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PRACTICE TIPS

ADI believes it is reasonably arguable that the limited procedures set forth in *People v. Delgadillo* (2022) 14 Cal.5th 216 only apply when a Penal Code section 1172.6 petition was denied at the prima facie stage; the full *Anders/Wende* procedures apply when a petition was denied after the superior court issued an order to show cause. This brief provides an example of such argument.

For structure of the brief, see section 1.26 of chapter 1, section 4.77, et seq. of chapter 4, and section 5.2, et seq. of chapter 5 of the [ADI Appellate Practice Manual and rules 8.204 and 8.360 of the California Rules of Court](#).

For tips on professional presentation of briefs, see ADI's [Going in Style](#) articles.

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION *[NUMBER]*

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent,

v.

[Appellant's name],
Defendant and Appellant.

Court of Appeal
No. *[number]*

Superior Court
No. *[number]*

APPEAL FROM THE SUPERIOR COURT OF
[NAME] COUNTY

Honorable *[Name]*, Judge

BRIEF SUBMITTED ON BEHALF OF APPELLANT
IN ACCORDANCE WITH THE PROCEDURES
OUTLINED IN *PEOPLE v. WENDE* (1979) 25 Cal.3d
436 AND *ANDERS v. CALIFORNIA* (1967) 386 U.S. 738

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By Appointment of the Court of Appeal
under the Appellate Defenders, Inc.
Program

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436 AND *ANDERS v. CALIFORNIA* (1967) 386 U.S. 738**

STATEMENT OF APPEALABILITY

This appeal is from an order made after judgment, affecting the substantial rights of the defendant, and is authorized by Penal Code section 1237, subdivision (b).¹

¹ All further statutory references are to the Penal Code unless otherwise indicated.

STATEMENT OF THE CASE

[See rule 8.204(a)(2)(A) of the California Rules of Court and chapter 5, § 5.15 of the ADI Appellate Practice Manual.]

STATEMENT OF FACTS

[See rule 8.204(a)(2)(C) of the California Rules of Court and chapter 5, § 5.16, et seq. of the ADI Appellate Practice Manual.]

ARGUMENT

I.

THE APPLICABLE LAW IN THIS CASE IS *PEOPLE v. WENDE* (1979) 25 Cal.3d 436 AND *ANDERS v. CALIFORNIA* (1967) 386 U.S. 738.

A. While this appeal involves Penal Code section 1172.6 proceedings, the limitations set forth in *People v. Delgadillo* (2022) 14 Cal.5th 216 do not apply because the superior court denied the petition after issuing an order to show cause.

In *People v. Delgadillo* (2022) 14 Cal.5th 216 (*Delgadillo*), the defendant filed a section 1172.6 petition. (*Delgadillo*, at p. 223.) After the parties filed written briefing, the superior court denied the petition at the prima facie stage; the court did not issue an order to show cause. (*Ibid.*) The defendant appealed. (*Ibid.*) Appellate counsel found no arguable issues and filed a brief following the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). (*Delgadillo*, at p. 223.) The Court of Appeal decided *Wende* procedures did not apply, because the appeal did not implicate the defendant's constitutional right to counsel. (*Delgadillo*, at p. 222.)

On review, the California Supreme Court agreed with the Court of Appeal on this point. (*Delgadillo, supra*, 14 Cal.5th at pp. 222, 224.) As the state high court explained, the procedures set forth in *Anders v. California* (1967) 386 U.S. 738 (*Anders*) and *Wende* apply only when “ ‘a litigant has a previously established constitutional right to counsel.’ ” (*Delgadillo*, at p. 224, quoting *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555.) Generally, there is no constitutional right to counsel in state postconviction proceedings. (*Delgadillo*, at p. 226.) Indeed, the defendant in *Delgadillo* conceded there was “no federal constitutional right to counsel under subdivision (c) of section 1172.6, and the right to counsel at that point” — i.e., at the prima facie stage — was “purely statutory.” (*Id.* at p. 227 & fn. 4; accord, *People v. Lewis* (2021) 11 Cal.5th 952, 973.) The *Delgadillo* court therefore held *Anders/Wende* procedures did not apply to the defendant’s appeal. (*Delgadillo*, at p. 231.) The Court prescribed limited procedures for appointed counsel and the appellate courts to follow when counsel finds no arguable issues in such an appeal. (*Id.* at pp. 222, 231-232.)

However, as the *Delgadillo* court recognized, defendants have a due process right to appointed counsel in habeas corpus and *coram nobis* proceedings after they establish a prima facie case for relief. (*Delgadillo, supra*, 14 Cal.5th at p. 228.)

In *People v. Shipman* (1965) 62 Cal.2d 226 (*Shipman*) the California Supreme Court held indigent defendants are entitled to appointed counsel when they file a petition for writ of error *coram nobis* and allege facts sufficient to establish a prima facie

case. (*Id.* at pp. 231-232.) This is because, at that point, the “claim can no longer be treated as frivolous....” (*Id.* at p. 232.) Moreover, the indigent defendant is entitled to appointed counsel on appeal, because the issues raised on *coram nobis* are as “crucial” and “substantial” as those raised on direct appeal. (*Id.* at pp. 231-233, citing *Douglas v. California* (1963) 372 U.S. 353 [federal due process and equal protection require appointed counsel on first appeal as of right].) In *In re Clark* (1993) 5 Cal.4th 750 (*Clark*) — a case involving habeas corpus proceedings — the California Supreme Court reaffirmed that “if a petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns.” (*Id.* at p. 780.)

This principle — that due process requires appointed counsel once the defendant establishes a prima facie case for relief — has been applied beyond the habeas and *coram nobis* contexts. (See, e.g., *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 981 [construing § 1473.7 as providing the right to appointed counsel where an indigent movant establishes a prima facie case for relief because “to interpret the statute otherwise would be to raise serious and doubtful questions as to its constitutionality”]; *People v. Rouse* (2016) 245 Cal.App.4th 292, 300-301 [due process requires counsel for a defendant who presents a petition under § 1170.18 [Prop. 47] and is found eligible for resentencing].)

Unlike in *Delgadillo*, the superior court in this case found appellant established a prima facie case and issued an order to show cause. Once the superior court issued the order to show

cause, appellant’s right to counsel evolved from purely statutory to constitutionally compelled. At that point, appellant’s section 1172.6 petition — attacking the validity of *[his/her]* conviction[s] under current law — could no longer be considered frivolous. (See *Shipman, supra*, 62 Cal.2d at p. 232.) And the issues raised in this case became as “crucial” and “substantial” as those raised on direct appeal. (*Id.* at pp. 231-233.) Indeed, after issuing an order to show cause, the superior court held an evidentiary hearing. (See § 1172.6, subd. (d)(1).) At this hearing, the People were required to prove, beyond a reasonable doubt, that appellant was guilty of *[attempted murder/murder]* under current law. (*Id.*, subd. (d)(3).) The parties were permitted to offer new or additional evidence, and the Evidence Code applied. (*Ibid.*)

Accordingly, the more limited procedures prescribed in *Delgadillo* do not apply in this case. Rather, the full procedures outlined in *Anders* and *Wende* apply. (See *Delgadillo, supra*, 14 Cal.5th at p. 231 & fn. 5 [noting that different postconviction contexts may require different procedures]; see also *In re Chavez* (2003) 30 Cal.4th 643, 656 [“a case is authority only for a proposition actually considered and decided therein”].)

B. Consistent with *Anders v. California* (1967) 386 U.S. 738 and *People v. Wende* (1979) 25 Cal.3d 436, this Court must independently review the record.

Counsel has thoroughly reviewed the record in this case and consulted with Appellate Defenders, Inc. This brief summarizes the proceedings and facts with citation to the transcript and outlines the issues counsel considered but urges

no specific contentions as grounds for relief. (*Anders, supra*, 386 U.S. 738; *Wende, supra*, 25 Cal.3d 436.) Counsel also has advised the client of this filing and the right to file a pro per brief and has complied with the other procedures laid out in *Wende*. (See attached declaration of counsel.)

This Court must conduct an independent review of the entire record to determine whether the record reveals any issues that would, if resolved favorably to the appellant, result in reversal or modification of the judgment. (*Wende, supra*, 25 Cal.3d at pp. 440-442.) It must also afford the client a chance personally to file a supplemental brief. (*Id.* at p. 439.)

The following information about issues that counsel considered is provided to assist the court in conducting its independent review of the record. (*Anders, supra*, 386 U.S. at pp. 744-745 [brief must refer to “anything in the record that might arguably support the appeal”; such a brief allows the court to “pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel”]; *In re Phoenix H.* (2009) 47 Cal.4th 835, 843 [counsel must “file a brief setting out the applicable facts and the law”].) By listing these unbriefed issues, counsel is not suggesting the court must address them in its opinion, although it has plenary discretion to do so.

[See chapter 1, §1.26, and chapter 4, §§4.77, 4.79 of the ADI Appellate Practice Manual.]

1. *[Identify the first Anders issue.]*
2. *[Identify the next Anders issue.]*

If this Court, in reviewing this brief, the record, or any supplemental briefing finds good cause to conclude that an arguable issue exists, it must order counsel to brief the issue. (*Penson v. Ohio* (1988) 488 U.S. 75, 88 [court-sanctioned withdrawal of counsel before court identified arguable issues “left petitioner completely without representation during the appellate court’s actual decisional process”].)

Dated: *[date]*

Respectfully submitted,

[Attorney’s Name]

State Bar No. *[number]*

Attorney for Defendant and Appellant

[Name]

DECLARATION OF *[APPELLATE COUNSEL'S NAME]*

[See chapter 4, §§4.82 of the ADI Appellate Practice Manual.]

I, *[appellate counsel's name]*, declare:

1. I am an attorney duly licensed to practice before all the courts in the State of California and the appointed attorney of record for appellant *[name]* in their appeal.
2. I have thoroughly reviewed the record in this case. An attorney at Appellate Defenders, Inc., has also reviewed this case.
3. I have advised appellant that a brief on their behalf is being filed in accordance with the procedures outlined in *Anders v. California* (1967) 386 U.S. 738 and *People v. Wende* (1979) 25 Cal.3d 436, and provided a copy of this brief.
4. I have further advised appellant that they may personally file a supplemental brief in this case raising issues to the court's attention and that they may request that I withdraw as counsel. I am making the appellate record available to appellant.
5. I hereby move to be relieved as appointed counsel, if appellant so requests.

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

Dated: *[date]*

Respectfully submitted,

[Attorney's Name]

State Bar No. *[number]*

Attorney for Defendant *[name]*

CERTIFICATION OF WORD COUNT

[See rule 8.204(c)(1) of the California Rules of Court and chapter 5.]

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify this brief contains *[number]* words as calculated by the *[name of program]* software in which it was written.

Dated: *[date]*

Respectfully submitted,

[Attorney's Name]
State Bar No. *[number]*

PROOF OF SERVICE