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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re CESAR AVILES, JR.

on Habeas Corpus.

G049294

(Super. Ct. No. 09NF2195)

O P I N I O N

Original proceedings; petition for a writ of habeas corpus to file a timely notice of appeal. Petition granted.

Appellate Defenders, Inc., Anna M. Jauregui-Law for Petitioner.

Kamala D. Harris, Attorney General, and Julie L. Garland, Assistant Attorney General for Respondent.

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THE COURT: *

Cesar Aviles, Jr. seeks relief from the failure to file a timely notice of appeal. The petition is granted.

Cesar Aviles, Jr. was sentenced to 17 years after a jury trial. According to Aviles's declaration filed in support of the petition seeking constructive notice of appeal, he advised trial counsel at the sentencing hearing on March 4, 2011, that he wanted to appeal his conviction. According to Aviles, counsel assured him that he would file a notice of appeal on his behalf and he relied on counsel's assurance that he would file the appeal. Trial counsel's declaration acknowledges that Aviles asked him to file an appeal from his conviction, but as a result of unfortunate medical circumstances to himself and family, counsel failed to file a notice of appeal as requested by Aviles.

The principle of constructive filing of the notice of appeal should be applied in situations where a criminal defendant requests trial counsel to file a notice of appeal on his behalf and counsel fails to do so in accordance with the law. (*In re Benoit* (1973) 10 Cal.3d 72, 87-88.) This is because an attorney, who has advised his client that he would file a notice of appeal, has a duty to file a proper notice of appeal, or tell the client how to file it himself. In this case, trial counsel advised Aviles that he would file a notice of appeal on his behalf. Aviles's reasonable reliance on the promise of trial counsel to file a timely notice of appeal entitles him to the relief requested.

The Attorney General does not oppose Aviles's request for relief to file a late notice of appeal without the issuance of an order to show cause. (*People v. Romero* (1994) 8 Cal.4th 728.)

The petition is granted. On Aviles's behalf, Attorney Anna M. Jauregui-Law is directed to prepare and file a notice of appeal in Orange County case number 09NF2195, and the clerk of the superior court is directed to accept the notice for filing if

* Before Rylaarsdam, Acting P. J., Fybel, J., and Ikola, J.

presented within 30 days of this opinion becoming final. Further proceedings, including the preparation of the record on appeal, are to be conducted according to the applicable rules of court. In the interest of justice, the opinion in this matter is deemed final forthwith.