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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re

JUAN MANUEL RODRIGUEZ, JR.

on Habeas Corpus.

E062560

(Super.Ct.No. RIF1104591)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Petition granted.

Cindi B. Mishkin, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric Swenson and Barry Carlton, Supervising Deputy Attorneys General for Respondent.

In this matter we are called upon to determine whether petitioner has stated adequate grounds to establish the constructive timely filing of a notice of appeal on petitioner's behalf under the authority of *In re Benoit* (1973) 10 Cal.3d 72, 86-89 (*Benoit*). Because petitioner has done so, we grant relief.

## STATEMENT OF THE CASE

After pleading guilty to one count of attempted murder (Pen. Code, §§ 664/187, subd. (a)) and admitting both a gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) and a gun use enhancement (Pen. Code, § 12022.5), on May 11, 2012, petitioner was sentenced to a term of 20 years in state prison. On July 4, 2012, prior to the expiration of his time to file a timely notice of appeal, petitioner was involved in an altercation resulting in a head wound that left him unresponsive to verbal inquiries and commands and required his transport off site for additional medical evaluation and treatment. Upon his return to prison, petitioner reported severe headaches, weakness in his left leg and hand and required the use of a wheelchair. Petitioner's need for a wheelchair and cane resolved by July 24, 2012, at which time it was noted that his headaches had also resolved. However, shortly thereafter he was seen by a neurosurgeon due to complaints about ongoing intermittent headaches. As of June 2013, petitioner continued to complain of severe headaches occurring two times per day and lasting for 20 to 30 minutes, including sensitivity to light and sound. Since his injury, petitioner has experienced memory loss, including short term memory loss that has hampered his attempts to file documents.

Petitioner became aware of his right to appeal in May or June 2014, after a conversation with a jailhouse lawyer. Petitioner attempted to file a notice of appeal and request for a certificate of probable cause, which was received by the trial court on August 14, 2014. He also filed this petition on his own behalf on December 23, 2014.

## DISCUSSION

California has long recognized that despite the jurisdictional nature of the requirement of a timely filing of a notice of appeal, in limited circumstances involving criminal cases, an otherwise late notice of appeal may be deemed to have been constructively filed for equitable reasons where the prisoner has acted diligently in attempting to prosecute an appeal and through no personal fault has been unable to do so in a timely manner. (*Benoit, supra*, 10 Cal.3d at pp. 83-89; *In re Martin* (1962) 58 Cal.2d 133, 139.) The Supreme Court has stated “as we have explained, emerged and developed the principle of constructive filing . . . embodies nothing more than a basis for judicial acceptance of an excuse for the appellant’s delay in order to do justice.” (*Benoit, supra*, 10 Cal.3d at p. 84.)

Petitioner asserts that as a result of the sequelae from his head injury, including issues with his short term memory, he did not realize that he had a right to appeal the judgment from his guilty plea until late spring 2014. Thereafter, as his medical condition allowed, petitioner prepared and filed a notice of appeal and request for a certificate of probable cause (received by the trial court on August 14, 2014), and after that was rejected, the instant petition for a writ of habeas corpus attaching a second notice of appeal and request for a certificate of probable cause (filed December 23, 2014). Although the reason the deadline to timely file his notice of appeal passed was not due to petitioner’s reliance on representations of counsel or of officials (see *Benoit, supra*, 10 Cal.3d 72), justice requires that we allow the late filing of his appeal because he has

demonstrated that the failure was through no fault of his own, and he diligently pursued an appeal to the best of his ability once he was aware of his right to do so.

The Attorney General, citing *In re Anderson* (1971) 6 Cal.3d 288, 293 for the proposition that “[e]xcuse once established cannot be deemed a palliative for a continuing failure to act after the disability which justified the initial failure has been removed,” argues that petitioner’s exhibits show that his injuries resolved within a few months and do not justify the continuing delay in completing and filing a notice of appeal. While the medical records show that petitioner’s physical complaints improved within a few months, the most recent medical progress note also shows that he continued to suffer daily from severe headaches nearly a year after the initial injury and was prescribed medication for migraines. The medical records also do not contradict petitioner’s declaration that he has had memory loss, including short term memory loss that has adversely impacted his ability to prepare and file the necessary documents.

#### **DISPOSITION**

The petition for writ of habeas corpus is granted. Petitioner may serve and file a notice of appeal and request for a certificate of probable cause in Riverside County case number RIF1104591 with the trial court clerk on or before 20 days from the date this

opinion is filed; and if he does so, the clerk of the trial court is directed to accept and file such documents.

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CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

HOLLENHORST  
J.