

**S250895**

Case No:

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**IN THE  
SUPREME COURT  
OF THE  
STATE OF CALIFORNIA**



DARRYL COTTON, PLAINTIFF/APPELLANT/PETITIONER,

v.

THE CITY OF SAN DIEGO, DEFENDANT/RESPONDENT.

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AFTER AN ORDER INVOLUNTARILY DISMISSING APPEAL  
ENTERED ON AUGUST 17, 2018  
FOURTH DISTRICT, DIVISION ONE, CASE NO. D073766

*ON APPEAL FROM*

THE SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION  
CASE NO. 37-2017-00037675-CU-WM-CTL  
THE HONORABLE JOEL R. WOHLFEIL

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**PETITION FOR REVIEW**

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**TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE,  
CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA,  
AND THE HONORABLE ASSOCIATE JUSTICES OF THE  
SUPREME COURT OF CALIFORNIA:**

Plaintiff/Appellant/Petitioner DARRYL COTTON (“Petitioner”) hereby petitions this Honorable Court pursuant to California Rules of Court (“CRC”) Rule 8.500(b)(2) and California Code of Civil Procedure (“CCP”) §473(b) for an order granting (1) his petition for review, (2) reinstating his appeal, and (3) leave to file the documents necessary to perfect the record on appeal.

**I.**

**ISSUE PRESENTED**

*Should this Court issue relief from an involuntary dismissal when the appellate court enters a default against a pro per litigant and newly substituted counsel’s attempt to clear the default is inadvertently submitted 14 minutes past the deadline because of a technological error?*

**II.**

**INTRODUCTION**

This motion is made on the grounds that (1) this Court has the discretion to grant the requested relief pursuant to Rule 8.500(b)(2) when the appellate court no longer has jurisdiction, and (2) that good cause exists therefor in light of the facts, circumstances and occurrences which culminated in dismissal of the appeal. Moreover, reinstating the appeal will serve the interests of justice and judicial economy in that a Petition for Writ of Mandate, Supersedeas and/or Other Relief in a related case addressing the identical issues raised on appeal in this matter will be filed in the appellate court on or about August 28, 2018.

### III.

#### WHY RELIEF SHOULD BE GRANTED

Petitioner respectfully submits that the relief requested herein should be granted because: (1) the appellate court entered default while Petitioner was a *pro per* litigant, (2) the action was dismissed ten-days after counsel for Petitioner (“Counsel”) substituted into this case to represent Petitioner, (3) Counsel drafted a meritorious motion to set aside the default and reinstate Petitioner’s appeal pursuant to CRC 8.60(d), CRC 8.63(b)(7) and CRC 8.63(b)(9) which he attempted to file but, he was unable to do so because of a corrupted file that resulted in a submission that was late by **14 minutes**, and (4) because Petitioner should be afforded the opportunity to address his appeal on the merits.

Petitioner was self-represented in this matter until Counsel substituted in on August 7, 2018. Ten days thereafter, the appellate court dismissed the appeal on August 17, 2018, thereby depriving its jurisdiction over this case.

Due to a number of time-limiting deadlines in the related case from which the appeal was taken (the “Lower Court case”) and, notwithstanding his diligent attempts to do so, Counsel had insufficient time to prepare the underlying motion and file within the prescribed time. Although Counsel was very close to making the deadline, the other tasks to be completed led to a last-minute filing. Ultimately the submission was 14 minutes late and, but-for corrupt files and computer glitches, the Motion to Set Aside Default (which was complete) would have been timely filed. The Petitioner’s default was primarily due to procedural error as a *pro per* in failing to designate the record that could have easily been fixed had the Motion to Set Aside Default been accepted.

#### IV.

#### RELEVANT FACTS AND BACKGROUND

As set forth herein, it was not until July 12, 2018 – six days prior to dismissal of the appeal – when Petitioner first learned that the Lower Court had filed a Notice of Default in this matter on May 22, 2018 (“05/22/18 NOD”) because it had deemed his Notice of Designation of Record on Appeal (“Designation”) to be “deficient.”

From December 8, 2017, until Counsel substituted in as his counsel on August 7, 2018, Petitioner was a self-represented litigant with no prior legal experience.

Petitioner filed the instant appeal in good faith. It is not frivolous or trifling and, despite his diligent efforts to perfect and proceed with the appeal, he encountered some “bumps in the road” so-to-speak due to his unfamiliarity with the appellate process, his dire financial straits and the compromised state of physical and emotional well-being.

As reflected in the record, the Lower Court filed a Notice of Default on April 27, 2018 after Petitioner failed to timely file and serve his Designation. To enable Petitioner to preserve the appeal, Counsel sent his contract paralegal to assist him in preparing his Designation which was filed with the Lower Court on May 17, 2018. That same day, the Lower Court vacated the default.

Thereafter, Petitioner began to prepare his Settled Statement, but his efforts were preempted by working with Counsel to meet deadlines associated with (1) multiple back-to-back law and motion matters in a related case in the Lower Court case of *Geraci v. Cotton* (Case No. 37-2017-00010073-CU-BC-CTL), (2) responding to extensive written discovery requests in a one-week period, and (3) preparing for his deposition scheduled

a few days after he completed discovery responses as ordered by the Lower Court.

On July 12, 2018, Petitioner informed Counsel that he had received a copy of the Notice of Default dated July 6, 2018 ("07/06/18 Notice") in the mail from the Lower Court. Upon receipt of the 07/06/18 Notice, Petitioner went to the Court of Appeal to inquire why the Lower Court had filed the 07/06/18 Notice after he had cured the default by filing the Designation on May 17, 2018.

The Appellate Clerk with whom he spoke advised him that the Lower Court had filed a Notice of Default on May 22, 2018 ("05/22/18 NOD") because (1) his Designation "lacked specificity," and (2) he had not filed a proof of service thereof with the Lower Court. The Appellate Clerk told Petitioner that the case would be dismissed by the Court of Appeal but, if he amended the Designation and filed it and a proof of service of same in the Lower Court, he thereafter could a motion in this Court to vacate the dismissal.

After meeting with the Appellant Clerk, Petitioner then went to the Appellate Division of the Lower Court where he met with C. De Los Santos – the clerk who had filed the 05/22/18 NOD and the 07/06/18 Notice – to whom he presented the copy of the 07/06/18 Notice and a conformed copy of the Designation, and asked her to explain (1) the meaning of the "lack of specificity" referenced in the 05/22/18 NOD, and (2) the reason why he had not received a copy of that document.

Clerk De Los Santos told Petitioner that the "lack of specificity" was a "procedural error." Specifically, she said that Petitioner had designated a transcript for only one hearing (the only hearing which had been recorded by a court reporter) and elected to prepare a Settled Statement for the remaining hearings at which no court reporters were present. She told Petitioner that he had only two options: (1) To designate the only transcript as his record or (2)

to prepare a Settled Statement for the hearings relevant to the appeal – but he could not do both. If he chose to prepare a Settled Statement, she instructed him that he must do so by completing and filing Form APP-014.

Counsel initially represented Petitioner on a limited-scope basis in Superior Court case *Geraci v. Cotton*. Representation was limited to preparing, filing, and oral argument of only one motion. However, on May 1, 2018, Counsel fully substituted in as attorney of record in that matter. At the time, Petitioner was still handling the appeal *pro per*, but on or about August 7, 2018 and after two Failures to Clear Default, as noted above, counsel substituted in as attorney of record.

It is important to note that during July and August of 2018, Counsel, a solo practitioner, was both preparing for trial, which was set for August 17, 2018, and preparing other various motions and appeals from rulings thereof. The trial was set for the same day as the deadline for the Motion to Set Aside Dismissal in this matter. In preparation for trial Counsel was required to file a Trial Readiness Conference Brief that also had a hearing date set on August 3, 2018.

However, because of other time sensitive obligations, including the need for additional discovery (Petitioner had never propounded any while he was representing himself *pro per*) and the extension of the law and motion cut off, Counsel had filed an *Ex Parte* Application For a Stay and An Order Continuing Trial Scheduled for August 17, 2018. The request was granted on August 2, 2018. However, Counsel had to prepare for the possibility that his request might not be granted and therefore never ceased preparation of the Trial Readiness Conference Brief, trial preparation. Further, Counsel necessarily had to begin answering approximately 70 new Requests for Admissions that opposing counsel served on August 3, 2018 the day after discovery was re-opened. These time-limiting factors were all in addition to a motion to disqualify the Superior Court judge – which must be filed at the



earliest practical opportunity – and also a Petition of Writ of Mandate based on two rulings of the Lower Court. The Writ of Mandate was based on an improper ruling on an *Ex Parte* Application for Appointment of a Receiver as well as a Motion of Judgment on the Pleadings (“MJOP”). The MJOP was originally filed on June 20, 2018 and was heard on July 13, 2018, the *Ex Parte* Application for Appointment of a Receiver was filed on June 13, 2018 and heard on June 14, 2018.

The Petition for Writ of Mandate consists of approximately 60 pages with an additional 1,234 pages of exhibits consisting of three volumes. The Verified Statement to Disqualify the presiding judge consists of proximately 30 pages not including the 16 attached exhibits. The Petition for Writ of Mandate will be filed August 28, 2018, and the Verified Statement of Disqualification is also expected to be filed August 28, 2018. Counsel has consistently and diligently worked on this matter to preserve Petitioner’s rights relating to appeal.

Despite all the time-limiting commitments in the *Geraci v. Cotton* matter involving the same dispute and operative facts as the case from which the appeal is taken, with the assistance of his contract paralegal, Zoë Villaroman (“Villaroman”), Counsel was still on track to file the Set Aside by August 17, 2018. In order to submit the Set Aside, Counsel worked to the 11<sup>th</sup> hour on Friday August 17, 2018, however when it came time for Villaroman was to upload the motion prior to the midnight deadline, she experienced computer technical issues which resulted in a filing that was 14 minutes late. Villaroman had logged in to One Legal (electronic filing service) prior to the midnight deadline, however, because of the technical issues when she attempted to upload the filing she received an error message stating, “corrupted file” that caused her computer to “freeze” causing further delay. This brief delay caused the Court of Appeals to reject the Motion to Reinstate because the last day of the court’s jurisdiction was

Friday, August 17, 2018 and the motion was not electronically uploaded until 12:14 a.m. on August 18, 2018.

V.

**DISCUSSION**

***A. The Court of Appeals Lack of Jurisdiction Necessitates This Petition.***

This Court has already decided that if an appellant misses the opportunity to seek relief before a dismissal is ordered, the final recourse is to file a motion to vacate the dismissal and permit a cure of the default. (*In re Jacqueline H.* (1978) 21 Cal.3d 170, 179; *Sanders v. Warden (Warden)* (1951) 106 Cal.App.2d 707, 708.)

As referenced above, the Court of Appeals entered default in this matter on July 18, 2018. According to CRC Rule 8.264(b)(1), "...a Court of Appeals decision in a civil appeal, including an order dismissing an appeal involuntarily, is final in that court 30 days after filing." In this matter, dismissal became final on August 17, 2018. Petitioner's Motion to Set Aside Default was file on August 18, 2018 at 12:14 a.m.

***B. Good Cause Exists to Extend Time to file Motion to Set Aside Default.***

Pursuant to California Rule of Court ("CRC") Rule 8.60(d), this Court is empowered with the discretion to grant relief from default to a party who has failed to comply with the provisions of CRC governing an appeal, with the only exceptions being the untimely filing of either a notice of appeal or a statement of reasonable grounds in support of a certificate of probable cause.

Relief from default for an appellant's delay in preparing the record on appeal is properly granted where the appellant has explained the delay and an assurance that appellant will proceed diligently with the appeal if such relief is granted. *Estate of Hanks* (1967) 255 Cal.App.2d 674, 675. When a

party is able to demonstrate good cause for its failure to comply with the appellate rules, the appellate court may grant relief to avoid consequences of default to that party. *In re Chavez* (2003) 30 Cal.4<sup>th</sup> 643, 652.

In determining whether an appellant should be relieved from default, the Court must consider, *inter alia*, such matters as the length of time and the circumstances surrounding the default, the relative injury which will flow to either party by granting or denying the relief and the nature of the default. Each case must turn on its own facts, and precedents are of little value. *Jarkieh v. Badagliacco* (1945) 68 Cal.App.2d 426, 432.

Furthermore, under CRC 8.63 Counsel is entitled to an extension of time to file the Motion to Set Aside. CRC 8.63 sets forth the factors considered in determining good cause including in relevant part: (7) Whether counsel responsible for preparing the document was new to the case ... (9) Whether counsel responsible for preparing the document has other time-limited commitments that prevent timely filing of the document.

As mentioned above, Counsel did not substitute into this matter until August 7, 2018 which would, practically speaking, give counsel only ten days to cure the default. Prior to August 7, 2018 Petitioner was handling the appeal on his own with the assistance of a contract paralegal, while Counsel, whose representation was originally limited to a single motion, was focused exclusively on preparing for trial and other law and motion matters in the *Geraci v. Cotton* case. On August 2, 2018, the Lower Court granted a continuance of trial and thereby reset the law and motion cutoff date. The next day, Counsel was served with approximately 70 new discovery requests. Counsel has yet to file the responses or propound his own discovery in order to file a Motion for Summary Judgment in the event that the underlying appeal, from the denial of the MJOP, in the *Geraci v. Cotton* case is not granted.

If default is not set aside Petitioner will be injured in that he will not be able to proceed against Respondent despite a related appeal which, if won, will likely impute liability to the City of San Diego for their violation of Petitioner's Constitutional right in the processing of a Conditional Use Permit on real property owned by Petitioner.

***C. But for Counsel's "Inadvertence" Petitioner's Default While Acting Pro Per Would Have Been Filed Timely, Prior the Court of Appeals Loss of Jurisdiction.***

"The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.... Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." Code of Civil Procedure §473(b).

In this case Counsel, by way of his contract paralegal, was unable to upload the Motion to Set Aside in a timely manner by a matter of **14 minutes**. This failure was due in part to Counsel's other time-limiting commitments that resulted in him working literally at the 11<sup>th</sup> hour seeking to file the Motion to Set Aside. However, upon completion, the files that were attempted to be uploaded were corrupted and needed to be recreated and converted into PDF files, resulting in the 14-minute past-the-deadline filing delay.

***D. The Law Favors a Policy of Resolution of Appeals on the Merits.***

Public policy favors determining appeals on their merits so as not to deprive parties of their right to appeal because of technical noncompliance with rules, at least where the parties are attempting to perfect an appeal in

good faith. *Brown v. Guy (Brown)* (1959)167 Cal.App.2d 211, 215; *In re Parker* (1968) 68Cal.2d 756, 760.

In *Brown*, as here, the Petitioner failed to designate the record properly in a timely manner. In granting relief from default, the Court explained that “the right to dismissal is not absolute, except for failure to file the notice of appeal.” *Id.* at 215, quoting *Jarkieh v. Badagliacco* (1945) 68 Cal.App.2d 426, 431. “In determining whether an appellant should be relieved from default, various factors must be considered such as the [1] length of the default, the [2] circumstances surrounding the default, the [3] relative injury that will flow to either party by granting or denying relief, the [4] nature of the default and other factors. Each case must turn on its own facts, and precedents are of little value.” *Id.*

In this case the length of default, though technically 30 days, is really only 14 minutes. As mentioned above, but for the filing being 14 minutes late, default would have been cured. In this case, the circumstances surrounding the default are that a pro per litigant attempting to designate the record on appeal was unable to do so, retained counsel and on a very short time, with other time-limiting commitments lead to a delay in the cure. The nature of the default is purely technical. These factors all weigh in favor of relief from default.

Furthermore, CRC Rule 1.5 states the rules must be “liberally construed to ensure the just and speedy determination of [appeals]...” In cases where there may be doubt, the right of appeal should be preserved in order to promote the public policy favoring deciding appeals on their merits. *Slawinski v. Mocettini* (1965) 63 Cal.2d 70, 72; *Montgomery Wards & Co., Inc.* (2000) 81 Cal.App.4th 356, 373. Here, the interests of justice require that the dismissal be set aside. The circumstances surrounding the dismissal of Petitioner’s Appeal are such that when taken as a whole show good cause

to vacate the involuntary dismissal and allow Petitioner to cure said default serves the public policy interest of adjudication on the merits.

**VI.**  
**CONCLUSION**

Summarized, Petitioner was representing himself *pro se* because he lacks financial resources. Counsel has undertaken Petitioner's representation believing his case to be meritorious and that the procedural posture of Petitioner's case reflects a miscarriage of justice. Counsel, having a small window since substituting in, has been working on numerous fronts to advance Petitioner's litigation, however, being a solo-practitioner, he is limited in the progress he can make. Most notably, preparing for trial and responding to and preparing to propound discovery.

Counsel did work and complete the Motion to Set Aside to preserve his client's right to timely file an appeal that he had prepared; unfortunately, due to a technical issue, he was delayed such that the final filing was past the prescribed limit by 14 minutes. Counsel respectfully requests that his client not be essentially sanctioned due to his Counsel's limited bandwidth that relegated him to finalizing the Motion to Set Aside on the evening of the deadline and which, again, he missed by a mere 14 minutes.

**VII.**  
**PRAYER**

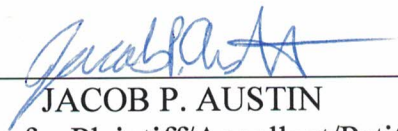
In light of the foregoing, Petitioner respectfully submits that good cause exists for this Court to grant this motion, and respectfully requests that it enter an order:

1. Vacating the dismissal entered on July 18, 2018 and reinstating the appeal;

2. Granting Petitioner leave to file his Civil Case Information Statement, Amended Certificate of Interested Entities and Parties, Amended Notice of Designation of Transcript on Appeal and Proposed Statement on Appeal.

DATED: August 27, 2018 Respectfully submitted,

THE LAW OFFICE OF JACOB AUSTIN

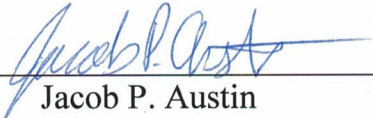
By  \_\_\_\_\_  
JACOB P. AUSTIN  
Attorney for Plaintiff/Appellant/Petitioner  
DARRYL COTTON

**WORD COUNT CERTIFICATION**

This brief contains 13-point font in Times New Roman typeface, and contains 3333 (permissibly) words as counted by Microsoft Word 2016, the word processing software used to generate this brief.

DATED: August 27, 2018    THE LAW OFFICE OF JACOB AUSTIN

By \_\_\_\_\_



Jacob P. Austin

Attorney for Petitioner DARRYL COTTON



COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

Court of Appeal  
Fourth Appellate District  
**FILED ELECTRONICALLY**

07/18/2018

Kevin J. Lane, Clerk  
By: J. Yost

DARRYL COTTON,  
Plaintiff and Appellant,  
v.  
CITY OF SAN DIEGO,  
Defendant and Respondent;  
LARRY GERACI,  
Real Party in Interest and Respondent.  
D073766  
San Diego County No. 37-2017-00037675-CU-WM-CTL

THE COURT:

Pursuant to California Rules of Court, rule 8.140, the appeals filed February 26, 2018 and March 20, 2018, are DISMISSED for appellant's failure to timely designate the record (Cal. Rules of Court, rule 8.121(a)).

MCCONNELL

Presiding Justice

cc: Clerk of the San Diego County Superior Court  
All Parties

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

07/18/2018

KEVIN J. LANE, CLERK

By: *J. Yost*  
Deputy Clerk

