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

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

[APPELLANT'S NAME],

Defendant and Appellant.

Case No. B_____

Superior Court
No. _____

FROM THE JUDGMENT OF THE LOS ANGELES COUNTY
SUPERIOR COURT

Honorable _____, Judge Presiding

**APPELLANT'S OPENING BRIEF AND REQUEST FOR
INDEPENDENT REVIEW OF THE RECORD
(*People v. Delgadillo* (2022) 14 Cal.5th. 216)**

[ATTORNEY'S NAME]
(State Bar No. ____)

[ATTORNEY'S ADDRESS]

Telephone: _____

Fax: _____

Email: _____

Attorney for Appellant

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**APPELLANT'S OPENING BRIEF AND REQUEST FOR
INDEPENDENT REVIEW OF THE RECORD
(*People v. Delgadillo* (2022) 14 Cal.5th. 216)**

STATEMENT OF APPEALABILITY

This timely appeal is from the denial of a Petition for Resentencing filed pursuant to Penal Code¹ section 1172.6 (formerly section 1170.95, recodified without substantive change by Stats. 2022, ch. 58, § 10, eff. June 30, 2022). Such an order is appealable pursuant to section 1237, subdivision (b), as an order after judgment affecting the substantial rights of the defendant.

All¹ further undesignated statutory references are to the Penal Code.

STATEMENT OF THE CASE

In 1992, appellant was convicted of one count of second degree murder and one count of premeditated attempted murder for crimes committed in 1989. Gun use allegations were found true on each count, and a personal infliction of great bodily injury enhancement was found true as to the attempted murder. (1CT 36, 65; Pen. Code, §§ 187; 664/187; 12022.5; 12022.7.) Appellant was sentenced to 15-life plus 22 years. (1CT 38.)

In 2022, appellant filed a Petition for Resentencing pursuant to Penal Code, section 1170.95². (1CT 39, 45.) The petition stated that he had been charged under an accusatory pleading that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; that he was convicted at trial of murder pursuant to the felony murder rule or the natural and probable consequences doctrine; and, that he could not presently be convicted of murder because of changes made to Penal Code sections 188 and 189, effective January 1, 2019. He also requested the appointment of counsel. (1CT 39-42.)³

² The section has since been renumbered; it is now section 1172.6.

³ Appellant used an old form petition that did not include references to changes made by SB 775 in 2021. Nonetheless, the parties treated the petition as a challenge to his attempted murder conviction as well as his murder conviction. Moreover, both parties addressed in their briefing the “other theory under which malice is imputed” language also added to the statute by SB 775. (1CT 55, 62, 135-145.)

The court appointed counsel and ordered briefing. (1CT 54.) The prosecutor's opposition argued that appellant was ineligible for relief because his jury was not instructed upon felony murder, the natural and probable consequences doctrine or any other theory under which malice was imputed to him. (1 CT 55, 62) The prosecutor appended to his response the complete set of jury instructions given in the case. (Exhibit 2; 1 CT 70-132.)

The trial court denied the petition. (1CT 147.) As to the murder conviction, the court noted that the jury returned guilty verdicts finding that appellant had personally used a firearm in the commission of a second degree murder. The standard murder instructions had been modified to omit any reference to implied malice. Instead, the jury was told that an element of murder was malice, and malice was defined as an unlawful intent to kill (see 1CT 104-05); further, the standard firearm use instruction had been modified to state that "used a firearm" meant to "intentionally fire it." (See 1CT 115.) So, the court denied the petition as to the murder because the jury found express malice. (1RT 305-308.)

The court cited those same reasons to deny the petition on the attempted murder count, plus others. Specifically, the jury was also instructed with CALJIC 8.66 which required as an element of attempted murder an unlawful intent to kill. The court further relied upon the jury finding that appellant personally and intentionally inflicted great bodily injury upon the victim of the attempted murder. (1RT 308-311.).

As further support for the denials the court noted that, (1)

no aiding and abetting instructions were given⁴; (2) the jury was not instructed upon the natural and probable consequences doctrine; (3) the jury was not instructed upon felony murder; and (4) no other instructions were given allowing the jury to impute malice to appellant solely upon appellant's participation in a crime. (1RT 310.)

Appellant filed a timely Notice of Appeal. (1CT 156) The appeal lies. (Pen. Code, § 1237; see *People v. Gentile* (2020) 10 Cal.5th 830, 858 [denial of a Penal Code section 1172.6 petition for resentencing is an appealable order].)

⁴ The trial court was mistaken in this regard: aiding and abetting instructions were given to appellant's jury. (1CT 120 [CALJIC 3.00], 121 [CALJIC 3.01].)

STATEMENT OF FACTS

Some options for prima facie denials:

Option: [No facts were adduced.]

Option: [“Because this matter was resolved at the prima facie stage of the proceedings under Penal Code section 1172.6, the record contains no appropriate summary of the facts underlying the charges. The admissible portion of a prior appellate opinion is limited to “the procedural history of the case” (Pen. Code, § 1172.6, subd. (d)(3).) This limitation applies at the prima facie stage. (*People v. Flores* (2022) 76 Cal.App.5th 974, 988, fn. 9.)”]

Option: [Because the court may only deny a petition for resentencing at the prima facie stage if the defendant is ineligible for relief as a matter of law, the facts underlying the conviction are not relevant to the issue presented herein. However, to provide context to the appeal, appellant provides a brief recitation of the facts of the [murder/attempted murder, etc.] conviction taken from [cite source]. The reliance on these facts in this context is not a concession that they are facts which were proven at trial or that they are the only facts proven at trial.]

Option: [A brief summary of facts if available.]

ARGUMENT

**APPELLANT REQUESTS THE COURT EXERCISE
ITS DISCRETION TO CONDUCT AN INDEPENDENT
REVIEW OF THE RECORD. APPELLANT ALSO
REQUESTS THAT THE COURT OTHERWISE
FOLLOW THE PROCEDURES OUTLINED IN
*PEOPLE v. DELGADILLO (2022) 14 CAL.5TH 216.***

Present counsel has reviewed the entire record and found no arguable issues to raise on appeal from the denial of appellant's Penal Code section 1172.6 petition for resentencing.

Under *People v. Delgadillo, supra*, upon the filing of a no-issue brief, "the court should send, with a copy of counsel's brief, notice to the defendant, informing the defendant of the right to file a supplemental letter or brief and that if no letter or brief is filed within 30 days, the court may dismiss the matter." (*Id.*, at pp. 231-232.) Appellate counsel asks that this court follow these procedures.

Appellant further requests that this court exercise its discretion to conduct an independent review of the record as permitted by *Delgadillo*. (*Id.*, at p. 232.) Prior to *Delgadillo*, numerous Courts of Appeal endorsed conducting an independent review of the record in the interests of justice in appeals from the denial of relief under Penal Code section 1172.6. (See *People v. Griffin (2022) 85 Cal.App.5th 329, 335-336* ["the interests of justice call for an independent review of the record as an additional layer of protection from the risk of a defendant remaining unlawfully incarcerated because of a failure to discover a meritorious issue in his or her appeal"]; accord *People v. Flores*

(2020) 54 Cal.App.5th 266, 269; *People v. Gallo* (2020) 57 Cal.App.5th 594, 598; *People v. Allison* (2020) 55 Cal.App.5th 449, 456.) Consistent with the Supreme Court’s own independent review of the record in *Delgadillo*, as well as the above cited Court of Appeal decisions, appellant respectfully requests that this Court conduct an independent review of the record in the interests of justice in order to determine whether there are any arguable issues on appeal in this case regardless of whether appellant personally files a supplemental brief.

Present counsel has written to _____ and advised him that he may file a supplemental brief with this court within 30 days, and that if he does not do so, the court will dismiss his appeal. Counsel has today sent appellant the transcripts of the record on appeal and a copy of this brief. Present counsel remains available to brief any issues, upon the court’s request. (See declaration attached hereto.)

Dated: March 14, 2023

Respectfully submitted,

/s/
[Attorney name]

Attorney for Appellant

**DECLARATION OF _____ IN SUPPORT
OF REQUEST FOR INDEPENDENT JUDICIAL
REVIEW OF THE ENTIRE APPELLATE RECORD
OR *DELGADILLO* PROCEDURES**

I, _____, declare as follows:

I am the attorney appointed to represent appellant, _____, on his appeal following the denial of his motion to vacate his conviction filed pursuant to Penal Code, section 1170.95 (now numbered 1172.6).

I reviewed the entire record on appeal, consisting of one volume of Clerk's Transcript and one volume of Reporter's Transcript. I did not find any arguable issues to raise on appellant's behalf. An attorney at the California Appellate Project has also reviewed this case.

I wrote to appellant and explained my evaluation of the record on appeal and my intention to file this pleading. I also informed him of his right to file a supplemental brief and that this court will dismiss the appeal if he does not file one. I have today sent the transcripts of the record on appeal and a copy of this brief to appellant at the following address:

[Client's name and CDCR number]
[Client's address]

I do not at this time move to withdraw as counsel of record for appellant, and I remain available to brief any issues that the Court requests.

I declare under penalty of perjury that the foregoing is true and correct and that I signed this declaration on, March 14, 2023, at Los Angeles, California.

/s/
Attorney Name

WORD COUNT CERTIFICATION

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 1,144 words.

/s/
Attorney Name

