

SIXTH DISTRICT APPELLATE PROGRAM

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Attorneys for Appellant,  
FERNANDO DOMINGUEZ

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	]	
	]	NO. H022727
Plaintiff and Respondent,	]	
	]	(SAN BENITO CO.
vs.	]	SUPERIOR COURT
	]	NO. CRF99-37033)
FERNANDO DOMINGUEZ,	]	
	]	
Defendant and Appellant.	]	
	]	

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL OPENING  
BRIEF (CALIFORNIA RULES OF COURT, RULE 13(a)(4))

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TO THE HONORABLE CONRAD L. RUSHING, PRESIDING  
JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE  
COURT OF APPEAL:

Pursuant to California Rules of Court, rule 13(a)(4), appellant seeks  
leave to file a supplemental opening brief. The proposed supplemental

opening brief has been lodged with the court. The grounds in support of this motion are stated in the attached declaration of counsel.

Dated: May \_\_, 2002

Respectfully submitted,

DALLAS SACHER  
Attorney for Appellant,  
FERNANDO DOMINGUEZ

DECLARATION OF DALLAS SACHER

I am an attorney licensed to practice in California. I am the attorney for appellant, Fernando Dominguez.

The facts stated in this declaration are within my personal and firsthand knowledge. If called as a witness in this action, I could and would testify competently under oath to the following facts.

On October 9, 2001, I filed appellant's opening brief. At that time, I believed that I had included all arguably meritorious issues available to my client. On February 11, 2002, the respondent's brief was filed. On February 28, 2002, I filed appellant's reply brief.

On May 20, 2002, I became aware of the California Supreme Court's order of May 15, 2002 granting review in *People v. Cavitt*, S105058. Among other issues, *Cavit* involves the question of whether felony murder liability attaches to a nonkiller accomplice when the killing is committed "in furtherance of the common design" of the felony or when the accomplice is "jointly engaged" in the commission of the felony. (*People v. Cavitt*, S105058, rv. granted May 15, 2002.)

After reviewing the order in *Cavitt*, it occurred to me that I may have missed a similar issue in this case (i.e. the trial court failed to instruct the jury that appellant could not be found liable for felony murder based on his

accomplice's act of killing the victim unless the accomplice was acting in furtherance of the common design of the felony or was jointly engaged in commission of the felony). On May 20, 2002, I contacted the First District Appellate Project and requested a copy of appellant's briefs in *Cavitt*. On May 23, 2002, I received and reviewed the briefs. The contents of the briefs persuaded me that I had failed to raise a meritorious issue in this case.

I have promptly prepared a supplemental opening brief in order to raise the previously omitted issue. In my professional opinion, the issue addressed in the brief is meritorious. Given these circumstances, I would respectfully request this court to grant leave to file the supplemental opening brief.

I would also request that the People be given 30 days from the date on which the supplemental opening brief is filed in which to file their respondent's brief. In this way, no prejudice will accrue to respondent. I would also request that appellant be given the right to file a reply brief within 20 days of the filing of respondent's brief. Since appellant is serving a sentence of 25 years to life, no prejudice will occur to the interests of either

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party if there is a slight delay in the adjudication of this appeal.

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

Executed this \_\_\_ day of May, 2002 at Santa Clara, California.

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DALLAS SACHER

## PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within MOTION FOR LEAVE TO FILE SUPPLEMENTAL OPENING BRIEF to the following parties hereinafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

John Deist, Esq.  
Attorney General's Office  
455 Golden Gate Avenue  
Suite 11,000  
San Francisco, CA 94102-7004  
[Counsel for People of the State of  
California]

Fernando Dominguez  
T-23937  
CCI  
P. O. Box 1905  
Tehachapi, CA 93581

District Attorney's Office  
419 Fourth St.  
Hollister, CA 95023

Superior Court Clerk  
County Courthouse, Rm. 206  
440 Fifth Street  
Hollister, CA 95023

I declare under penalty of perjury the foregoing is true and correct. Executed this \_\_\_\_ day of May, 2002, at Santa Clara, California.

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Sue Yarbrough