

IN THE THIRD DISTRICT ASK FOR THE BENEFIT OF THE CONSTRUCTIVE FILING DOCTRINE IN A NOTICED MOTION, NOT IN A PETITION FOR A WRIT OF HABEAS CORPUS

While a request to an appellate court that a notice of appeal that is not timely filed may be timely under the constructive filing doctrine explained in *In re Benoit* (1973) 10 Cal.3d 72 can be raised either by a petition for a writ of habeas corpus or a noticed motion, the Third District Court of Appeal prefers that any request for the benefit of the constructive filing doctrine be tendered to it as a noticed motion. The Court explained its reasons for preferring a noticed motion to a petition for a writ of habeas corpus in *People v. Zarazu* (2009) 179 Cal.App.4th 1054.

In *Zarazu* the defendant, in propria persona, prepared and filed a motion in the Court of Appeal asking that he be given the benefit of the constructive filing doctrine so he could appeal from a resentencing that had occurred five months earlier. The defendant explained in his motion that he had relied on his trial counsel to file a timely notice of appeal and that when he discovered that had not been done he obtained information from CCAP and used it to prepare and file a motion asking the Court to construe his notice of appeal as timely filed under the constructive filing doctrine described in *In re Benoit* (1973) 10 Cal.3d 72. (*Id.*, at pp. 1059-1060.) The Court of Appeal granted his request and the Attorney General moved to vacate the order, asserting the request should have been tendered not in a motion in the appellate court, but in a petition for a writ of habeas corpus tendered first in the trial court.

Asserting that because an appellate court has inherent authority to determine, on its own motion, whether it has jurisdiction in a case, it must have inherent jurisdiction to determine whether an appeal has been timely filed under the constructive filing doctrine, the Court disagreed with the Attorney General. The Court explained that while a party may seek constructive filing of a notice of appeal by filing a writ of habeas corpus as was done in *Benoit, supra*, 10 Cal.3d at p.78; *In re Gonsalves* (1957) 48 Cal.2d 638, 641, and *In re Arthur N.* (1974) 36 Cal.App.3d 935, 937, those cases are not authority for the proposition “that the issue can be raised solely by habeas corpus.” (*Zarazu, supra*, 179 Cal.App.4th at p.1063.) The Court concluded that “an appellate court has jurisdiction to determine whether a notice of appeal has been constructively filed, and that jurisdiction may be invoked by a noticed motion in the appellate court. (*Id.* at 1063.)