IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSE DE JESUS DELGADILLO, Defendant and Appellant.	)	No. S266305

Second District Court of Appeal, Division Four, Case No. B304441
Los Angeles County Superior Court Case No. BA436900
Honorable Katherine Mader, Judge Presiding

APPELLANT'S REPLY BRIEF ON THE MERITS

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By Appointment of The
Supreme Court Of California

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Appellant Jose Delgadillo files the following Reply Brief on the Merits to Respondent's Answer Brief on the Merits. The failure to respond to a particular argument should not be construed as a concession that respondent's position is accurate. It merely reflects appellant's view that the issue was adequately addressed in Appellant's Opening Brief on the Merits.

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ARGUMENT

I

THE APPROPRIATE PROCEDURES FOR APPOINTED COUNSEL AND THE COURTS OF APPEAL TO FOLLOW WHEN COUNSEL DETERMINES THAT AN APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF LACKS ARGUABLE MERIT

In Appellant's Opening Brief on the Merits, appellant primarily contended the federal constitutional right to counsel mandates application of *Wende-Anders*[1] procedures in appeals from the denial of Penal Code[2] section 1170.95 petitions for resentencing in which appointed counsel files a no-issue brief. (AOBM pp. 20-30.) Appellant believes that issue has been fully addressed, and offers no further argument as to it.

Appellant additionally notes that in *Lewis*, this Court recently determined there is no federal constitutional right to counsel under subdivision (c) of section 1170.95, and the right to counsel at that point in the proceedings is purely statutory. (*People v. Lewis* (2021) 11 Cal.5th 952, 972-973.)

Appellant writes below primarily to expound upon and offer some additional alternatives for this Court to consider, and to also further address the broader issue on review in this case concerning postconviction appeals in general.

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[1] *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*); *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct.1396, 18 L.Ed.2d 493] (*Anders*).

[2] All further statutory references will be to the Penal Code unless otherwise noted.

A. As A Matter Of State Due Process And/Or This Court's Supervisory Powers, This Court Should Consider Requiring *Wende-Anders* Review In All Postconviction Criminal Appeals In Which Counsel Files A No-Issue Brief

California's Constitution contains its own due process guarantee in criminal cases (Cal. Const., art. I, § 15), and this Court is free to interpret it to afford more protection of a defendant's rights than is required under the federal constitution. (See *Conservatorship of Ben. C* (2007) 40 Cal.4th 529, 538-539 (*Ben C.*) [principles of state due process may require extension of *Wende-Anders* protections even when the federal constitution does not]; *In re Sade C.* (1996) 13 Cal.4th 952, 987-991 (*Sade C.*) [accord]; see also *People v. Batts* (2003) 30 Cal.4th 660, 689 [the state constitution may afford a greater right to equal protection than is required by the federal constitution].)

This Court has also recognized that ""[d]ue process is flexible and calls for such procedural protections as the particular situation demands."" (*People v. Tilbury* (1991) 54 Cal.3d 56, 68.)

In addition, this Court possesses inherent supervisory powers in order to declare appropriate rules of appellate procedure in California. (See *Ben. C, supra,* 40 Cal.4th at pp. 543-544; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967; *People v. Cole* (2020) 52 Cal.App.5th 1023, 1033-1034.)

In recent years, our Legislature and voters have enacted an increasing number of laws that empower previously convicted defendants to seek postconviction relief reducing their sentences, reducing their crimes of conviction, or vacating their pleas. (See, e.g., §§ 1170.126 [defendants convicted of "third strike" offenses

and sentenced to an indeterminate term of 25 years to life under the Three Strikes law may seek a reduction in their sentence if their third strike offense does not qualify as a serious or violent felony], 1170.18 [defendants convicted of certain low-level felonies may seek reduction of those crimes to misdemeanors], 1473.7 [defendants facing deportation may seek to vacate their pleas if they did not "meaningfully understand" the "immigration consequences" of their pleas].)

Arguably the most significant of all, recently enacted Senate Bill No. 1437 (Stats. 2018, ch. 1015, eff. 1/1/19) (Senate Bill 1437) revised California's homicide laws to eliminate liability for murder under the natural and probable consequences doctrine, and to limit application of the felony murder rule to defendants who were either the actual killer, who with the intent to kill, aided and abetted the actual killer in the commission of murder in the first degree, or who were major participants in the underlying felony who acted with reckless indifference to human life. Senate Bill 1437 also added section 1170.95 to provide a procedure for those previously convicted of felony murder or murder under the natural and probable consequences doctrine to seek postconviction relief in the superior court under the revised homicide laws. (*People v. Gentile* (2020) 10 Cal.5th 830, 839, 842-843; §§ 188, subd. (a)(3), 189, subd. (e), 1170.95; Senate Bill 1437, Stats. 2018, ch. 1015.)

While *Wende-Anders* protections have thus far been deemed required by this Court only in first appeals of right, i.e., direct appeals, from criminal convictions in which appointed

counsel was unable to find any arguable issues (see *Ben. C., supra,* 40 Cal.4th at p. 537; *Sade C.,* 13 Cal.4th at p. 986), this Court should consider extending those protections to all appeals from postconviction relief as a matter of due process under the California Constitution and/or as an exercise of this Court's inherent supervisory powers.

As noted above, many of these statutes involve incredibly important issues and significant consequences to the defendant, many of which may be deemed weightier than what might be deemed at stake at an "average" or "ordinary" trial. Moreover, all of the postconviction relief statutes were necessarily enacted by our Legislature with the goal of effectuating and achieving the relief sought to be provided.

The vast majority of these postconviction statutes are also newly enacted, without a vast amount of case law to guide courts and counsel at the time relief is being sought, and they are thus readily and uniquely subject to misinterpretation and/or misapplication, for which *Wende-Anders* review would serve an important function.

In addition, the records in postconviction appeals tend to be far shorter than the records on appeal from a trial. The legal issues involved in postconviction appeals also tend to be much more focused and limited than appeals from jury trials. All of this means that the amount of judicial resources necessary to conduct a *Wende-Anders* review in postconviction appeals is generally far less than is required in a first appeal of right.

Thus, this Court may deem the limited expenditure of judicial resources necessary for conducting *Wende-Anders* reviews in postconviction appeals is warranted in cases in which appointed counsel on appeal did not find any arguable issues in order to ensure the defendant has received the effective assistance of appellate counsel and that justice has been done. (See *People v. Kelly* (2006) 40 Cal.4th 106, 118 [the purpose of *Wende*'s procedures is "to ensure [the] indigent criminal defendant's right to effective assistance of counsel."].)

To the extent this Court does not believe that *Wende-Anders* review is appropriate in all postconviction appeals, then as will be set forth in detail in the next section, it is critical that such protections at a minimum be extended to appeals from orders denying Penal Code section 1170.95 petitions for resentencing.

B. At A Minimum, This Court Should Extend A Form Of *Wende-Anders* Review To The Denial Of Penal Code Section 1170.95 Petitions for Resentencing

In both *Sade C.* and *Ben C.*, which involved a proceeding to terminate or limit a parent's rights with respect to his child and a conservatorship proceeding, respectively, this Court determined the federal constitutional right to counsel did not compel application of *Wende-Anders* protections in those cases because they were civil in nature, not criminal. (*Sade C., supra,* 13 Cal.4th at pp. 959, 982; *Ben C., supra,* 40 Cal.4th at p. 537.)

In *Sade C.*, drawing on a test for ensuring the due process right to fundamental fairness set forth in *Lassiter v. Department of Social Services* (1981) 452 U.S. 18 [101 S.Ct. 2153, 68 L.Ed.2d 640], this Court then considered whether principles of federal due

process should be deemed to require extension of *Wende-Anders* procedures to appeals from juvenile court orders affecting child custody or parental status based on a balancing of the following three factors: "(1) the private interests at stake; (2) the state's interests involved; and (3) the risk that the absence of the procedures in question will lead to an erroneous resolution of the appeal." (*Sade C., supra,* 13 Cal.4th at p. 987.) After balancing the interests of the parent, child, and state, *Sade C.* held that due process does not compel an extension of *Anders's* procedures to appeals in cases of child custody or parental status. (*Id* at pp. 990-991.)

Subsequently, in *Ben C.*, this Court balanced the same three factors, and concluded, in a sharply divided 4-3 decision, that principles of federal and/or state due process do not require extension of *Wende-Anders* protections to conservatorship appeals, and further declined to extend such procedures under the Court's inherent authority. (*Ben C., supra,* 40 Cal.4th at pp. 535, 537-543; *id.* at pp. 544-557 (dis. opn. of George, C.J.) [joined by Kennard and Moreno, JJ.].)

In balancing these three factors, the majority in *Ben C.* observed that the private interests at stake are significant, as a person found to be gravely disabled in a conservatorship proceeding is subject to a loss of liberty and involuntary commitment for up to one year, and the conservatorship may be extended for additional one-year periods, so long as the person remains gravely disabled. (*Ben C., supra,* 40 Cal.4th at p. 540.)

The majority further observed that "[b]ecause of the important liberty interests at stake, correspondingly powerful safeguards protect against erroneous findings." (*Ben C., supra,* 40 Cal.4th at p. 541.) The Court observed such safeguards include a right to a jury trial, a right to appointed counsel, proof beyond a reasonable doubt, and a unanimous jury verdict. (*Ibid.*) Significantly, during the one-year period, the conservatee also has the right to petition for rehearing up to two different times, and at a rehearing, a conservatee need only prove to the court by a preponderance of the evidence that he or she is no longer gravely disabled. (*Ibid.*) In addition, the conservatorship automatically terminates after one year, and if the conservator seeks a one-year extension, the conservatee is afforded another jury trial based on proof beyond a reasonable doubt and a unanimous verdict. (*Id.* at p. 542.) Finally, the conservatee has the right to appeal, and the right to appointment of qualified counsel on appeal. (*Ibid.*)

"If a conservatorship is sustained on appeal, all safeguards remain in effect. The conservatorship still automatically expires at the end of a year. If a conservator seeks a new one-year commitment, the conservator again bears the burden of proof beyond a reasonable doubt. The conservatee again has the rights to appointed counsel, a jury trial, and a unanimous verdict. If the conservatorship is reestablished, the conservatee has renewed rehearing and appellate rights." (*Ben C., supra,* 40 Cal.4th at p. 542.)

The majority observed that "[b]y establishing the layers of protections described, the Legislature, this court, and the Judicial Council have vigilantly guarded against erroneous conclusions in conservatorship proceedings." (*Ben C., supra,* 40 Cal.4th at p. 542.) The majority further contrasted all these ongoing protections in conservatorship cases with criminal cases, in which ordinarily once a judgment has been rendered the superior court loses jurisdiction to correct errors, and the criminal defendant's only recourse is to the courts of review. (*Id.* at p. 543.) The majority thus concluded that "the trial court's ongoing supervision" in conservatorship cases and the "panoply of safeguards" that already exist render an extension of *Wende-Anders* protections in such cases unnecessary. (*Ibid.*)

The dissent disagreed, finding an extension of independent review of the record under *Wende-Anders* to be appropriate in such cases when appointed appellate counsel files a no-issue brief. (*Ben C., supra,* 40 Cal.4th at pp. 544-557 (dis. opn. of George, C.J.).)

In addressing the applicable three-factor balancing test, the dissent first observed "the private interests at stake are of the most fundamental nature, as the conservatee may be subjected to restraints upon physical freedom and personal autonomy for lengthy periods, and may be denied other basic civil rights as well." (*Ben C., supra,* 40 Cal.4th at pp. 545, 547-548 (dis. opn. of George, C.J.).)

The dissent further characterized the state's interests in avoiding the additional procedure of independent review under

Wende-Anders as "essentially nonexistent." (*Ben C., supra,* 40 Cal.4th at pp. 545, 548-549 (dis. opn. of George, C.J.).) The dissent observed that the "state shares the conservatee's interest in a correct adjudication" of the appeal. (*Id.* at p. 548.) Moreover, while the state "has a countervailing interest in avoiding the expense of additional procedures," the dissent characterized this interest as "hardly significant," and merely "legitimate." (*Id.* at pp. 548-549, citing *Lassiter, supra,* 452 U.S. at p. 28; *Sade C., supra,* 13 Cal.4th at p. 990.) The dissent further observed the appeals themselves require "minimal time to review," in part because the records in such cases are not "lengthy." (*Id.* at p. 549.) *Wende-Anders* review also does not impose "any burden" on the petitioner in that case, county counsel. (*Ibid.*)

As to the third due process factor, the risk of error if independent review is not afforded, the dissent determined there was no reliable manner to determine whether errors are being overlooked by counsel on appeal. (*Ben C., supra,* 40 Cal.4th at pp. 545, 550 (dis. opn. of George, C.J.).) The dissent further observed *Wende-Anders* review was appropriate because "[t]he most knowledgeable resource for evaluating these appeals resides within the Courts of Appeal — the justices and their experienced staff who handle" these cases on a regular basis. (*Id.* at p. 551.) The dissent additionally observed the safeguards in conservatorship proceedings relied upon in the majority opinion applied at the trial level, not on appeal, and further concluded it was not clearly apparent that errors in such cases would not be overlooked by appointed counsel absent independent review, such

that an extension of *Wende-Anders* procedures to appeals in such cases was warranted. (*Id.* at pp. 545, 551-553.)

The dissent concluded: "Just as the procedural safeguards afforded in criminal trials and proceedings involving the termination of parental rights provide no basis upon which to conclude there is no risk that errors will be overlooked absent independent review, these safeguards do not afford a basis for concluding there is no risk that errors will be overlooked in [conservatorship] cases. In light of what is at stake, fundamental interests of the individual, the state's strong interest in ensuring an accurate result, the lack of any burden on the state in affording independent review, and the lack of any reassurance that appellate counsel consistently have acted as active advocates and do not overlook errors on appeal (or that trial courts routinely correct errors as they preside over [conservatorship] proceedings), the analysis we set forth in *Sade C. supra,* 13 Cal.4th 952 compels the conclusion that independent review is required in [conservatorship] appeals when appointed appellate counsel is unable to identify an arguable issue on appeal." (*Ben C., supra,* 40 Cal.4th at p. 554 (dis. opn. of George, C.J.).)

Further observing that appointed counsel was already required to file a brief summarizing the procedural and factual history of the case in order to assist the Court of Appeal, the dissent concluded "[a]ll that remains to be done in order to provide independent review is for the Court of Appeal to confirm that proper procedures were followed and that the order is

supported by sufficient evidence. With counsel's brief as a guide, and a short record, it should be an easy task to make these determinations. In light of the massive curtailment of liberty that may be imposed in a [conservatorship] case, this court should exercise its supervisory powers to impose this negligible additional burden upon the Courts of Appeal in order to ensure that the rights of these vulnerable litigants are protected and that the Legislature's objective of preventing the inappropriate, indefinite, and involuntary commitment of mentally disordered persons is achieved." (*Ben C., supra,* 40 Cal.4th at p. 555 (dis. opn. of George, C.J.).)

Applying this same three-factor test for due process, this Court should conclude that an extension of *Wende-Anders* protections to appeals from the denial of Penal Code section 1170.95 petitions for resentencing is appropriate.

First, the private interests at stake, the potential for relief from a prior murder conviction that is unlawful under the homicide laws as revised by SB 1437, are enormous. Every person previously convicted of murder in California has received an indeterminate sentence of at least 15 or 25 years to life in prison (§§ 189, 190), and thus all such defendants are subject to spending the rest of their lives in prison if relief under section 1170.95 is improperly denied.

Further underscoring the significance of the private interests at stake is the fact that, as noted in Respondent's Answer Brief on the Merits, out of the 33 total recently enacted statutes providing for some form of potential postconviction relief,

Penal Code section 1170.95 is one of only three that provides for the appointment of counsel for the defendant at the outset of the proceedings without any initial prima facie showing of merit. (See RABM pp. 14-18; see § 1170.95, subd. (c) [providing for the appointment of counsel at the outset of the proceedings upon the filing of a facially valid petition]; Govt. Code, § 68662 [providing for the appointment of counsel to defendants subject to a capital sentence for their postconviction proceedings]; § 1405, subd. (b)(1) [providing for the appointment of counsel for postconviction DNA testing in order to potentially exonerate wrongfully convicted individuals as long as the defendant's request for counsel meets certain basic requirements].)

As to this factor, respondent agrees that "persons convicted of murder certainly have a weighty interest in potential vacatur of their convictions," but then attempts to downplay the significance of the interest by suggesting that Penal Code section 1170.95 proceedings concern only a "mere anticipation or hope of freedom" that is available "through legislative grace." (RABM p. 46.) Appellant disagrees with respondent's characterization of Penal Code section 1170.95 as being an act of "legislative grace." Rather, a more apt characterization of this groundbreaking new legislation would be the righting of past wrongs.

As stated by our Legislature in enacting SB 1437: "It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability." (Stats. 2018, c. 1015. S.B. 1437 § 1(d).) "Reform is needed in California to limit convictions and

subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual." (Stats. 2018, ch. 1015. S.B. 1437 § 1(e).) Thus, the fact that a defendant was previously convicted of murder under an old law that has now been deemed by our Legislature to be unfair and unjust does not diminish the individual's current interest in obtaining a fair and accurate resolution of his or her petition for resentencing under the newly reformed laws.

In sum, the substantial private liberty interests at stake in the appropriate and just resolution of section 1170.95 petitions for resentencing are both fundamental and extraordinarily significant.

As to the second factor in the balancing test, the state's interest, the state also "has an interest in an accurate and just resolution" of the appeal at issue. (*In re Sade C., supra,* 13 Cal.4th at p. 989.) The state additionally has a "'fiscal and administrative interest in reducing the cost and burden of [the] proceedings.'" (*Ibid.*) However, "[t]his [latter] concern has been deemed merely 'legitimate.' [Citation.] To be sure, money counts little. '[I]t is hardly significant enough to overcome private interests as important as those' of the indigent parent and his child. [Citation.]" (*Id.* at p. 990.) Rather than fiscal concerns, deemed more significant in *Sade C.* was the factor of time, and the need to conclude such proceedings as rapidly as possible so

that the child can be placed in an appropriate and stable setting without the further delay that would be occasioned by *Wende-Anders* review. (*Ibid.*)

Applicable herein, this second factor supports extension of *Wende-Anders* review to the denial of Penal Code section 1170.95 petitions for resentencing. As noted, the state has an interest in the accurate and just resolution of appeals from the denial of such petitions, and application of *Wende-Anders* protections directly furthers that interest.

While the state also has a legitimate interest in limiting costs and administrative concerns, this factor has been deemed to carry relatively weight in the overall analysis. (See *In re Sade C., supra,* 13 Cal.4th at p. 990 [fiscal concerns count little]; *Ben C., supra,* 40 Cal.4th at pp. 537-543 [not citing fiscal concerns as a basis for the majority decision and instead characterizing "[t]he salient question [as] whether the absence of the *Anders/Wende* procedures significantly increases the risk of erroneous resolutions"]; *id.* at pp. 548-549 (dis. opn. of George, C.J.) [characterizing the state's interest in "avoiding the expense of additional procedures" as "hardly significant"].)

In addition, in *Lewis*, this Court recently observed that in enacting Senate Bill 1437, the Legislature weighed the benefits of this new law versus the costs and deemed the legislation appropriate, which is the appropriate function of the legislature. (See *People v. Lewis, supra,* 11 Cal.5th at pp. 968-969 ["the Legislature appears to have concluded that the benefits to be gained from providing broad access to counsel, in order to ensure

that all those entitled to resentencing are able to obtain relief, outweigh the costs of appointing counsel in many cases where no relief will prove available," and the "legislative background shows the Legislature did, in fact, engage in the exact type of cost-benefit assessment and policy determination it was entitled to make"].) The legislative history of Senate Bill 1437 further "demonstrates the Legislature's full awareness of its potential impact on judicial resources." (*Id.* at p. 968.) As additionally recognized by this Court in *Lewis*, Senate Bill 1437 also produces significant cost savings when eligible defendants are afforded relief under this new law. (*Id.* at p. 969.)

As set forth in the Senate Committee On Appropriations Report's analysis of the fiscal impact of Penal Code section 1170.95:

> "With respect to the overall population in state prison for a murder conviction, CDCR reports that a snapshot on December 31, 2017 showed 14,473 inmates were serving a term for the principal offense of first-degree murder and 7,299 were serving a term for the principal offense of second-degree murder. If 10 percent of this population, or 2,177 individuals, would file a petition for resentencing under this bill, and it took the court an average of four hours to adjudicate a petition from receipt to final order, it would result in additional workload costs to the court of about $7.6 million. While the court is not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to fund additional staff and resources." (Senate Bill 1437, Sen. Com. Appropriations Report, pp. 3-4.)

As also stated in the Senate Committee On Appropriations Report, the proposed new law was expected to result in:

> "potentially-major out-year or current-year savings in reduced incarceration expenses for inmates resentenced to a shorter term of incarceration. The proposed 2018-19 per capita cost to house a person in a state prison is $80,729 annually, with an annual marginal rate per inmate of between $10,000 and $12,000. The average contract-prison rate cost per inmate is over $30,000 annually. The actual savings would be dependent on the number of individuals who successfully petition the court for resentencing and whose sentences to state prison are reduced to a shorter term than what was initially imposed. When these averted admissions are compounded, the savings could reach into the millions of dollars annually. (General Fund)" (Senate Bill 1437, Sen. Com. Appropriations Report, p. 1.)

Thus, as recognized by the Senate Committee, the savings in incarceration costs due to the implementation of SB 1437 are potentially major and could reach into the millions of dollars annually. Moreover, the actual savings depends on the number of inmates who successfully petition the court for resentencing and whose state prison sentences are therefore reduced. (Sen. Com. Appropriations Report, p. 1.) In other words, while conducting a *Wende-Anders* review in a portion of these cases is not without cost, to the extent the Court of Appeal identifies potential issues on appeal that were overlooked by appointed counsel, the savings from such a procedure are also potentially massive and conducting a *Wende-Anders* review in fact furthers the purpose of the legislation in terms of reducing overall inmate incarceration costs.

Pursuant to the above, if even just one improperly denied petition for resentencing was discovered through a *Wende-Anders*

review of the record, and that defendant was released from prison under section 1170.95 rather than being incarcerated for the next 20, 30, 40, or 50 years, the fiscal savings in just that one case could quickly run into the hundreds of thousands of dollars and even be in excess of $1,000,000, not to mention of course achieving justice for this individual rather than keeping him or her improperly imprisoned for potentially the remainder of his or her life based on an erroneous denial of their section 1170.95 petition.

In addition, the costs of conducting a *Wende-Anders* review in Penal Code section 1170.95 cases is limited and reduced by the fact that the record in such cases is frequently very short. For example, in the current case before this Court, the record on appeal is a total of only 168 pages, and most of that was the result of the People raising a non-meritorious boilerplate challenge to the constitutionality of Senate Bill 1437. (See B304441 [the current record on appeal encompasses 1 volume of Clerk's Transcript containing 150 pages, of which pages 42-132 contain briefing on the constitutionality of Senate Bill 1437, and 1 volume of Reporter's Transcript containing 18 pages].) Thus, a *Wende-Anders* review of the record on appeal in this case could properly be conducted in a matter of minutes, not hours or days.

As also observed in the majority opinion of Division Two of the Fourth District Court of Appeal in *Scott*, and although the majority of that particular Court of Appeal ultimately advocated against imposition of a requirement of *Wende-Anders* review in section 1170.95 cases, the majority observed that in most such

cases in which a *Wende-Anders* brief is filed, "we can readily confirm that, in fact, the defendant is ineligible for relief as a matter of law," and such ineligibility "typically can be readily determined." (*People v. Scott* (2020) 58 Cal.App.5th 1127, 1131; see also *id.* at pp. 1135-1137 (dis. opn. of Miller, Acting P.J.) [determining *Wende-Anders* review is appropriate in such cases].) Thus, as recognized by even the majority in *Scott*, it typically does not require a significant amount of work to conduct a *Wende-Anders* review in these cases.

As also observed by Justice Menetrez in dissent in *Gallo,* which was another case out of Division Two of the Fourth District Court of Appeal, but in which the majority in that case concluded independent review under *Wende-Anders* was appropriate, in many Penal Code section 1170.95 appeals, it is not necessary to review the entire record on appeal, as is generally required under *Wende-Anders*, in order to determine whether the superior court's ruling was right or wrong. (See *People v. Gallo* (2020) 57 Cal.App.5th 594, 598-600 [majority opinion concluding that although *Wende-Anders* review is not required on appeal in Penal Code section 1170.95 cases, the reviewing court can and should conduct such a review in the interests of justice]; *id.* at pp. 600-603 (dis. opn. of Menetrez, J.) [determining review of every page of the record under *Wende-Anders* is an unnecessary burden on judicial resources because unlike an appeal from a trial in which an error can occur at any point in the proceedings from pretrial proceedings through sentencing, review of the entire record is often unnecessary in section 1170.95 appeals in order to

determine whether the superior court's ruling on the petition was correct].)

Current counsel's experience in handling a significant number of section 1170.95 appeals has been similar to Justice Menetrez's observation on this point, and it is frequently unnecessary to review every page of the record in order to determine the propriety of the superior court's ruling. For example, in this particular case, it was not necessary to review each page of the relatively lengthy briefing submitted by the parties on the constitutionality of Senate Bill 1437 (see 1 C.T. pp. 42-132), as the superior court's ruling denying appellant's petition was not based on the constitutionality of Senate Bill 1437, and this issue has already been resolved in appellant's favor with the statute deemed constitutional. (See, e.g. *People v. Superior Court (Gooden*) (2019) 42 Cal.App.5th 270; *People v. Lamoreaux* (2019) 42 Cal.App.5th 241.) Thus, it appears it would be appropriate in crafting a requirement of independent review of the record in no-issue brief cases such as this as a matter of due process and/or this Court's supervisory powers, to require the Court of Appeal to review only those portions of the record that are necessary to determine whether the superior court's ruling denying relief was correct, or whether there are in fact any arguable issues on appeal.

Such a more limited scope of review further appears to strike a reasonable and appropriate balance between the state's interest in conserving costs and preserving judicial resources, and

both the defendant's and the state's interest in obtaining a correct resolution of the defendant's appeal.

The third factor in the applicable balancing test, the risk of an erroneous resolution of the defendant's appeal if appointed counsel fails to identify a meritorious issue on appeal and the appellate court also fails to identify that issue by failing to conduct an independent review of the record, weighs heavily in favor of requiring an independent review of the record in section 1170.95 cases in which counsel on appeal files a no-issue brief.

As to this issue, respondent argues that appellant failed to point out in his Opening Brief any cases in which appointed counsel overlooked a meritorious issue that resulted in an erroneous resolution of the defendant's appeal. (RABM pp. 29, 53.) However, as in *Ben C.*, current counsel has no way of knowing in how many cases on appeal appointed counsel missed a potentially meritorious issue.

What current counsel does know and can demonstrate is there are literally a massive amount of mistakes being committed by superior courts in erroneously denying Penal Code section 1170.95 petitions for resentencing, and the safeguard of independent review of the record by the Court of Appeal is critical to noticing and correcting all these errors in the event appointed counsel happens to overlook the error in a particular Penal Code section 1170.95 case.

Indeed, in just current appellate counsel's own individual practice, counsel has thus far identified and obtained Court of Appeal reversals of erroneous superior court denials of Penal

Code section 1170.95 petitions for resentencing in no less than 17 different cases. (See *People v. Garcia* (Jan. 19, 2022, B307757) [nonpub. opn.]; *People v. Gregory* (Jan. 4, 2022, B310573) [nonpub. opn.]; *People v. Williams* (Dec. 22, 2021, B309676) [nonpub. opn.]; *People v Hayes* (Dec. 16, 2021, B308908) [nonpub. opn.]; *People v. McDaniel* (Nov. 22, 2021, B306957) [nonpub. opn.]; *People v. Navarro* (Nov. 16, 2021, B308269) [nonpub. opn.]; *People v. Fox* (Oct. 21, 2021, B307236) [nonpub. opn.]; *People v. Lauer* (Aug. 24, 2021, B307421) [nonpub. opn.]; *People v. Chavez* (Jul. 21, 2021, B304341 [nonpub. opn.]; *People v. Cervantes* (Jun. 29, 2021, B304428) [nonpub. opn.]; *People v. Ramirez* (Jun. 23, 2021, B306029) [nonpub. opn.]; *People v. Naylor* (Jun. 16, 2021, B307457) [nonpub. opn.]; *People v. Perez* (Apr. 22, 2021, B308674) [nonpub. opn.]; *People v. Lavera* (Mar. 25, 2021, B305936) [nonpub. opn.]; *People v. Rodriguez* (Dec. 7, 2020, B303099) [nonpub. opn.], previously published at *People v. Rodriguez* (2020) 58 Cal.Appp.5th 227; *People v. Rodriguez* (Jun. 20, 2020, G057517) [nonpub. opn.]; *People v. Offley* (2020) 48 Cal.App.5th 588.)

And, of course, current counsel is just one attorney out of hundreds of attorneys throughout the State of California who handle court-appointed cases on appeal. If current counsel had missed the meritorious issue in just one of the above 17 cases, and/or if any of the hundreds of other court appointed counsel happened to miss a meritorious issue in one of their section 1170.95 cases, and if the Court of Appeal did not conduct an independent review of the record when a no-issue brief was filed

in order to identify the issue, then a defendant potentially eligible for vacatur of his or her murder conviction would be erroneously denied relief. It must also be remembered appellate attorneys are humans too, and with the vast amount of errors being committed by highly experienced superior court judges in improperly denying these petitions, it is unrealistic to assume the assigned appellate attorney correctly identifies and raises the error, many of which are subtle, complex, and/or involve questions of first impression, in every such case.

The law of homicide in California was in fact already highly complex prior to the passage of Senate Bill 1437, and the appropriate resolution of Penal Code section 1170.95 petitions requires not just an extensive knowledge of the numerous complexities and subtleties of the prior homicide laws, but also a thorough knowledge of the intricacies of Penal Code section 1170.95 and how those intricacies relate to the homicide laws and prior convictions obtained under those laws. Properly viewed in this fashion, the high prevalence of errors being committed by superior courts in erroneously denying section 1170.95 petitions is perhaps not too surprising, or at least less shocking.

The errors in applying Penal Code section 1170.95 have also not been limited to the superior courts. As held by this Court in *Gentile,* the Fourth District Court of Appeal, Division Two, previously and erroneously concluded Senate Bill 1437 did not eliminate liability for second degree murder under the natural and probable consequences doctrine, and that erroneous interpretation of Senate Bill 1437 was also endorsed by the San

Diego County District Attorney. (*People v. Gentile, supra,* 10 Cal.5th at pp. 839, 841-843, 848-851.) More recently, in *Lewis*, this Court determined that numerous Courts of Appeal were interpreting subdivision (c) of section 1170.95 incorrectly, and were imposing an improper barrier to the appointment of counsel for the defendant and briefing on the merits. (*People v. Lewis, supra,* 11 Cal.5th at pp. 957, 961-967.)

In addition, even just the relatively small number of published cases addressing Penal Code section 1170.95 petitions suggest further problems. For example, in *Allison*, the defendant was convicted on a felony murder theory, pleaded guilty to a robbery special circumstance allegation (§ 190.2, subd. (a)(17)) in 1997, and his subsequent section 1170.95 petition for resentencing was denied by the superior court on the basis that this prior special circumstance finding rendered him ineligible for relief as a matter of law. (*People v. Allison* (2020) 55 Cal.App.5th 449, 453.) On appeal, appointed counsel then filed a no-issue brief pursuant to *People v. Wende, supra,* 25 Cal.3d 436. (*Id.* at p. 456.)

The Court of Appeal elected to conduct an independent review of the record and then notified appointed counsel of the appropriate issue he had missed regarding whether this prior special circumstance finding, which was obtained prior to this Court's decisions in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*) that construed the meanings of "major participant" and "reckless indifference to human life" for purposes of this special circumstance allegation in a significantly different, and narrower manner than courts had

previously, did in fact render the defendant ineligible for relief under section 1170.95 as a matter of law. (*People v. Allison, supra,* 55 Cal.App.5th at p. 456.)

Although the Court of Appeal in *Allison* ultimately agreed with the line of authorities finding such a special circumstance finding does preclude relief as a matter of law (*People v. Allison, supra,* 55 Cal.App.5th at pp. 457-462), this is currently a matter of significant dispute in the Courts of Appeal, and numerous other Courts of Appeal have concluded that such a pre-*Banks/Clark* special circumstance finding does not preclude relief under section 1170.95 as a matter of law. (See, e.g., *People v. Torres* (2020) 46 Cal.App.5th 1168, 1179-1180, review granted July 7, 2020, S262011; *People v. Smith* (2020) 49 Cal.App.5th 85, 92-94, review granted July 22, 2020, S262835; *People v. York* (2020) 54 Cal.App.5th 250, 257-263, review granted Nov. 18, 2020, S264954; *People v. Harris* (2021) 60 Cal.App.5th 939, 954-958, review granted April 28, 2021, S267802; *People v. Secrease* (2021) 63 Cal.App.5th 231, 254-255, review granted June 30, 2021, S268862.) Most importantly, the issue of whether a pre-*Banks/Clark* robbery special circumstance finding precludes a defendant from making a prima facie showing of eligibility for relief under Penal Code section 1170.95 is currently under review in this Court in *Strong*, and thus remains an open question. (*People v. Strong* (S266606, review granted 3/10/21).)

Thus, the published decision in the *Allison* case clearly demonstrates that appointed counsel missed a potentially meritorious issue on appeal from the denial of the defendant's

section 1170.95 petition in that case, and it was only noticed upon the Court of Appeal's subsequent independent review of the record.

Similarly, in *Scott*, the defendant was previously convicted of attempted murder and appointed counsel filed a no-issue brief pursuant to *People v. Wende, supra,* 25 Cal.3d 436 following the denial of his petition for resentencing. (*People v. Scott, supra,* 58 Cal.App.5th at pp. 1129-1130.)

In advocating against independent review under *Wende* in such circumstances, the majority opinion of the Fourth District Court of Appeal, Division Two in that case identified three separate reasons why it was "clear at a glance" the defendant could not prevail on his section 1170.95 petition: 1) the defendant was convicted of attempted murder, not murder; 2) "one can determine from a single sentence of our opinion in Scott's direct appeal (*People v. Scott* (Dec. 22, 2020 [sic],[3] E040370)) that he was convicted on a theory of intentionally aiding and abetting an attempted murder (rather than on a natural and probable consequences or felony murder theory). We stated that Scott was convicted under the standard aiding and abetting jury instruction and quoted it. That also establishes that Scott is ineligible for section 1170.95 relief;" and 3) "one can read the paragraph of our opinion on direct appeal that upheld Scott's attempted murder conviction. We held that the jury's findings were well supported by the evidence, which showed 'Scott was aware of [the shooter's] intent,' 'Scott facilitated the crime,' and Scott 'shared [the

[3] The actual filing date of the underlying opinion on direct appeal in the *Scott* case was December 15, 2008, not December 22, 2020. (See *People v. Ricketts et al.* (Dec. 15, 2008, E040370).)

shooter's] criminal intent.' Scott drove a fellow gang member in a car and stopped so his passenger could shoot at a rival gang member. This was intentionally aiding and abetting the passenger's crime of attempted murder. That conviction is permitted under current law. Scott's conviction obviously was not based on a natural and probable consequences or felony murder theory." (*People v. Scott, supra,* 58 Cal.App.5th at pp. 1131-1132.)

However, it appears all three of the reasons cited by the majority in *Scott* for why the defendant could not make a prima facie case for relief under subdivision (c) of section 1170.95 were in fact legally incorrect.

First, contrary to the majority's decision, whether Penal Code section 1170.95 as originally enacted afforded potential relief to defendant's convicted of attempted murder was an open question of law upon which this Court granted review in *People v. Lopez* (S258175, rvw. granted 11/13/19), and which has since been resolved in the defendant's favor via the passage of Senate Bill 775, which now expressly provides that the potential relief afforded under section 1170.95 applies to defendant's convicted of attempted murder. (Senate Bill No. 775; Stats. 2021, ch. 551, §§ 1-2, signed by Governor & chaptered, Oct. 5, 2021, eff. Jan. 1, 2022.)

Second, contrary to the majority's decision, one cannot determine from a single sentence in the Court's underlying opinion as a matter of law that the defendant was convicted as a direct aider and abettor rather than under the natural and probable consequences doctrine. As set forth in that underlying opinion, the evidence of defendant Scott's intent at trial, and

whether he shared in the shooter's intent to kill, was conflicting. (See *People v. Ricketts et al., supra,* E040370; Slip Opn. pp. *2-*4, *15.)[4] Unlike the other defendants, Scott's jury also found it not true that he acted with premeditation and deliberation. (*Id.;* Slip Opn. p. 2*.) Significantly, on appeal, defendant Scott contended the version of CALJIC No. 3.01 given his jury was erroneous and ambiguous because it only required the jury to find defendant Scott shared in the "unlawful purpose" of the perpetrator and aided and abetted in "the crime" without specifying the requisite intent or crime, and thus argued Scott's jury could have convicted him of attempted murder on a natural and probable consequences type theory based on an intent to aid and abet a lesser crime such as assault, rather than finding he directly aided and abetted in the crime of attempted murder. (*Id.;* Slip Opn. p. *18.) In support of this argument, defendant Scott further quoted from the prosecutor's closing argument, in which the prosecutor expressly told Scott's jury that Scott did not have to share in the perpetrator's intent to kill the victim in order to be convicted of aiding and abetting the victim's attempted murder, and it was enough if defendant Scott knew the perpetrator intended to hurt the victim and the defendant assisted in some way in the attempt to hurt the victim. (*Id.*, Slip Opn. p. *19.)

The Court of Appeal first found defendant Scott's challenges to both the jury instructions and the prosecutor's

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[4] The page citations being utilized by appellant are from the Westlaw version of this unpublished opinion and correspond with the page citations utilized in that document labeled *1, *2*, *3 etc.

closing argument were forfeited due to lack of an objection at trial, and further found that while "CALJIC No. 3.01 could have been clarified to avoid the ambiguities highlighted by Scott" the jurors "likely understood the CALJIC No. 3.01 instruction to refer to the crime of attempted murder," and "although the prosecutor did misstate the law in one portion of his argument," it was unnecessary to reverse defendant Scott's attempted murder conviction because it was not reasonably probable based on the record as a whole the jury convicted him on a theory other than directly aiding and abetting in the attempted murder. (*People v. Ricketts et al., supra,* E040370; Slip Opn. pp. *18-*21.)

The problem with relying on this analysis in the context of the denial of the defendant's section 1170.95 petition for resentencing is that while the record may not have shown a reasonable probability under the *Watson*[5] standard that the defendant was convicted on a theory that did not require him to personally act with an intent to kill as determined in the Court of Appeal's prior opinion, this does not mean the defendant was ineligible for relief under section 1170.95 *as a matter of law*. In other words, a finding it was not reasonably probable the defendant was convicted on a natural and probable consequences or other theory that did not require him to personally act with intent to kill is not the same thing as a finding he was not convicted on such a theory as a matter of law for purposes of subdivision (c) of section 1170.95. (See *People v. Lewis, supra,* 11 Cal.5th at p. 972 ["the probative value of an appellate opinion is

[5] *People v. Watson* (1956) 46 Cal.2d 818, 836.

case-specific, and 'it is certainly correct that an appellate opinion might not supply all answers;'" "[i]n reviewing any portion of the record at this preliminary juncture, a trial court should not engage in 'factfinding involving the weighing of evidence or the exercise of discretion'"].)

Third, the *Scott* majority's conclusion that "one can read the paragraph of our opinion on direct appeal that upheld Scott's attempted murder conviction," in which "[w]e held that the jury's findings were well supported by the evidence, which showed 'Scott was aware of [the shooter's] intent,' 'Scott facilitated the crime,' and Scott 'shared [the shooter's] criminal intent'" (*People v. Scott, supra,* 58 Cal.App.5th at p. 1132), did not establish appellant's ineligibility for relief under section 1170.95 as a matter of law. The above observations in the underlying direct appeal were made in the context of addressing the defendant's challenge to the sufficiency of the evidence to support his conviction on a direct aiding and abetting theory. (See *People v. Ricketts et al., supra,* E040370; Slip Opn. pp. *12-*15.)

However, a finding there is sufficient evidence to support a conviction on a currently valid theory is not an appropriate basis upon which to deny a section 1170.95 petition for resentencing. (See *People v. Lopez* (Oct. 30, 2020, H047254), review dismissed 12/22/21, previously published at *People v. Lopez* (2020) 56 Cal.App.5th 936; *People v. Rodriguez* (Dec. 7, 2020, B303099), review dismissed 12/22/21, previously published at *People v. Rodriguez, supra,* 58 Cal.App.5th 227; but see *People v. Duke* (Sep. 28, 2020, B300430), review dismissed 11/23/21, previously

published at *People v. Duke* (2020) 55 Cal.App.5th 113, 123-124.) Indeed, in enacting Senate Bill 775, our Legislature squarely provided that the prior *Rodriguez* and *Lopez* decisions were correct on this issue, *Duke* was wrongly decided, and a finding there is sufficient evidence to support a conviction on a currently valid theory of murder is not an appropriate basis upon which to deny a section 1170.95 petition. (See § 1170.95, subd. (d)(3), as revised by SB 775 ["A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing."].) As also observed by this Court in *Lewis*, in ruling on a defendant's petition for resentencing at the subdivision (c) stage of the proceedings, the court is not supposed to engage in any weighing of the evidence. (*People v. Lewis, supra,* 11 Cal.5th at p. 972.)

What all of the above somewhat painstakingly demonstrates is that there is in fact a massive amount of confusion in the proper application and resolution of section 1170.95 petitions for resentencing, the superior courts are erroneously denying a very significant number of such petitions, and even the various Courts of Appeal are often finding it difficult to properly apply the law in this area. What this further means is that the need for *Wende-Anders* protections in cases in which appointed counsel fails to identify an issue on appeal is both real and significant, and without such protections there is a substantial risk that a number of defendants will be erroneously denied relief from their murder convictions under this new law.

(See *Ben C., supra,* 40 Cal.4th at p. 538 ["[t]he salient question here is whether the absence of the *Anders/Wende* procedures significantly increases the risk of erroneous resolutions."]; see also *People v. Thurman* (2007) 157 Cal.App.4th 36, 45 ["due process does not mandate extending those procedures beyond the first appeal of right in a criminal prosecution unless, among other considerations, their absence would significantly increase the risk of erroneous appellate resolution"].) What the above also shows is that contrary to respondent's argument herein, the risk of error absent independent review in these cases is not "neglibile." (See RABM p. 50.)

This is also not a situation like in *Ben C.* where the individual gets an opportunity to relitigate the issue twice during the first year of commitment, and then again each year thereafter. Rather, the judgment upon the defendant's first such petition is generally going to be final. Appellant further notes that while there are some procedural protections built into the superior court proceedings under section 1170.95 such as the right to counsel and briefing, once a petition has been denied by the superior court and the case is on appeal, the defendant's only protections are his or her appointed counsel, and, if counsel is unable to identify any issues, independent review by the Court of Appeal. Dispensing with the second of these two protections would in fact create an undue risk of erroneous resolutions in these critically important cases that is not justified by the state's limited interests in saving costs and resources, at the expense of

the accuracy of the proceedings and the defendant's right to resentencing under the revised laws if he or she is in fact eligible.

Finally, appellant notes that requiring independent *Wende-Anders* review when no-issue briefs are filed following the denial of section 1170.95 petitions for resentencing is consistent with the principles of justice adopted by the Courts of Appeal in *Flores, Gallo,* and *Allison,* each of which held that while currently existing precedent did not require independent review of the record, when an appointed counsel files a *Wende* brief in an appeal from a denial of a section 1170.95 petition, the Court of Appeal can and should conduct an independent review of the record "in the interests of justice." (*People v. Flores* (2020) 54 Cal.App.5th 266, 269, 274, *People v. Gallo*, *supra*, 57 Cal.App.5th at p. 598, and *People v. Allison*, *supra*, 55 Cal.App.5th at p. 456.)

For all the above reasons, this Court should hold as a matter of state due process and/or as an exercise of its supervisory powers that upon the filing of a *Wende-Anders* brief by appointed counsel on appeal from the denial of a Penal Code section 1170.95 petition for resentencing, the Court of Appeal can and should conduct an independent review of the record to determine whether there are any arguable issues on appeal.

As also noted above, such an independent review of the record by the Court of Appeal does not necessarily need to encompass a review of every page of the record on appeal, but rather only those portions of the record that are necessary to determine whether there are any arguable issues on appeal.

C. Appropriate Procedures In The Event This Court Determines Independent Review Of The Record Is Not Required

In the event this Court determines that an independent review of the record is not required when appointed appellate counsel files a no-issue in a postconviction appeal, appellant urges the following procedures would be most appropriate.

First and foremost, even if independent review is not required, the Court of Appeal should have the discretion to independently review the record for potential issues in any case in which the Court of Appeal believes doing so would be in the interests of justice. It appears the majority if not all of the Courts of Appeal are in favor of maintaining such discretion. (See *People v. Flores, supra,* 54 Cal.App.5th at pp. 269, 273-274 [courts can and should exercise discretion]; *People v. Gallo*, *supra*, 57 Cal.App.5th at p. 598 [same]; *People v. Allison*, *supra*, 55 Cal.App.5th at p. 456 [same]; *People v. Scott, supra,* 58 Cal.App.5th at p. 1131 [majority opinion recognizing the Court always maintains discretion to conduct an independent review of the record in no-issue cases, while advocating such discretion be exercised only in certain cases, not as a routine matter]; *People v. Cole, supra,* 52 Cal.App.5th at p. 1034 [rejecting only the conclusion that the constitution "compels" *Wende-Anders* review]; *People v. Johnson* (2016) 244 Cal.App.4th 384, 389, fn. 5 [conducting independent review]; *In re J.S.* (2015) 237 Cal.App.4th 452, 457 [same]; see also *Ben C., supra,* 40 Cal.4th at pp. 556-557 [dis. opn. of George, C.J.] [observing the majority's opinion in *Ben C.* held *Wende-Anders* procedures were not constitutionally required in

conservatorship cases, it did not deprive the Courts of Appeal of the discretion to undertake such a review].)

Second, appellant urges that such postconviction appeals should be resolved by written opinion, rather than summary dismissal. As recognized by the dissent in *Ben C.*, written opinions in criminal appeals serve "various institutional purposes even if no arguable issue is identified." (*Ben C., supra,* 40 Cal.4th at p. 556 [dis. opn. of George, C.J.].) In addition, drafting a written opinion in such cases can typically be done in relatively short order, the opinion itself need not be lengthy, and such opinions ultimately serve to properly document the procedural history of the case and the basis for the Court of Appeal's ruling.

As the recent proliferation of postconviction relief statutes including section 1170.95 have aptly demonstrated, judicial opinions may also prove extremely valuable at some point years down the road for reasons that were necessarily unknown at the time the opinion was filed. (See *People v. Kelly, supra,* 40 Cal.4th at p. 120 [written opinions (1) provide "guidance to the parties and the judiciary in subsequent litigation arising out of the same 'cause,'" and (2) promote "a careful examination of each case and a result supported by law and reason."].) Such opinions also serve the laudable purpose of treating defendants in "a considerate and compassionate manner rather than summarily informing them that their appeals are frivolous and have been abandoned." (*Id.* at p. 557.)

Finally, appellant urges that in such cases appointed appellate counsel should be required to review the entire record on

appeal and conduct any necessary legal research (see *Sade C., supra,* 13 Cal.4th at p. 974), file a brief setting forth the applicable procedural and factual history of the case but advising the Court counsel was unable to find any arguable issues, and file a declaration stating that (1) counsel reviewed the entire record on appeal and that review did not disclose any arguable issues, (2) counsel has informed the client of the nature of this brief, (3) counsel has informed the client of his right to file a supplemental brief within 30 days, (4) counsel has provided the client with a copy of the record on appeal in order to file such a supplemental brief, if any, and (5) counsel remains available to brief any further issues upon the Court's request. (*Wende, supra*, 25 Cal.3d at p. 442.)

Upon receipt of such a brief, the Court of Appeal should also notify the client of his or her right to file a supplemental brief, and regardless of whether or not the client files such a supplemental brief, resolve the appeal by written opinion. If the client does file such a supplemental brief, the Court of Appeal's opinion should address those concerns. (See *People v. Kelly, supra,* at pp. 120, 124; see also *People v. Scott, supra,* 58 Cal.App.5th at p. 1131 [in order to ensure that defendants are heard if they wish to be, and to potentially avoid a later claim of ineffective assistance of counsel by some defendants, claims raised by the client in a supplemental letter brief should be adjudicated on the merits].) Finally, if the Court of Appeal identifies an arguable issue in its review of the case, the Court of Appeal may also request supplemental briefing from counsel.

/ / /

II

PRINCIPLES OF DUE PROCESS AND FUNDAMENTAL FAIRNESS, AS WELL AS A PROPER EXERCISE OF THIS COURT'S SUPERVISORY POWERS, REQUIRE THAT DEFENDANTS RECEIVE NOTICE OF THE PROCEDURES TO BE EMPLOYED BY THE COURTS OF APPEAL WHEN A NO-ISSUE BRIEF IS FILED IN THEIR APPEAL

In his Opening Brief on the Merits, appellant asserted that principles of due process require a defendant be given fair notice of the procedures to be employed in the resolution of his or her appeal when a no-issue brief is filed. (AOBM pp. 31-33; *Evitts v. Lucey* (1985) 469 U.S. 387, 393 [105 S.Ct. 830, 83 L.Ed.2d 821]; *Cole v. Arkansas* (1948) 333 U.S. 196, 201 [68 S.Ct. 514, 92 L.Ed. 644]; C.V.C. v. Superior Court (1973) 29 Cal.App.3d 909, 915.)

It appears respondent agrees as a general proposition that defendants should be afforded such notice. (See RABM p. 29.) However, respondent nevertheless contends the notice afforded appellant in this case was adequate. (RABM pp. 54-56.) Appellant disagrees with this latter contention.

The problem in this case is that appellant was told of his right to file a supplemental brief in the Court of Appeal if he wished to do so. However, appellant was not told his appeal would be dismissed if he did not do so.

Moreover, in this case, appellant had already included his own memorandum of points and authorities as an attachment to his petition for resentencing and explained in detail within that brief why he believed he was entitled to relief under section

1170.95. (See 1 C.T. pp. 16-18 [petition], pp. 19-24 [points and authorities].)

Under these circumstances, appellant may have reasonably believed it was unnecessary, and potentially even improper, to file another brief reiterating those same arguments. Rather, appellant may have reasonably believed the Court of Appeal would consider those arguments on appeal from the denial of his petition for resentencing and repeating them in another brief would serve no purpose. Had appellant instead been told his appeal would be subject to dismissal if he did not file a supplemental brief in the Court of Appeal, he thus would have been afforded adequate notice it was necessary to file another brief, even just another copy of his prior brief, in order to obtain a decision on the merits and avoid dismissal of his appeal.

The notice afforded appellant in this case was inadequate, and this Court should hold that as a matter of due process, fundamental fairness, and an appropriate exercise of its supervisory powers, defendants should be afforded specific notice of the procedures to be applied by the Court of Appeal when his or her appointed counsel files a no-issue brief on appeal.

CONCLUSION

For the foregoing reasons, the additional reasons set forth in Appellant's Opening Brief on the Merits, and in the interests of justice, this Court should hold that an independent review of the record under *Wende* is appropriate in cases denying postconviction relief where appointed counsel files a no-issue brief, or is at least appropriate in appeals from the denial of

Penal Code section 1170.95 petitions for resentencing, and that defendants are entitled to specific notice of the procedures to be employed by the Court of Appeal in resolving such cases.

Dated: 1/29/22

Respectfully submitted,

/s/ Eric R. Larson
Eric R. Larson
Attorney for Defendant and
Appellant Jose Delgadillo

Certificate of Word Count

Pursuant to California Rules of Court, rule 8.520(c)(1), I, Eric R. Larson, hereby certify that according to the Microsoft Word computer program used to prepare this document, Appellant's Reply Brief on the Merits contains a total of 9,701 words.

Executed this 29th day of January, 2022, in San Diego, California.

/s/ Eric R. Larson
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Supreme Court No.: S266305
Court of Appeal No.: B304441

DECLARATION OF SERVICE

I, Eric R. Larson, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, #609, San Diego, California, 92101. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 29th day of January, 2022, I caused to be served the following:

APPELLANT'S REPLY BRIEF ON THE MERITS

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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(Attn: Hon. K. Mader)

Second District Court of Appeal
Division Four
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 29, 2022, at San Diego, California.

/s/ Eric R. Larson
Eric R. Larson

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. DELGADILLO**
Case Number: **S266305**
Lower Court Case Number: **B304441**

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1/29/2022
Date

/s/Eric Larson

Signature

Larson, Eric (185750)

Last Name, First Name (PNum)

Law Firm