 501 U.S. at p. 755.) The *Martinez* Court explained why the singular significance of a trial-counsel ineffectiveness claim merited special consideration: "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." (*Martinez*, at p. 12.) It is essential that convicted persons be able to raise this kind of trial error in some judicial forum, since it goes to the heart of whether the defendant received a "fair trial" adjudicating guilt and depriving the defendant of liberty. (*Ibid.*; cf. *Sade C.*, *supra*, 13 Cal.4th at p. 971.) The "importance of the right" led the Court in *Martinez* to hold that a procedural default on these claims due to ineffective assistance of counsel in the first proceeding where inmates can present them would be excused, regardless of whether there is a constitutional right to counsel in such proceedings. (*Martinez*, at pp. 16-17.)

And, further, *Coleman* made clear that there would still be no right to counsel on *appeal* from such a proceeding—the relevant posture here. There, the Court considered whether "an exception to the rule of *Finley*" gave Coleman "a constitutional

right to counsel on appeal from the state habeas trial court judgment." (*Coleman*, *supra*, 501 U.S. at p. 755.) It concluded the answer was no. Even assuming the trial court habeas proceeding could be considered Coleman's "'one and only appeal'" as to his ineffective assistance claims, arguably justifying an extension of the constitutional right to counsel recognized in *Douglas*, he would still not have a constitutional right to counsel on appeal from that proceeding, because at least one state court had already addressed those claims. (*Id.* at p. 756, quoting *Douglas*, *supra*, 372 U.S. at p. 357.)

The same reasoning applies here. Even assuming appellant's section 1170.95 petition could be considered his "first appeal" as to the legal question presented in that proceeding, that rationale would not support a constitutional right to counsel or *Wende* procedures "on appeal from *that* determination." (*Coleman*, *supra*, 501 U.S. at p. 756.) Indeed, given that this Court has already held offenders do not have an unconditional constitutional right to counsel in a section 1170.95 proceeding (*Lewis*, *supra*, 281 Cal.Rptr.3d at p. 536), it would "defy logic" to conclude they have a constitutional right to counsel "to appeal [that] state collateral determination" (*Coleman*, at pp. 756-757). And without an unconditional constitutional right to counsel synonymous with the right that applies on direct appeal from conviction, *Wende* procedures do not attach.

II. GENERAL DUE PROCESS PRINCIPLES DO NOT REQUIRE EXTENDING *WENDE* PROCEDURES TO APPEALS FROM DENIAL OF POSTCONVICTION RELIEF

Alternatively, appellant argues that the "equities at play" in his appeal "strongly favor" construing the California Constitution to afford *Wende* protections under its general due process guarantee of procedural fairness. (OBM 25.) Here again, appellant specifically takes issue with the Court of Appeal's decision not to conduct an independent review of the record. (See OBM 25-28.) He also asserts that even though neither he nor his counsel raised any claims of error for the court to decide, the court should not have dismissed his appeal on its own motion. Instead, appellant argues, because he allegedly had no reason to anticipate dismissal, the court should have notified counsel of this possibility, requested briefing on whether it could dismiss the appeal, and ultimately issued a written decision on the merits after conducting independent review. (OMB 31-33; see also OBM 30.) But the court had no such duties.[13]

A. Appellant was not constitutionally entitled to independent court review

Although appellant argues for independent judicial review of the entire record as a matter of general due process principles under the state Constitution, he appears to rely on the federal due process analysis employed by this Court in *Sade C.* and *Ben*

[13] Because the issues presented assume the presence of appointed counsel, this case does not require the Court to address whether and in what circumstances general due process principles might mandate appointment of counsel on appeal from denial of postconviction relief.

C. to determine whether it should extend *Wende-Anders* independent review to the appellate proceedings at issue in those cases as a matter of procedural fairness. (See OBM 25-28, discussing *Serrano*, *supra*, 211 Cal.App.4th 496 and citing *Sade C.*, *supra*, 13 Cal.4th at pp. 987-991.) A state constitutional due process analysis typically differs in that it incorporates consideration of the "dignitary interest" in notice and participation. (*Sade C.*, at p. 991, fn. 18.) But the Court has held that interest "could not command" *Wende-Anders* procedures and has conducted a single analysis to guide both the state and federal constitutional inquiries in this context. (*Ibid.*; see also *Ben C.*, *supra*, 40 Cal.4th at p. 539.) Appellant does not dispute the application of *Sade C.* and *Ben C.*'s analytical framework to this case. (See OBM 26.)

In *Sade C.*, after holding that *Wende-Anders* did not apply to an appeal addressing parental rights, this Court examined whether general due process principles nonetheless called for extending all *Wende-Anders* procedures to such appeals. (*Sade C.*, *supra*, 13 Cal.4th at p. 985-991.) As here, each counsel in the *Sade C.* appeals filed a no-issue brief of the type described in *Wende* and *Anders*, but the court of appeal declined to undertake independent review of the records. (*Id.* at pp. 964-965.) This Court applied the balancing test set forth in *Lassiter v. Department of Social Services* (1981) 452 U.S. 18 and *Mathews v. Eldridge* (1976) 424 U.S. 319 to resolve whether "fundamental fairness" required independent court review. (*Sade C.*, at p. 987.) That test considers "'the private interests at stake, the

government's interest, and the risk that the procedures [currently] used will lead to erroneous decisions'" (*id.* at p. 987, quoting *Lassiter*, at p. 27), *i.e.*, the risk that withholding full *Wende-Anders* procedures would "lead to an erroneous resolution" of the appeal (*id.* at p. 990).

After evaluating each of the *Lassiter* factors, this Court concluded that fundamental fairness under the due process clause "does not compel imposition of *Anders*'s 'prophylactic' procedures," including independent review. (*Sade C.*, *supra*, 13 Cal.4th at p. 990.) As to the first factor, the Court acknowledged the "'fundamental'" liberty interests at stake in such appeals (*id.* at p. 987, quoting *Santosky v. Kramer* (1982) 455 U.S. 745, 753, 759), which *Wende-Anders* procedures as a whole, including independent review, would arguably protect by ensuring counsel acted "in the role of an active advocate" (*id.* at p. 988, quoting *Anders*, *supra*, 386 U.S. at p. 744). Such procedures would also arguably support "an accurate and just resolution," which was relevant to both the private and government interests at stake. (*Id.* at pp. 988, 989.) But, with regard to the second factor, the government also had an interest in an "economical and expeditious resolution" of an appeal from a decision that is "presumptively accurate and just." (*Id.* at p. 990.)

As to the third factor, this Court concluded that the chance that withholding *Wende-Anders* procedures would "lead to an erroneous resolution of the indigent parent's appeal" was "negligible." (*Sade C.*, *supra*, 13 Cal.4th at p. 990.) Attorneys were "enabled, and indeed encouraged, to effectively represent

their clients" by virtue of procedural protections afforded to parents both in the juvenile court and on appeal. (*Ibid.*) And experience "reveal[ed] that appointed appellate counsel" in these types of cases "faithfully conduct[ed] themselves as active advocates" for their clients. (*Ibid.*) The Court also noted that one appellate court that had conducted independent review in such cases for over a decade had discovered "*no* unbriefed issues warranting further attention." (*Ibid.*) In light of these considerations, the Court held that *Wende-Anders* procedures would be "practically 'unproductive'" and "need not be put into place, no matter how many and how weighty the interests that theoretically support their use." (*Id.* at pp. 990-991.)

This Court reached a similar conclusion in *Ben C.*, holding that despite the significant liberty interests in a conservatorship appeal, which may result in the conservatee's involuntary confinement and physical restraint, the absence of *Wende-Anders* procedures did not "significantly increase[] the risk of erroneous resolutions," and thus, on balance, their imposition was not warranted as a matter of general due process. (*Ben C.*, *supra*, 40 Cal.4th at p. 538.) The Court observed that the conservatee benefitted from other procedural safeguards, including the assistance of counsel at trial, a "reasonable doubt" standard of proof, the right to appellate counsel, and court rules "ensur[ing] active advocacy" by appellate counsel. (*Id.* at pp. 541-542.) This "panoply of safeguards" was "appropriately geared to the specific goals and interests involved." (*Id.* at p. 543.)

Applying the *Lassiter* balancing test here leads to the same result: due process did not require the Court of Appeal to independently review the record in appellant's appeal or otherwise compel *Wende* procedures.[14] As to the private interests at stake, persons convicted of murder certainly have a weighty interest in potential vacatur of their convictions. But whereas a direct appeal implicates a defendant's potential unlawful "loss" of liberty through the imposition of state criminal proceedings, the proceedings at issue here concern the inmate's "mere anticipation or hope of freedom" through legislative grace. (*In re Sturm* (1974) 11 Cal.3d 258, 266 [comparing parole revocation and parole release]; see also *Cole*, *supra*, 52 Cal.App.5th at p. 1036 [comparing the interests on direct appeal from conviction versus in a section 1170.95 appeal].) And even the "significant" liberty interest of relief from confinement does not, on its own, require imposition of independent review. (*Ben C.*, *supra*, 40 Cal.4th at p. 540; see also *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1436 [*Wende* inapplicable to proceedings to extend commitments under section 1026.2]; cf. *Serrano*, *supra*, 211 Cal.App.4th at p. 502 ["dire consequences" of deportation did not justify

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[14] Although *Sade C.* and *Ben C.* involved civil proceedings, this Court has at times applied a similar balancing test to decide whether due process requires additional procedures in certain postconviction contexts. (See, e.g., *In re Sturm* (1974) 11 Cal.3d 258, 266 [parole release decisions].) More generally, this Court has recognized that due process is a flexible concept calling for such protections as the particular situation demands. (*Tilbury*, *supra*, 54 Cal.3d at p. 68.)

independent review under *Wende* in appeal from section 1016.5 postconviction proceeding].)

As to the second *Lassiter* factor, the government's competing interests in a section 1170.95 appeal are also significant. Although the government has an interest in procedures that materially advance just and accurate resolutions of these proceedings (see *Sade C.*, *supra*, 13 Cal.4th at p. 990), this Court has recognized the "presumed" validity of a criminal conviction that is collaterally attacked—whose propriety a section 1170.95 proceeding does not challenge—and "the importance of finality of judgments." (*Clark*, *supra*, 5 Cal.4th at p. 764). And because the trial court's denial of relief under section 1170.95 is "presumptively accurate and just" (*Sade C.*, at p. 990), the government also has an interest in a prompt—and efficient—resolution that carries out the Legislature's choice to exclude persons like appellant from the ambit of this postconviction relief statute. (See *ibid.*; see also *Cole*, *supra*, 52 Cal.App.5th at p. 1037, quoting *Sade C.*, at p. 989; cf. *Clark*, at p. 764.)

Appellant himself acknowledges that the burdens independent review imposes on the courts are "not insignificant." (OBM 28.) As *Serrano* explained, independent review takes substantial time and court resources. (*Serrano*, *supra*, 211 Cal.App.4th at p. 503.) Even cases decided pursuant to a plea agreement may have records that, "while not overwhelming, are not insignificant." (*People v. Williams* (1997) 59 Cal.App.4th 1202, 1205; see also *id.* at p. 1206 [consolidated record's five reporters' transcripts included 90-page transcript of preliminary

hearing].) In the section 1170.95 context, for example, "the record" can vary greatly, and sometimes encompasses large portions of the trial record.[15] And as the court in *Scott* noted, "[t]o the extent we spend time reviewing records and producing opinions disposing of challenges these defendants do not make, we disserve other litigants whose cases await." (*Scott*, *supra*, 58 Cal.App.5th at p. 1133.) Granted, independent review in an individual case may impose only "modest" burdens on the appellate court. (*Flores*, *supra*, 54 Cal.App.5th at p. 274; see also OBM 28.) Collectively, however, such postconviction relief appeals may comprise a not-insubstantial portion of an appellate court's docket. (See, e.g., *Scott*, *supra*, 58 Cal.App.5th at p. 1134 [opinions issued in uncontested postjudgment appeals comprised approximately one quarter of court's criminal opinions in a recent year].) And as *Scott* persuasively explained, spending time "on this class of uncontested and typically frivolous cases"—meaning, appeals from postconviction judgments where counsel has filed a no-issue brief—comes "at the expense of contested ones," including ultimately meritorious ones. (*Id.* at p. 1133; see also

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[15] See, e.g., *People v. Cooper* (2020) 54 Cal.App.5th 106, 110 (preliminary transcript, change of plea transcript, abstract of judgment, information), review granted Nov. 10, 2020, S264684; Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2019) § 23:51 (describing record portions typically relevant to section 1170.95 proceedings, including jury instructions and the arguments of counsel).

Smith, *supra*, 528 U.S. at p. 282, fn. 13.) "That burden falls on other litigants." (*Scott*, at p. 1135.)[16]

Finally, the risk of error in the absence of independent review is not substantial enough to warrant that additional procedure, especially in light of the procedural safeguards already in place. A section 1170.95 proceeding involves a narrow legal issue: whether the petitioner could be convicted of murder under the amended section 188 or section 189. To proceed to a section 1170.95 evidentiary hearing, a petitioner need only make a "limited" prima facie showing that he is entitled to relief—a bar "intentionally" set "very low." (*Lewis*, *supra*, 281 Cal.Rptr.3d at pp. 535-536.) By statute, all petitioners who file a facially sufficient petition receive the assistance of counsel to navigate the legal theories relevant to that showing. (*Id.* at p. 524.) In most cases where counsel files a no-issue brief on appeal from denial of relief at the prima facie stage, the appellate court can "readily confirm" ineligibility with the assistance of the brief, and without an independent review of the entire record. (*Scott*, *supra*, 58 Cal.App.5th at p. 1131.) And while section 1170.95 does not require the appointment of counsel on appeal from the proceeding, courts of appeal routinely appoint counsel. (See, e.g., *Cole*, *supra*, 52 Cal.App.5th at p. 1029.) Court rules require the reviewing court to evaluate the attorney's qualifications for

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[16] See also *Kelly*, *supra*, 40 Cal.4th at p. 123, fn. 6 (explaining a typical Court of Appeal process for *Wende* appeals); Warner, *supra*, 23 Fla. St.U. L.Rev. at p. 670 (table summarizing *Wende* procedures then utilized in California).

appointment and, afterwards, their performance as appointed counsel in the proceeding. (Cal. Rules of Court, rule 8.300.) California's various Appellate Projects likewise provide some supervision of no-issue briefs.[17] Counsel independently owes the client-appellant duties of competence and diligence and has ethical duties to the court as well. (Cal. Rules of Prof. Conduct, rules 1.1, 1.3, 3.1, 3.3.)[18] The risk of error in these circumstances is negligible.

This case well illustrates why no additional procedural protections are constitutionally necessary. Here, the trial court—after appointment of counsel, briefing, and hearing—concluded in a written order that appellant was ineligible for relief as a matter of law because the record clearly showed he was "the actual and only participant" in the murder. (CT 147.) On appeal from that determination, appellant likewise had the assistance of appointed counsel who, after examining the case with an advocate's eye, determined there were no arguable issues for appeal and filed a brief summarizing the applicable procedural history and facts for the court's review. Appellant received notice of his right to file a

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[17] See, e.g., *Wende Brief*, Central Cal. Appellate Program <https://capcentral.org/criminal/wende/index.asp> (as of Sept. 7, 2021).

[18] See also *McCoy*, *supra*, 486 U.S. at pp. 438-439; ABA Stds. for Crim. Justice (2d ed. 1980) Criminal Appeals, std. 21-3.2(b) <https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_crimappeals_blk/> (as of Sept. 7, 2021); Pollis, *Fixing the Broken System of Assessing Criminal Appeals for Frivolousness* (2019) 53 Akron L.Rev. 481, 503, fns. 175 & 176.

supplemental brief raising issues for appeal, but he declined to do so. Only then did the Court of Appeal dismiss his appeal as abandoned. In these circumstances, the chances that an arguable issue was overlooked and appellant would have benefitted from the court's independent review of the entire record are virtually non-existent.

With respect to other appeals from denial of postconviction relief, the procedures required by due process will necessarily depend on those already employed in any particular setting. (See *Tilbury*, *supra*, 54 Cal.3d at p. 68.) Nonetheless, it is hard to see how fundamental fairness would ever call for independent review in appeals from denials of postconviction petitions and motions. The Legislature has carefully tailored the procedures in each postconviction proceeding to be "appropriately geared" to the interests involved and any legal or factual complexities at play (*Ben C.*, *supra*, 40 Cal.4th at p. 543), without need for a reviewing court to step into the shoes of an advocate to conduct independent review of the record for arguable issues. These statutory schemes are designed to help litigants present their claims to the court, and to assist the court in identifying which litigants qualify for relief. And they expressly provide for additional procedures—including the appointment of counsel—where the interests at stake are particularly weighty or where relief may turn on more complex issues of law or fact. (See, e.g., Gov. Code, § 68662 [counsel for habeas petitioners who are subject to capital sentences]; Pen. Code, § 1405, subd. (b)(1) [counsel for convicted persons requesting DNA testing related to factual innocence

claims]. Compare, e.g., Health & Saf. Code, § 11361.8, subd. (b) [court shall presume petitioner satisfies criteria for relief under Control, Regulate and Tax Adult Use of Marijuana Act unless party opposing petition proves otherwise] with Pen. Code, § 1170.95, subds. (c), (d) [requiring hearing on entitlement to relief after petitioner establishes prima facie case].) And appellate courts in the postconviction context appear to liberally appoint counsel to assist appellants and ensure any arguable issues are brought to the court's attention. (See *ante*, pp. 17-18.)

These statutory procedures appropriately balance the interests at stake and mitigate the risk of error where appellate counsel finds no arguable issues on appeal from denial of postconviction relief. Real-world experience bears this out. One Court of Appeal division—the Fourth Appellate District, Division Two—has estimated receiving "hundreds" of appeals annually from an array of postconviction proceedings in recent years. (*Scott*, *supra*, 58 Cal.App.5th at p. 1133.)[19] That division "found that, during [a recent one-year period], [its] eight justices issued 117 written opinions in postjudgment appeals in which the defendant's attorney was unable to raise any argument" and that "[e]ven after [its] independent review and opinion, the defendant

[19] In this Court alone, 42 petitions for review from Court of Appeal proceedings where counsel found no arguable issues have been granted and held for this case as of the date of this filing. The vast majority of those petitions involve section 1170.95 petitions denied for failing to establish a prima facie case.

prevailed in none of those 117 cases." (*Id.* at p. 1133.)[20] Furthermore, appeals where counsel can find no arguable issues "are by definition meritless," and only in an "exceptional case" would independent review disclose an issue for decision. (*Kelly*, *supra*, 40 Cal.4th at p. 127 (conc. & dis. opn. of Corrigan, J.).) Here, appellant has identified not one such "exceptional case," nor have the People. There are, however, many examples of courts performing independent review but ultimately affirming. (See *Scott*, at p. 1133.)[21] In the absence of evidence that independent court review of the entire record on appeal from denial of postconviction relief sometimes, or ever, uncovers "unbriefed issues warranting further attention" and ultimately reversal, the process is "practically 'unproductive'" and should not

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[20] "Fifty-four of the 117 opinions we found adjudicated a section 1170.95 challenge, at least in part. Others involved postjudgment challenges based on sections 17, subdivision (b); 851.8; 1016.8; 1170.18; 1170.19; 1170.91; 1202.45; 1202.46; 1203.3; 1203.4; 1473.7; 1170, subdivision (d); 1170.126; Proposition 57; Senate Bill 136; Senate Bill 620; coram nobis; denial of transcripts; mentally disordered defendant determinations; requests to modify sentences; requests to modify credits; violations of release; challenges to restitution; as well as requests to vacate judgment, withdraw a plea, or recall the sentence." (*Scott*, *supra*, 58 Cal.App.5th at p. 1134, fn. 6.)

[21] See also *Allison*, *supra*, 55 Cal.App.5th at pp. 456, 462 (identifying issue for briefing but ultimately resolving case against appellant); *Flores*, *supra*, 54 Cal.App.5th at p. 274 (no arguable issues); *People v. Gallo* (2020) 57 Cal.App.5th 594, 598-600 (same); *Scott*, *supra*, 58 Cal.App.5th at p. 1137 (dis. opn. of Miller, Acting P.J.) (same); *People v. Johnson* (2016) 244 Cal.App.4th 384, 389, fn. 5 (no issues identified by independent review).

be constitutionally imposed. (*Sade C.*, *supra*, 13 Cal.4th at p. 990.)

B. Appellant received constitutionally adequate notice of the procedures employed by the Court of Appeal

Appellant separately argues that the Court of Appeal failed to give him adequate notice of the procedures it would employ in his appeal. He contends that the court should have notified his counsel "that involuntary dismissal was being considered" and requested briefing on that issue. (OBM 31.) He claims these alleged errors violated his right to due process. (See *ibid.*)

In other contexts, the U.S. Supreme Court has held that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314.) Under that test, the Court of Appeal gave sufficient notice that it would dismiss appellant's appeal if neither he nor his counsel raised challenges to the trial court's judgment. Once an attorney files a no-issue brief, the court has an "adequate basis" to "dismiss the appeal on its own motion" if the appellant chooses not to raise any points. (*Ben C.*, *supra*, 40 Cal.4th at p. 544.) "Nothing is served by requiring a written opinion when the court does not actually decide any contested issues." (*Ibid.*)

Sade C. is instructive. There, appellate counsel for each parent appealing a parental rights order filed a brief relying on *Wende-Anders* that raised no arguable issues and requested that

the court independently review the record. (*Sade C.*, *supra*, 13 Cal.4th at pp. 961, 964-965.) The appellants did not file supplemental briefs after being informed they could do so. (*Id.* at pp. 962, 964, 965.) On its own motion, the reviewing court consolidated the appeals and dismissed them as abandoned. Although the court granted rehearing "evidently" so that the litigants could "present their views" on the application of *Wende-Anders* (*id.* at p. 965), this Court held the original dismissals were appropriate (*id.* at p. 994). It observed that if an appellant raises no claims of reversible error, the court has "inherent power" to deem the appeal abandoned and dismiss it. (*Ibid.*)

The same logic applies here. Appellant's counsel filed a no-issue brief that summarized the case and requested independent review under *Wende*. (C.A. Br. 8-9.) Appellant received notice of his right to file a supplemental brief raising issues for appeal, but he declined to do so. (Opn. 2.) Appellant's contentions notwithstanding (OBM 33), under these circumstances, he had adequate notice and every reason to anticipate that his appeal could be dismissed.

Appellant fails to acknowledge this Court's relevant precedents or explain why this Court should overrule or qualify them. Instead he claims the Court of Appeal impermissibly rendered a "decision" based on an unbriefed issue. (OBM 31.) Contrary to appellant's assertions (OBM 30-33), the court did not impermissibly decide the merits of the appeal without appellant's input. Because appellant had raised "no error or other defect . . . [in] the orders appealed from," the Court of Appeal had "no

reason to proceed to the merits" at all and appropriately dismissed the appeal. (*Ben C.*, *supra*, 40 Cal.4th at p. 544, fn. 8.) There was no due process violation.

III. THIS COURT MAY PRESCRIBE GUIDANCE FOR COUNSEL AND COURTS TO FOLLOW IN POSTCONVICTION APPEALS WHERE COUNSEL FINDS NO ARGUABLE ISSUES

Because the procedures below complied with the Constitution, this Court should affirm the judgment of the Court of Appeal. (See *Ben C.*, *supra*, 40 Cal.4th at p. 544; *Sade C.*, *supra*, 13 Cal.4th at pp. 994-995.) Nonetheless, where an appeal implicates parties' liberty interests, this Court and the Courts of Appeal have at times exercised their inherent authority to declare rules of appellate procedure for future cases. (See, e.g., *Ben C.*, at pp. 543-544; *Cole*, *supra*, 52 Cal.App.5th at pp. 1038-1040; *Serrano*, *supra*, 211 Cal.App.4th at p. 503.)

The appropriate procedures for postconviction appeals where counsel find no arguable issues may vary depending on the particular context. In selecting procedures for appellate counsel and courts to follow in these circumstances, California courts have weighed the costs and benefits of a particular rule or procedure. Courts have considered, among other things, whether the procedure helps "ensur[e] that appointed appellate counsel conduct themselves as active advocates" (*Sade C.*, *supra*, 13 Cal.4th at p. 993); whether the procedure facilitates a "just and efficient adjudication" of the appeal (*Cole*, *supra*, 52 Cal.App.5th at p. 1036); and whether the costs of the procedure outweigh any benefits (*Sade C.*, at p. 993). Although this is not a constitutional analysis, general due process criteria provide "a ready analogy"

and courts may apply these criteria in "fix[ing] the procedures that best calibrate competing interests." (*Cole*, at p. 1036; see also *Sade C.*, at p. 993 [weighing the State's interests in finality and efficiency]; *Flores*, *supra*, 54 Cal.App.5th at p. 273.)

In surveying the approaches adopted to date in the postconviction context, it appears helpful to consider particular factors such as the number and complexity of legal issues presented; whether the proceeding challenges the lawfulness of the original conviction or sentence or instead offers the petitioner-appellant the benefit of ameliorative changes in the law; and the types of procedures afforded in the postconviction proceeding from which the petitioner-appellant appeals, including any assistance of counsel offered there.

In light of these considerations, in the section 1170.95 appeal context, the People propose that this Court adopt procedures adapted from *Ben C.*, *supra*, 40 Cal.4th 529 and *Serrano*, *supra*, 211 Cal.App.4th 496. The *Serrano* court drew from *Ben C.* in the context of an appeal from denial of a section 1016.5 motion to vacate a conviction based on an asserted failure to be advised about the immigration consequences of a plea. (*Serrano*, at p. 503; see also *id.* at p. 499.) Subsequent courts of appeal have relied on so-called "*Serrano* brief[s]" in other contexts. (*People v. Soto* (2020) 51 Cal.App.5th 1043, 1052 [section 1170.95 appeal], review granted Sept. 23, 2020, S263939; see also *In re J.S.* (2015) 237 Cal.App.4th 452, 456-457 [appeal from juvenile court's denial of honorable discharge motion].)

The People's suggested procedures—which, as we explain below, differ somewhat from those adopted by *Cole* and the Court of Appeal below—would include the following:

Appellate counsel who determines there are no arguable issues on appeal from denial of a section 1170.95 petition would first recommend to the client that the appeal be voluntarily dismissed. (See *Lewis*, *supra*, 281 Cal.Rptr.3d at p. 533 [similar at petition stage].) If the client disagrees, counsel would then file a no-issue brief. That brief should "set[] out the applicable facts" (*Serrano*, *supra*, 211 Cal.App.4th at p. 503)—more specifically, a statement of facts and a statement of the case with citations to the record (*Cole*, *supra*, 52 Cal.App.5th at p. 1038). In an appeal from denial of section 1170.95 relief at the prima facie stage, for example, the statement should describe the charging document, jury instructions, the jury verdict, and any other facts set out in the record that are relevant to the theory of murder on which the conviction was based. If the proceeding was resolved by plea, discussion of the plea agreement, plea hearing, or preliminary hearing may also be necessary. This discussion, if done properly, will generally reveal to the court why counsel has been unable to formulate issues for appeal (without requiring counsel to assert that the appeal is frivolous). The relevant record excerpts will often "readily" provide facts refuting the petition's allegations of entitlement to relief. (*Soto*, *supra*, 51 Cal.App.5th at p. 1055; see also *Lewis*, at p. 536; *Scott*, *supra*, 58 Cal.App.5th at p. 1135 ["the wisdom of counsel's surrender typically is readily apparent"].) For example, the appellant is "obviously" ineligible for relief if

convicted on a theory that he was the actual killer or intentionally aided and abetted a murder, or if he was convicted of something other than murder. (*Scott*, at pp. 1131, 1132; see, e.g., *Allison*, *supra*, 55 Cal.App.5th at p. 460 [special circumstances murder requiring intentional killing]; *Gallo*, *supra*, 57 Cal.App.5th at p. 599 [section 1170.95 does not apply to a sole perpetrator]; *People v. Mancilla* (Aug. 12, 2021, B308413) __ Cal.App.5th __ [2021 WL 3560657, at *6-7] [provocative act murder].) And the statement should have enough detail for the court to discern that counsel has carefully reviewed the relevant parts of the record. (Cf. *Kelly*, *supra*, 40 Cal.4th at p. 119.)

In addition to the facts and procedural history, counsel's no-issue brief would also briefly set out any "applicable . . . law" with citations to relevant authority. (*Serrano*, *supra*, 211 Cal.App.4th at p. 503; see also *Ben C.*, *supra*, 40 Cal.4th at p. 544.) In the section 1170.95 context, that would include a discussion of that section's criteria for relief, as well as a summary of the newly amended sections 188 and 189.[22] Like the statement of facts, a statement of the applicable law helps the appellate court assess whether counsel has diligently reviewed and considered the appeal. (See *Anders*, *supra*, 386 U.S. at p. 745 [requiring references to legal authorities].) A statement of the applicable

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[22] This differs slightly from the procedures recommended in *Cole*, which would not require counsel to set out the law. (*Cole*, *supra*, 52 Cal.App.5th at p. 1039.) *Cole* followed the requirements of a *Wende* brief, which must "summarize[e] the proceedings and the facts with citations to the record[.]" (*Kelly*, *supra*, 40 Cal.4th at p. 119; see *Cole*, at p. 1039.)

law is therefore helpful to the court in this context, even though the court has no duty to conduct its own comprehensive review of the record. Setting out the applicable law also primes counsel to think through the issues, ensuring thoughtful and engaged advocacy. (See *Penson v. Ohio* (1988) 488 U.S. 75, 81, fn. 4 ["simply putting pen to paper can often shed new light on what may at first appear to be an open-and-shut issue"].)

Counsel need not disclose specific issues that counsel considered but ultimately rejected as bases for appeal. (Cf. *Wende*, *supra*, 25 Cal.3d at p. 442.) A contrary approach risks requiring counsel to impermissibly "argue the case against his client" (*id.* at p. 440, quoting *Feggans*, *supra*, 67 Cal.2d at p. 447), offering the court "one-sided briefing . . . against his own client's best claims" (*Smith*, *supra*, 528 U.S. at p. 272). Instead, allowing counsel to remain "silent on the merits" (*id.* at p. 265) helps mitigate the "ethical and procedural predicaments" counsel faces when "torn between the duty to provide zealous advocacy to his or her client," the "duty of candor to the court," and the duty not to pursue a frivolous appeal. (*Flores*, *supra*, 54 Cal.App.5th at p. 270.)[23] And it avoids exposing counsel's mental impressions. (Pollis, *supra*, 53 Akron L.Rev. at pp. 506-507.) Counsel's no-issue brief would *not* argue for independent review under *Wende*.

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[23] See also *Smith*, *supra*, 528 U.S. at pp. 281-282; Pengilly, *Never Cry* Anders*: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal* (1986) 9 Crim. Justice J. 45, 51-52. But see *Flores*, *supra*, 54 Cal.App.5th at p. 269, fn. 2 (counsel encouraged to raise "arguable-but-unmeritorious" issues).

Counsel would accompany this no-issue brief with a declaration that counsel has performed an exhaustive search of the record, has found no arguable issues to pursue on appeal, but remains ready to brief any issues. (See *Ben C.*, *supra*, 40 Cal.4th at p. 544; *Cole*, *supra*, 52 Cal.App.5th at p. 1038.) *Wende* noted that an analogous statement "might be helpful" but ultimately found it unnecessary since it was already implied by the filing of the brief. (*Wende*, *supra*, 25 Cal.3d at p. 442.) The People believe such a declaration is useful in the postconviction relief context because it creates a "clear record" of counsel's efforts (*Cole*, at p. 1039), and provides further assurance that counsel has fulfilled all duties before attesting to these efforts. And such a declaration would not require counsel to withdraw because counsel has not expressly characterized the appeal as frivolous. (*Wende*, at p. 442.)

After filing the no-issue brief, counsel would provide the appellant with a copy of the brief, notice of the appellant's opportunity to file a supplemental brief, and an advisement that counsel will forward the record to the appellant upon request but will otherwise retain it in the event that the court requests further briefing. (See *Ben C.*, *supra*, 40 Cal.4th at p. 544, fn. 6.) The declaration attached to counsel's brief would state that counsel took these steps. (See, e.g., *Johnson*, *supra*, 244 Cal.App.4th at p. 388 [similar procedures in Prop. 36 appeal].) This gives appellants notice and an opportunity to be "heard if they wish to be." (*Scott*, *supra*, 58 Cal.App.5th at p. 1131.)

Upon receiving a no-issue brief, the court would provide its own notice to the appellant that it has received counsel's brief and that the appellant has an opportunity to file a supplemental brief. (See, e.g., *Cole*, *supra*, 52 Cal.App.5th at p. 1039; Opn. 2.) The court's order would give the appellant clear notice that the court will dismiss the appeal as abandoned if no supplemental brief is received.

If the appellant does not file a supplemental brief, and the court has satisfied itself that counsel "has discharged his duty to the court and his client" (*Feggans*, *supra*, 67 Cal.2d at p. 447), the court may issue a concise written order dismissing the appeal as abandoned. (*Ben C.*, *supra*, 40 Cal.4th at p. 544 & fn. 8; *Cole*, *supra*, 52 Cal.App.5th at pp. 1039-1040.) This means the court, before dismissing, would determine whether counsel's brief "set[s] forth adequately the facts and issues involved" (*Feggans*, at p. 447), and "fully and intelligently discusses" the nature of the case (Means, Postconviction Remedies (2021 ed.) § 35:18). In some circumstances, counsel's brief may prompt the court, if it chooses, to review cited portions of the record. (See *ibid.*) To be clear, this exercise is *not* an independent review of the record. If on review of the brief the court is satisfied that the attorney has "responsibl[y]" concluded there are no arguable issues, that provides "enough basis for confidence in the lawyer's competence" for the court to dismiss the appeal. (*Ibid.*)[24] And, of course, if the

[24] See also Pollis, *supra*, 53 Akron L.Rev. at pp. 508-511, 514 (explaining various approaches for assessing counsel's brief in the *Anders* context).

court's review of counsel's no-issue brief leads the court to desire briefing on certain issues or a revised brief, the court would retain the appeal and order counsel to provide such further briefing. (See *Ben C.*, at p. 544, fn. 7; *Scott*, *supra*, 58 Cal.App.5th at p. 1131.)

If, however, the appellant does file a supplemental brief, the appeal becomes contested, and the court should decide the issues raised in a written opinion, rejecting the appeal if the issues are frivolous. (*Cole*, *supra*, 52 Cal.App.5th at p. 1040.) And if an appellant files a brief that the court determines raises nonfrivolous issues, the court would direct counsel to brief them or appoint new counsel to do so. (See, e.g., *People v. Daniel* (2020) 57 Cal.App.5th 666, 671, review granted Feb. 24, 2021, S266366.)

For reasons already discussed in the due process analysis, the court of appeal would not undertake independent review of the record: the burden of independent review on courts is heavy, the tangible benefits to appellants in the postconviction relief context exceedingly slim, and the adverse impacts on the court system and other litigants great. (See *ante*, pp. 47-54.) Independent review also poses other concerns for courts and appellants alike. It essentially asks a court to "abandon its traditional role as an adjudicatory body and to enter the appellate arena as an advocate" (*Ben C.*, *supra*, 40 Cal.4th at p. 542, fn. 5), "determining what contentions should be urged on appeal" (*Wende*, *supra*, 25 Cal.3d at p. 444 (conc. & dis. opn. of Clark, J.)). While this Court has determined this additional check is required to safeguard the right to appellate counsel on

direct appeal, it is otherwise not appropriate. (See *Ben C.*, at p. 543 [acknowledging """consistent and severe criticism""" of *Wende-Anders* procedures since their inception].) Appellant has provided no reason to think that appointed counsel in these cases do anything other than "faithfully conduct themselves as active advocates [on] behalf of" their clients. (*Id.* at p. 539.) And, in any event, "concerns about counsels' competence would most directly be addressed by further refining the process for appointing and training counsel." (*Id.* at p. 542, fn. 5.) This is preferable to requiring the appellate court to take on a quasi-advocacy role. (See *ibid.*) The People's approach leaves comprehensive record-review duties to appointed counsel, where that duty traditionally lies outside the *Wende* context.

It is possible that some more unusual postconviction context or matter will call for additional or more specialized requirements. For example, *Cole* suggested courts might adopt a different approach for offenders appealing the denial of postconviction relief from a death sentence, in light of the critical stakes in such proceedings. (*Cole*, *supra*, 52 Cal.App.5th at p. 1038, fn. 3.) The Court may consider in appropriate cases whether certain other postconviction contexts warrant additional procedures. (See *ante*, pp. 38, fn. 12, 51-52.) But for most postconviction appeals where counsel finds no meritorious issues, including those arising from section 1170.95 proceedings, the People's proposed procedures would adequately ensure that counsel engages in active advocacy; that the appellant has notice of counsel's conclusion that there are no arguable issues for

appeal and an opportunity to raise issues for decision; and that the court is able to determine whether counsel has adequately represented the client-appellant without wasting limited judicial resources or assuming the role of quasi-advocate.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
JANILL L. RICHARDS
Principal Deputy Solicitor General
JULIE L. GARLAND
Senior Assistant Attorney General
SAMUEL P. SIEGEL
Deputy Solicitor General
LYNNE G. MCGINNIS
Deputy Attorney General

/s/ Amari Lynn Hammonds

AMARI L. HAMMONDS
Associate Deputy Solicitor General

Attorneys for the People of the State of California

September 8, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 13,964 words.

ROB BONTA
Attorney General of California

/s/ Amari Lynn Hammonds

AMARI L. HAMMONDS
Associate Deputy Solicitor General
Attorneys for the People of the State of California

September 8, 2021

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Last Name, First Name (PNum)

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Law Firm