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COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2009-SC-000762-D

MICHAEL A. HALLUM — **APPELLANT**

v. **APPEAL FROM LOGAN CIRCUIT COURT**
HON. TYLER L. GILL, JUDGE
INDICTMENT NO. 01-CR-00061

COMMONWEALTH OF KENTUCKY — **APPELLEE**

BRIEF FOR APPELLANT, MICHAEL A. HALLUM

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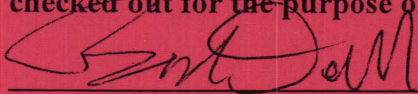
CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Tyler L. Gill, Judge, Courthouse, 200 W. 4th Street, P.O. Box 667, Russellville, Kentucky 42276-0667; the Hon. Gail Guiling, Commonwealth's Attorney, 329 W. 4th Street, P.O. Box 1133, Russellville, Kentucky 42276-1133; the Hon. Christian Woodall, Trial Attorney, 1100 S. Main Street, Suite 22, Hopkinsville, Kentucky 42240; and to served by U.S. postal mail, postage prepaid, to the Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on May 17, 2010. The record on appeal was not checked out for the purpose of this brief.



BRANDON N. JEWELL

INTRODUCTION

This is a criminal case on discretionary review of a Kentucky Court of Appeals order dismissing Michael Hallum's (hereinafter Appellant) appeal for failure to timely file a notice of appeal from the Circuit Court's denial of his RCr 11.42 motion.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is to be heard on Friday, June 11, 2010, at 9:00 a.m. prevailing Frankfort time, in the Supreme Court courtroom along with oral argument in the case of Joe B. Jones 2010-SC-000049-D.

STATEMENT CONCERNING CITATION

The documents in the record on appeal cited to are not numbered and will be cited as follows:

~~The Circuit Court's October 6, 2008 order denying the 11.42 motion will be cited~~ to as "Circuit Court order".

The notice of appeal and motion and order to proceed in froma pauperis will be cited to collectively as "NOA/IFP".

The Court of Appeals October 20, 2009 show cause order will be cited as "show cause order".

The response to the show cause order will be cited to as "response to show cause order".

The Court of Appeals order dismissing the appeal will be cited to as "order dismissing".

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STATEMENT OF THE CASE

Appellant, while incarcerated at Luther Luckett Correctional Complex, placed his pro se notice of appeal and motion to proceed in forma pauperis in the prison mail system on November 2, 2008, three (3) days before it was due to the Court, and it was mailed out on November 3, 2008. (MDR, order dismissing). Appellant was appealing from an October 6, 2008 order of the Logan Circuit Court denying his RCr 11.42 motion. (Circuit Court order). On November 13, 2008, eight (8) days after the due date, the notice of appeal with the motion to proceed in forma pauperis was tendered in the Circuit Court (while the docket reflects that the notice of appeal was tendered, and motion to proceed in forma pauperis was filed, on November 13, 2008, the notice of appeal was not "filed" until June 4, 2009). (NOA/IFP, show cause order, order dismissing, case history sheet).

On June 17, 2009, the Kentucky Court of Appeals entered a show cause order, ordering Appellant to show why his appeal should not be dismissed for failure to timely file a notice of appeal. (show cause order).

In response, Appellant, through counsel, informed the Court of Appeals of the aforementioned facts supported by Appellant's affidavit and a copy of the mail log, and argued that his appeal should not be dismissed because he placed his notice of appeal and motion to proceed in forma pauperis in the prison mail system three (3) days before the deadline for filing. Appellant also informed the Court that he never actually received the order from which he was appealing but learned about it by calling the Department of Public Advocacy post-trial branch and attached Appellant's affidavit to that effect and a memo in response to a request for legal mail entries for the months of October and November stating there were none. (MDR).

On October 20, 2009, the Court of Appeals entered an order dismissing Appellant's appeal, stating in pertinent part:

> [T]his appeal must be dismissed because the appellant failed to comply with the Kentucky Rules of Civil and Criminal Procedure. Pursuant to CR 73.02(1)(b), a Notice of Appeal shall be considered timely if it is accompanied by a timely filed motion to proceed in forma pauperis, but the Notice of Appeal shall not be filed until a ruling on the motion to proceed in forma pauperis is entered by the circuit court. Here, while appellant's motion to proceed in forma pauperis and Notice of Appeal were delivered for mailing on November 3, 2008, those documents were not tendered until November 13, 2009, which is beyond the 30 day period for filing a Notice of Appeal. As appellant failed to ensure that the motion to proceed in forma pauperis was timely filed as required by CR 73.02(1)(b), this appeal must be dismissed as having been untimely filed.
>
> Furthermore, RCr 12.04(3) and CR 73.02(1)(a) require the Notice of Appeal to be filed within 30 days from the date of entry of the judgment or order from which the appeal is being taken. Time for filing a Notice of Appeal is not triggered by service, but by the date of the circuit clerk's notation on the docket of service of notice of entry, with that date fixing the running of time for the appeal. Fox v. House, 912 S.W.2d 450 (Ky. App. 1995). The filing of a Notice of Appeal within the prescribed time frame is mandatory and failure to do so is fatal to an appeal. CR 73.02(2). In this case, appellant admits that he did not tender his Notice of Appeal within the 30 day timeframe. Instead, he relies on the fact that he submitted his Notice of Appeal to the inmate legal mailroom of the Luther Luckett Correctional Complex three days prior to the deadline for filing a Notice of Appeal. Any reliance on the "mailbox rule" to justify the untimely filing of a Notice of Appeal is misplaced because the Kentucky Supreme Court has expressly declined to adopt this rule. Robertson v. Commonwealth, 177 S.W.3d 789 (Ky. 2005). As appellant failed to timely file his Notice of Appeal as required by CR 73.02(1)(b) and RCr 12.04(3), this appeal must be dismissed as having been untimely filed.

On November 19, 2009, Appellant filed a motion for discretionary review in this Court which was granted on April 15, 2010.

ARGUMENT

I.

Not applying a prison mail box rule in this case and dismissing Appellant's appeal was contrary to, and in violation of, Appellant's due process rights to court access, equal protection, and fundamental fairness.

This issue is preserved by Appellant's response to the show cause order. The case at bar is one in which Appellant appealed from the trial court's order denying Appellant's RCr 11.42 motion and the Kentucky Court of Appeals thereafter dismissed the appeal for failure to timely "file" a notice of appeal. The Court of Appeals order dismissing the appeal was erroneous and must be reversed. Under Section 110 of the Kentucky Constitution, KRS 22A.020(1), and Moore v. Commonwealth, 199 S.W.2d 132 (Ky. 2006), Appellant has a constitutional and statutory right to appeal the trial court's order denying his motion. Regarding initiating a criminal appeal, RCr 12.04(1) states:

> An appeal is taken by filing a notice of appeal in the trial court.

RCr 12.04(3) states:

> The time within which an appeal may be taken shall be thirty (30) days after the date of entry of the judgment or order from which it is taken, subject to Rule 12.06, but if a timely motion has been made for a new trial an appeal from a judgment of conviction may be taken within thirty (30) days after the date of entry of the order denying the motion; provided, however, that in the case of a motion for new trial made later than five (5) days after return of the verdict, the appeal must be from the order overruling or denying the motion, and the review on appeal shall be limited to the grounds timely raised by the motion as provided by Rule 10.06.

RCr 12.06 states:

> (1) Immediately upon the entry in the trial court of a judgment, a final order, or an order that affects the running of time for taking an appeal, the clerk shall serve a written notice of the entry, either by mail or by personal delivery, upon counsel of record for each defendant, affected by the judgment or order, or upon the defendant personally if the defendant is without counsel of record. Service of notice under this Rule may be waived in writing by either the defendant or the defendant's counsel of record.
>
> (2) The clerk shall make a note in the criminal docket of the service required by paragraph (1) of this Rule, which notation shall show the date and manner of service. Unless notice has been waived, the date of such notation shall be the date of entry for purposes of Rule 12.04(3) or, in a bond forfeiture proceeding, for purposes of Civil Rule 73.02(1)(a). [1]

---

[1] Similarly, regarding civil appeals, CR 73.02(a) states in pertinent part "[t]he notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)."

Regarding indigent litigants, CR 73.02(1)(b), applicable to criminal appeals by RCr 12.02, states in pertinent part:

> If timely tendered and accompanied by a motion to proceed in forma pauperis supported by an affidavit, a notice of appeal or cross-appeal shall be considered timely but shall not be filed until the motion to proceed in forma pauperis is granted or, if denied, the filing fee is paid.

***

The Court of Appeal's dismissal of Appellant's appeal violated Appellant's state and federal due process rights to court access, equal protection, and fundamental fairness. Appellant contends that a prison mailbox rule must be utilized in this case. Specifically, Appellant contends that a notice of appeal should be considered "timely tendered" or "filed" under the procedural rules when an incarcerated, pro se litigant relinquishes control over the notice of appeal to correctional facility authorities for mailing or surrenders it to the correctional facility mail system for mailing on or before thirty (30) days after notation in the criminal docket of service of written notice of the entry of the judgment or order from which it is taken or, if service is waived, on or before thirty (30) days after the date of entry of the judgment or order from which it is taken.

Access to the Courts:

As the Supreme Court of the United States has stated, it is "established beyond doubt that prisoners have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 821-822 (1977) (citing Ex parte Hull, 312 U.S. 546 (1941). Access to the courts is protected by the First Amendment right to petition for redress of grievances and

the Fourteenth Amendment guarantees of substantive and procedural due process. Jackson v. Procunier, 789 F.2d 307, 310 (5th Cir. 1986).

Moreover, under Section 1 of the Kentucky Constitution, individuals have the right "of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance," and under Section 14 of the Kentucky Constitution, "[a]ll courts shall be open, and every person for an injury done him in his hands, goods, person or reputation, shall have remedy by due course of law, and right and justice administration without sale, denial or delay."

In adopting a prison mailbox rule, the Courts in Florida, Louisiana, Hawaii, and Oklahoma recognized that prisoners have a right to access the courts. Tatum v. Lynn, 637 So.2d 796 (La. Ct. App. 1st Cir. 1994); Setala v. J.C.Penny Co., 40 P.3d 886 (Haw. 2002); Woody v. State, ex rel. Dept. of Corrections, 1992 OK 45, 833 P.2d 257 (Okla. 1992), (the Court cited to the Oklahoma Constitution, specifically, Okla. Const. Art. 2 § 6, in its reasoning; which provides: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."); Haag v. State, 591 So.2d 614, 617 (Fla.1992); see also State ex rel. Johnson v. Maggio, 440 So.2d 1336, 1337 (La. 1983) (pro se petitioner "is not to be denied access to the courts for review of his case on the merits by the overzealous application of forms and pleading requirements or hyper-technical interpretations of court rules.").

Even when incarcerated as prisoners of the state, individuals retain their constitutional right to court access. As stated by the United States Supreme Court,

"inmate access must be adequate, effective, and meaningful." Bounds, 430 U.S. at 822. Furthermore, "[t]he fundamental constitutional right to access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id, at 828. However, failure to provide adequate law libraries or adequate assistance from persons trained in the law are not the only ways in which a prisoner can be denied "adequate, effective, and meaningful" access to the courts.

A notice of appeal is a "meaningful legal paper" because it is a substantive requirement of an appeal. See Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (Nev. 1992) (in applying a prison mailbox rule the Court stated that substantial rights depend on the date of filing of a notice of appeal). As such, when an incarcerated, pro se litigant places a notice of appeal in a correctional facility mail system or relinquishes control of the notice of appeal to correctional facility authorities on or before thirty (30) days after notation in the criminal docket of service of written notice of the entry of the judgment or order from which it is taken or, if service is waived, on or before thirty (30) days after the date of entry of the judgment or order from which it is taken, and the appeal is dismissed for failure to timely tender or file a notice of appeal, then the individual has been denied "adequate, effective, and meaningful" access to the courts by the state.

Correctional facilities and their employees or contract workers are state actors. Flint ex rel. Flint v. Kentucky Dept. of Corrections, 270 F.3d 340 (6th Cir. 2001) (Department of Corrections workers are clearly state actors and private workers or

contractors are state actors when their actions are "fairly attributable to the state" such as when they oversee the rehabilitation of inmates or are performing a traditional state function and are clothed with the authority of the state). The only option an incarcerated, pro se litigant has with regard to filing legal papers is to place them in the correctional facility mail system or relinquish control of them to correctional facility authorities so that they can be mailed to the appropriate court clerk for filing. Accordingly, in a civil rights action, the Court in Gramegan v. Johnson, 846 F.2d 675, 676-678 (11th Cir. 1988) found that a correctional facility policy of allowing a "sizeable bundle" of mail to accumulate prior to delivery to prisoners and thus preventing them from filing legal documents on time was a patent deprivation of the prisoners' right of access to the courts. Similarly, the Court in Brewer v. Wilkinson, 3 F.3d 816, 826 (5th Cir. 1993), found that prison officials opening and removing a writ of mandamus from a prisoner's outgoing legal mail and thus preventing it from arriving in court on time was a cognizable constitutional claim for a denial of the prisoner's right of access to the courts. Citing Wolff v. McDonnell, 418 U.S. 539, 576 (1974).

As state actors, correctional facility authorities and correctional facility mail systems are the "court clerks" for practical purposes with regard to incarcerated, pro se litigants wishing to file legal documents in order to access the courts.

In the case at bar, the Kentucky Court of Appeals dismissed Appellant's appeal stating that he "failed to ensure" that his motion to proceed in forma pauperis, which was accompanied by his notice of appeal, was filed within 30 days from the date of entry of the judgment or order from which the appeal was taken. However, this was a logical impossibility. As the United States Supreme Court pointed out in Houston v. Lack, 487

U.S. 266 (1988), pro se "prisoners **cannot** take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30 day deadline." Id, at 270-271 (emphasis added). "Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the pro se prisoner is forced to do so by his situation." Id, at 271. Because prison mail must be screened, transmitted to the Postmaster who must then sort the mail and deliver the mail to the clerk, the date a notice of appeal reaches the clerk is determined by happenstance rather than by the dilatoriness of the inmate. Moreover, as a practical matter, "no matter how far in advance pro se prisoners deliver their petitions to the proper prison authorities, they can never be sure that their petitions ultimately will be filed on time by the court clerk." Munson v. State, 917 P.2d 796, 800 (Idaho 1996).

Equal Protection:

As stated by the Court in Woody v. State, ex rel. Dept. of Corrections, 1992 OK 45, 833 P.2d 257 (Okla. 1992) "a rule other than the mailbox rule for incarcerated pro se prisoners would interject a degree of arbitrariness which could sabotage equal protection and equal access to the courts." The equal protection clause protects indigent defendants from procedural rules that unfairly affect their right to an effective defense. Gideon v. Wainwright, 372 U.S. 335 (1963); see also Griffin v. Illinois, 351 U.S. 12 (1956) (holding that state must provide free copy of transcript to indigent defendants for appeals as a matter of right). The Equal Protection Clause requires that state appellate procedures be "free of unseasoned distinctions." Rinaldi v. Yeager, 384 U.S. 305, 310 (1966). Essentially, the integrity of the criminal justice system requires that everyone, rich or

poor, receive an equal chance to use the system's mechanisms. "Unfairness results... if indigents are singled out by the state and denied meaningful access to the appellate system because of their poverty." Ross v. Moffitt, 417 U.S. 600, 611 (1974). Also, Section 3 of the Kentucky Constitution states that "[a]ll men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services..."

Appellant's appeal being dismissed because he "failed to ensure" that his motion to proceed in forma pauperis, which was accompanied by his notice of appeal, was filed within 30 days from the date of entry of the order he was appealing violated federal and state equal protection principles because pro se "prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30 day deadline." Houston, at 270-271 (emphasis added).

Fundamental Fairness:

Fundamental fairness is the touchstone of due process. Gagnon v. Scarpelli, 411 U.S. 778 (1973). As the Court stated in Pettibone v. Pennsylvania Bd. Of Probation and Parole, 782 A.2d 605, 608 (2001):

> At the heart of the "prisoner mailbox rule" are the constitutional notions of due process and fundamental fairness. See Commonwealth v. Castro, 766 A.2d 1283 (Pa.Super.2001) (stating that these concepts permeate the "prisoner mailbox rule"). As this court has stated, due process is a flexible notion derived from the Fourteenth Amendment that calls for such procedural safeguards as a particular situation demands to ensure fundamental fairness to a litigant. Harris v. Pennsylvania Department of Corrections, 714 A.2d 492 (Pa.Cmwlth.1998). Thus, it was by design that, in Smith, our supreme court held "that in the interest of fairness, a pro se prisoner's appeal shall be deemed to be filed on the date that he delivers the appeal to prison authorities and/or places his notice of appeal in the institutional mailbox." Smith, 546 Pa. at 122, 683 A.2d at 281 (emphasis in original).

It is fundamentally unfair for Appellant to be denied his right to appeal when Appellant relinquished control over the notice of appeal to prison authorities and the prison mail system before thirty (30) days after the date of entry of the order from which it is taken. Requiring a logical impossibility, that an Appellant "ensure" that his notice of appeal is timely filed, is ultimately and fundamentally unfair. Again, "prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30 day deadline." Houston, 487 U.S., at 270-271 (emphasis added). And "no matter how far in advance pro se prisoners deliver their petitions to the proper prison authorities, they can never be sure that their petitions ultimately will be filed on time by the court clerk." Munson, 917 P.2d at 800.

Other Jurisdictions:

Due to circumstances similar to Appellant's, the United States Supreme Court applied a prison mailbox rule when an incarcerated individual placed his pro se notice of appeal with the prison mail system two (2) days before it was due even though the notice of appeal was not "filed" until after the deadline had passed. Houston, 478 U.S. at 268-273. The Court found that the prisoner had "filed" the notice of appeal at the time he delivered it to prison authorities for mailing to the district court. Id, at 276. The Court explained that the situation of a pro se prisoner is far different from the situation facing other litigants because a pro se prisoner is forced to deposit his appeal with prison authorities and trust the mailing process. Id, at 270-271. While other litigants may choose between personal delivery or mail delivery, a prisoner's lack of freedom prevents a pro se prisoner from supervising the process and leaves him with no method of ensuring

that his notice of appeal is timely filed. Id. This places the pro se prisoner in a situation where he has no control over delays that may be caused by prison authorities, the prison mail system, the postal system, the court clerk's office, or anyone who may handle the appeal after it leaves the prisoner's hands. Id, at 273.

In reaching its conclusion that a prison mailbox rule should be applied, the Court interpreted the Federal Rules of Appellate Procedure[2] to mean that the moment of "filing" occurs when the notice of appeal is delivered to the prison authorities. Id. In a variety of situations, at least twenty (20) states have followed the lead of Houston v. Lack. Other states have declined to follow the lead of Houston v. Lack, often stating as reasons that they are not required to because Houston v. Lack is only an interpretation of federal procedural rules. Toua Hong Chang v. State, 778 N.W.2d 388 (Minn.App. 2010); Hamel v. State, 1 S.W.3d 434 (Ark. 1999); Espinal v. State, 607 N.Y.S.2d 1008 (N.Y.Ct.Cl. Dec 30, 1993); O'Rourke v. State, 782 S.W.2d 808, 809 (Mo.Ct.App.1990); Carr v. State, 554 A.2d 778, 779 (Del.1989).

It should be noted that F.R.A.P. Rule 4(1) simply establishes a thirty day deadline for filing a notice of appeal, and like Kentucky's rules, contains no language regarding pro se prisoners or prison mail.

In **Alabama**, a prison mail box rule applies to notices of appeal filed by incarcerated, pro se litigants in civil and criminal cases:

> If an inmate confined in an institution and proceeding pro se files a notice of appeal in either a civil or a criminal case, the notice will be considered timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for 'legal' mail to be processed by the United

[2] In particular, F.R.A.P. Rule 4(1)(1), which provides: "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from…"

> States Post Office, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement that sets forth the date the filing was deposited in the institution's mail system.

Rule 4(c), Ala. R. App. P.

A notarized statement is not the only way of demonstrating timely filing. In Ex parte Jones, 773 So.2d 989, 989-990 (Ala.1998), a notice of appeal was considered timely when the record contained a copy of the envelope that contained Jones' notice of appeal which had been sent to the clerk by certified mail and showed a postmark date two days before the deadline. In Thigpen v. State, 825 So.2d 241, 244 (Ala. Crim. App. 2001), the appellant's notice of appeal was marked filed by the clerk two days late. It contained an unsworn certificate of service stating that it had been delivered to prison authorities for mailing on the deadline. The Court found the evidence insufficient and remanded the matter to the trial court to determine whether the notice of appeal was timely filed. On remand the parties stipulated that the notice of appeal was delivered to prison authorities in a timely manner.

In Holland v. State, 621 So.2d 373, 375 (Ala. Crim. App 1993), opinion extended after remand, 654 So.2d 77 (Ala. Crim. App. 1994), the Court held that a prison mailbox rule also applied to post conviction petitions by a judicially imposed rule based on Houston v. Lack. Specifically, the Court held "that a pro se incarcerated petitioner 'files' a Rule 32 petition when he hands the petition over to prison authorities for mailing." Holland, 621 So.2d at 375. The Court further found that even though the petition was not received by the clerk until one day after the deadline, and despite not having a prison mail log, the petition at issue was timely filed because the certificate of service averred that it was placed in the mail four days before the deadline and since the district attorney

did not challenge this, it must be accepted as true. Id, at 374 (citing Ex parte Floyd, 457 So.2d 961, 962 (Ala. 1984)). (Note, prison mailbox rule does apply to a Rule 32 motion to amend a post conviction relief petition when time deadlines have been imposed for the filing of such an amendment, but does not apply to a motion to amend a post conviction relief petition when no deadline is imposed other than that they must be filed before the entry of a final judgment, because such a situation is not one in which an individual has only 30 days to submit an initial action, and the courts could not rule on such petitions as efficiently. Ex parte Allen v. State, 825 So.2d 271,273 (Ala. 2002).

In **Arizona**, the Court found Houston v. Lack persuasive in interpreting Ariz. R. Crim. P. 9(a) and held that "a pro se prisoner is deemed to have filed his notice of appeal at the time it is delivered, properly addressed, to the proper prison authorities to be forwarded to the clerk of the superior court." Mayer v. State, 908 P.2d 56, 59 (Ct. App. Div. 1 1995). Similarly, the Court later held that a prison mailbox rule also applied to a notice of a petition for post-conviction relief. State v. Rosario, 987 P.2d 226, 228 (App.1999).

Arizona has also applied a prison mailbox rule through judicial interpretation to an incarcerated, pro se litigant's petition for review by the Supreme Court of denials of post conviction relief which by statute are to be filed "[w]ithin 30 days after the filing of a decision or within 15 days after the clerk has mailed notice of the determination of a motion for reconsideration" State v. Goracke, 106 P.3d 1035, 1036 (Ct. App. Div. 1 2005) (citing Ariz. R. Crim. P. 31.19(a).

The Arizona Courts have further concluded that "[w]hen there is no clear record as to when the [document] was delivered to prison authorities, the proper course of action

is to remand to the trial court to make this determination." Goracke, 106 P.3d at 1038; Mayer, 908 P.2d at 59. In Goracke, the petition's certification on the mailing certificate stated that it was placed in the institutional mail before the deadline and the Court found that absent any facts to suggest that the certification was not accurate (and because the petition was received by the clerk's office in a time frame consistent with the certification) the petition was timely filed. Goracke, 106 P.3d at 1038.

In **California**, the Court in In re Jordan, 840 P.2d 983, 985 (Cal. 1992) concluded that the "prison-delivery" rule established in People v. Slobodion, 181 P.2d 868 (Cal. 1947) was still in effect. This rule provides that a prisoner's notice of appeal is deemed timely filed if delivered to prison authorities within the 60-day filing period set forth in rule 31(a) of the California Rules (now renumber 8.308).[3] In re Jordan, 840 P.2d at 984.

The Court examined Houston v. Lack and stated that the "prison-delivery rule ensures that an unrepresented defendant, confined during the period allowed for the filing of an appeal, is accorded an opportunity to comply with the filing requirements fully comparable to that provided to a defendant who is represented by counsel or who is not confined. In re Jordan, 840 P.2d at 984. "The Court also noted that not only does the rule afford equality of treatment but "also furthers the efficient use of judicial resources by establishing a "bright-line" test that permits courts to avoid the substantial administrative burden that would be imposed were courts required to determine, on a case-by-case basis, whether a prisoner's notice of appeal was delivered to prison

[3] California Rules of Court, rule 31(a), then provided in pertinent part: "In the cases provided by law, an appeal is taken by filing a written notice of appeal with the clerk of the superior court within 60 days after the rendition of the judgment or the making of the order.... Whenever a notice of appeal is received by the clerk of the superior court after the expiration of the period prescribed for filing such notice, the clerk shall mark it 'Received (date) but not filed' and advise the party seeking to file the notice that it was received but not filed because the period for filing the notice of appeal had elapsed....".

authorities 'sufficiently in advance of the filing deadline' to permit the timely filing of the notice in the county clerk's office." Id.

In **Florida**, the Court in Haag, 591 So.2d at 617, held that since an inmate loses control of his post conviction motion after placing it in the hands of prison officials who may not timely mail the document, it is deemed "filed" when he or she places it in the hands of prison officials. This decision was based on concepts of fairness and court access. Id. The Court noted that it was the inmates duty to produce a mail log or other evidence. Id. The mailbox rule was later greatly extended based on the notions of simplicity and fairness and held not be limited solely to the filing of petitions or notices of appeal in court, but instead to be uniformly applied whenever a pro se inmate is required to use the U.S. mail to file documents within a limited jurisdictional time frame. Gonzalez v. State, 604 So.2d 874, 876 (Fla. 1st DCA 1992)

In **Georgia**, the Court in Massaline v. Williams, 554 S.E.2d 720 (Ga. 2001) held that when a prisoner, who is proceeding pro se, appeals from a decision on his habeas corpus petition, his application for certificate of probable cause to appeal and notice of appeal will be deemed filed on the date he delivers them to the prison authorities for forwarding. The Court's decision was based on the reasoning of Houston v. Lack and the Court also noted that the decision was consistent with the statutory language in OCGA § 9-14-52(b)[4]. Massaline, 554 S.E.2d at 722-723.

[4] "If an unsuccessful petitioner desires to appeal, he must file a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court within 30 days from the entry of the order denying him relief. The petitioner shall also file within the same period a notice of appeal with the clerk of the concerned superior court. The Supreme Court shall either grant or deny the application within a reasonable time after filing. In order for the Supreme Court to consider fully the request for a certificate, the clerk of the concerned superior court shall forward, as in any other case, the record and transcript, if designated, to the clerk of the Supreme Court when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court shall return the

Regarding proof of timeliness, the Court stated that (a) an official United States Postal Service post-mark showing a date before the deadline will be conclusive; (b) the date on the certificate of service will give rise to a rebuttable presumption that the prisoner handed his filing to the prison officials on that date; or (c) an affidavit reflecting the date and the fact the prisoner provided his legal filing with sufficient prepaid postage for first-class mail will give rise to a rebuttable presumption. Massaline, 554 S.E.2d at 723. In Roberts v. Cooper, --- S.E.2d ----, 286 Ga. 657, 2010 WL 889554 (Ga.), the Court announced that the prison mailbox rule only applies to pro se, incarcerated litigants in a habeas corpus arena.

In **Hawaii**, the Court in Setala, 40 P.3d at 887, held "that a notice of appeal is deemed 'filed' for purposes of Hawaii Rules of Appellate Procedure (HRAP) Rule 4(a) on the day it is tendered to prison officials by a pro se prisoner." HRAP Rule 4(a) stated that "the notice of appeal required by Rule 3 shall be filed by a party with the clerk of the court or agency appealed from within 30 days after the date of entry of the judgment or order appealed from." The Court applied a mailbox rule based on the policy reasons underlying Houston v. Lack and other jurisdictions that had applied a similar mailbox rule. Setala, 40 P.3d at 890. The Court stated that "[a] rule other than the mailbox rule would interject a level of arbitrariness that could undermine equal protection and equal access to the courts. Id, at 889. The Court cited to the state constitution and Bounds, 430 U.S. at 824 (prisoners have fundamental constitutional right to adequate, effective, and

original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Supreme Court denies the application for a certificate of probable cause, the clerk of the Supreme Court shall return the original record and transcript and shall notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal."

meaningful access to courts to challenge violations of constitutional rights); Wolff, 418 U.S. at 578 (instructing that access of prisoners to the courts for the purpose of presenting their complaints should not be denied or obstructed); Johnson v. Avery, 393 U.S. 483, 485 (1969) (prisoners' right of access to courts may not be denied or obstructed). Setala, 40 P.3d at 893.

In Setala, the prisoner filed a complaint against J.C. Penney for personal injuries arising out of a shoplifting incident and the lower court dismissed the action. The prisoner appealed and his notice of appeal was filed after the deadline. The prisoner contended that his notice of appeal was placed in the mail system before the deadline and that a Corrections Officer's signature with the date was written on the back of the envelope in which it was sent. However, no envelope was attached to the notice of appeal. The Court stated that the prisoner should not be penalized for the absence of a postmarked and initialed envelope, which would prove his filing date. The Court went on to state that it is probable, based on documents in the court file, that the lack of the envelope was the result of a court clerk's action. Setala, 40 P.3d at 892-893 (citing Da'Ville v. Wise, 470 F.2d 1364, 1365 (5th Cir.) (refusing to hold notice untimely when the court clerk's practices of forwarding notices on to a larger clerk's office, but "[n]o record is kept of the papers received and forwarded[,]" created a strong possibility that the notice was not stamped when received); United States v. Smith, 545 F.2d 874, 875-76 (3d Cir.1976) (remanding for a determination of whether a notice of appeal was timely, because although the notice was filed five days after the time for appeal had lapsed, there was a evidence in the record indicating that the clerk's office had signed for the certified mail containing the notice within the time period)). The Court remanded the case to the

trial court for an evidentiary hearing to supplement the record regarding the timeliness of the tendered notice of appeal)).

In **Idaho**, the Court in Munson, 917 P.2d at 796 held "the mailbox rule applies for purposes of pro se inmates filing petitions for post conviction relief." The Court relied on the reasoning of Houston v. Lack and also stated that a mailbox rule applies because an incarcerated pro se inmate looses control over their petitions once the petitions are delivered to prison officials and "no matter how far in advance pro se prisoners deliver their petitions to the proper prison authorities, they can never be sure that their petitions ultimately will be filed on time by the court clerk." Munson, 917 P.2d at 800. The Court also cited to State v. Smith, 645 P.2d 369, 379 (Idaho 1982) which held that the Court would consider the appellant's notice of appeal despite appellant's failure to comply with the 42 day time limit for filing the notice of appeal, on the basis of judicial economy and the Court's plenary jurisdiction. Id.

Munson actually involved two cases which were consolidated because of nearly identical facts. In both, the district court entered an order denying their petitions for post conviction relief because they were filed late. Id. Both Appellant's responded to the orders and attached an affidavit from themselves and a Corrections Official stating that the petitions were placed in the mail system on time and a copy of the mail log. Id. In both, the district court still ordered that the petitions were denied and both Appellant's appealed and their orders dismissing the petitions were reversed and remanded. Id.

In **Kansas**, the Court in Taylor v. McKune, 962 P.2d 566 (Kan. App. 1998) held that in a case involving a prisoner appeal of a disciplinary action taken by the Department of Corrections, that the 30-day statute of limitations under K.S.A. 60-1501(b) was

effectively tolled when Taylor delivered his petition to the penal authorities for mailing to the clerk of the district court. The Court found the reasoning of Houston v. Lack persuasive in interpreting K.S.A. 60-1501(b)[5] and stated that an inmate faced with a narrow window of 30 days to file his or her habeas petition should not be further limited by a statutory interpretation that leaves a timely filing to the vagaries of the very entity against whom the action is brought and effectively reduces the time within the petitioner's control to 29 days, or 28 days, or 27 days, or less to make certain the petition is filed in a timely manner. Taylor, 962 P.2d at 569. An interpretation that gives an inmate a 30-day opportunity to challenge the action taken by prison authorities is consistent with statutory language and sound public policy, and affords every inmate, wherever situated, with a full 30-day filing period. Id, at 570. The Court also mentioned that the Second, Fourth, Tenth, and Eleventh Circuit Courts of Appeal have all applied, and some have extended, the Houston rule. See Dory v. Ryan, 999 F.2d 679, 682 (2d Cir.1993), modified on other grounds on reh'g 25 F.3d 81 (1994) (extending the Houston rule to pro se inmates filing complaints); Garvey v. Vaughn, 993 F.2d 776, 781-82 (11th Cir.1993) (extending the Houston rule to pro se inmates filing claims under 42 U.S.C. § 1983 and the Federal Tort Claims Act); Lewis v. Richmond City Police Dept., 947 F.2d 733, 735-36 (4th Cir.1991) (extending the Houston rule to pro se inmates filing complaints); Dunn v. White, 880 F.2d 1188, 1190 (10th Cir.1989), cert. denied 493 U.S. 1059, (1990) (citing Houston v. Lack and mentioning that while the inmate's complaint was filed in the district court beyond the deadline, the complaint was mailed from the prison in a timely fashion).

[5] "(b) Except as provided in K.S.A. 60-1507, and amendments thereto, an inmate in the custody of the secretary of corrections shall file a petition for writ pursuant to subsection (a) within 30 days from the date the action was final, but such time is extended during the pendency of the inmate's timely attempts to exhaust such inmate's administrative remedies."

In **Louisiana**, the Court in Tatum v. Lynn, 637 So. 2d 796 (La. Ct. App. 1st Cir. 1994) found the reasoning in Houston v. Lack to be persuasive and held that a pro se prisoner's petition for judicial review of adverse administrative decisions by the Department of Corrections, which is to be filed within 30 days of that decision, is considered filed at the time that their document is delivered to prison officials for mailing to the district court[6]. In State ex rel. Egana v. State, 771 So. 2d 638 (La. 2000), the Court recognized the mailbox rule again and cited Haines, 404 U.S. at 520 (Courts hold pro se filings to "less stringent standards than formal pleadings filed by lawyers…") and State ex rel. Johnson v. Maggio, 440 So.2d 1336, 1337 (La. 1983) (pro se petitioner "is not to be denied access to the courts for review of his case on the merits by the overzealous application of forms and pleading requirements or hyper-technical interpretations of court rules.").

In **Massachusetts**, Commonwealth v. Hartsgrove, 553 N.E.2d 1299 (Mass. 1990), the Court held that an incarcerated pro se defendant should be deemed to have filed a notice of appeal with the trial court clerk upon relinquishing control of said notice to prison authorities within the 30 day deadline for filing.[7] The Court stated that it looked to Houston v. Lack in reaching its conclusion. The Court also stated that a " flexible approach to the rules, which takes into account the peculiar facts of a case, is particularly appropriate here" and cited to Fallen v. United States, 378 U.S. 139, 142, (1964).

[6] La.R.S. 15:1171-1177 provided that an individual may "within thirty days after receipt of the decision, seek judicial review of the decision only in the Nineteenth Judicial District Court.... in the manner provided by R.S. 49:964." La.R.S. 15:1177(A). La.R.S. 49:964(B) of the Administrative Procedure Act provided in part that "[p]roceedings for review may be instituted by filing a petition in the district court.... within thirty days after mailing of notice of the final decision by the agency...."

[7] Mass. R.A.P. 4(b). "In a criminal case, unless otherwise provided by statute, the notice of appeal ... shall be filed with the clerk of the lower court within thirty days after ... imposition of sentence."

The appellant in Hartsgrove was found guilty by a jury, notified of his right to appeal, and transported to imprisonment at a correctional institution. 553 N.E.2d at 1301. While incarcerated, his trial counsel informed him that if he wanted to appeal he had to file his own notice of appeal. Id. The notice was not filed in time and returned to the appellant. The appellant wrote the clerk and said he placed his notice of appeal in the institutional mailbox six days before it was due. Id. Thereafter he filed a motion entitled "Belated Notice of Appeal" and the motion was granted. Id. On appeal, the state moved to dismiss the appeal stating that the judge did not have jurisdiction to grant the motion for belated appeal. Id. The Appellate Court remanded the case and stated that "once the defendant comes forward with evidence as to the date and time he deposited the notice of appeal with prison authorities, the burden of proof (civil) is on the Commonwealth to show that the defendant could not have deposited the notice of appeal in the prison mailbox within the established time period, the prison being the entity with the best access to the evidence needed to resolve the question." Id, at 1302-1302. The Court also noted, that in considering whether the Commonwealth has met its burden, the trial judge may take into account evidence of, for example, the routine practice of the prison authorities of picking up and delivering all mail within twenty-four hours of its being deposited in the prison's institutional mailbox; any records kept by the prison authorities regarding the dates of the deposit and delivery of outgoing mail; and the credibility of the defendant and any other witnesses. Id.

In **Mississippi**, the Court in Sykes v. State, 757 So. 2d 997, 1000-1001 (Miss. 2000) held that a pro se prisoner's motion for post-conviction relief under the Uniform Post Conviction Collateral Relief Act ("UPCCRA") is delivered for filing under the

Mississippi Rules of Civil Procedure when the prisoner delivers the papers to prison authorities for mailing.[8] The Court cited to Houston v. Lack and in adopting the prison mailbox rule stated that it has the power to interpret statutes and court rules within the framework of a legislative act which impacts on the exercise of constitutional rights and that under M.R.C.P. 2(c)[9] the Court could suspend procedural rules. Id. After adopting the mailbox rule, the Court stated that prison authorities may initiate such procedures as are necessary to document reliably the date of such delivery, by means of a prison mail log of legal mail or other expeditious means, and that, henceforth, an inmate's certificate of service would not suffice as proof. Id.

In Gaston v. State, 817 So.2d 613, 616 (Miss.Ct.App.2002), the Court held that in Mississippi the prison mailbox rule extends to all actions under the UPCCRA, including appeals in those actions, to bring Mississippi law into conformity with those jurisdictions that have adopted the prison mailbox rule after Houston v. Lack. The Court stated that while a notice of appeal must be filed with the trial court within thirty days of the order or

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[8] Miss.Code Ann. § 99-39-5(2) required that motions must be "made" within three (3) years after entry of the judgment of conviction upon a guilty plea. Rule 5(e) of the Mississippi Rules of Civil Procedure provided that filing is accomplished by delivery to the clerk of the court, or to the judge if the judge should so allow. Rule 5(e) states:

> (e)(1) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.
> (2) Electronic Filing with Court Defined. A court may, by local rule, allow pleadings and other papers to be filed, signed, or verified by electronic means in conformity with the Mississippi Electronic Court System procedures. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these rules.

[9] "(c) Suspension of Rules. In the interest of expediting decision, or for other good cause shown, the Supreme Court or the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction; provided, however, in civil cases the time for taking an appeal as provided in Rules 4 or 5 may not be extended."

judgment appealed under M.R.A.P. 4(a)[10] and all untimely filed appeals must be dismissed, under M.R.A.P. 2, in the interests of justice they should be granted. Gaston, 817 So.2d at 616.

In Jewell v. State, 946 So.2d 810, 813 (Miss.Ct.App.2006), the Court reiterated that the prison mailbox rule applies to a defendant's appeal from the denial of his motion for post-conviction collateral relief. The Court also held that when an appellant's notice of appeal is stamped filed within a reasonable time after the expiration of the time allowed by Mississippi Rule of Appellate Procedure 4(a) a rebuttable presumption exists that it was timely filed. Id. In Jewell, the Court held six days to be a reasonable time. Id. In order to demonstrate otherwise, the State must present proof, "in the form of a 'prison mail log of legal mail,' or some similarly reliable documentation ... [to include] [a] self-authenticating certificate from the records custodian pursuant to Mississippi Rules of Evidence 803(10), 902(4), or 902(11)...." Id. See also Owens v. State, 17 So.3d 628 (Miss. Ct. App. 2009) (the Court held that notice of appeal filed one day late was presumptively timely); Rhone v. State, 957 So.2d 1018 (Miss. Ct. App. 2006) (post conviction motion three days late, court noted the state has burden of proving notice not timely mailed and addressed appeal on its merits because the state had not challenged the motion as time-barred); Mosby v. State, 830 So.2d 661 (Miss. Ct. App. 2002) (motion for post conviction relief filed pro se subject to mailbox rule, and delivery to clerk two days after expiration of time was presumed timely).

In **Nevada**, the Court in Kellogg, 835 P.2d at 13 (Nev. 1992) held that notices of appeal in civil or criminal cases submitted by incarcerated proper person litigants to

[10] Mississippi Rule of Appellate Procedure 4(a) required that a notice of appeal "[s]hall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from."

prison officials are deemed filed for the purposes of timeliness on the date of delivery into the hands of prison officials. Recognized by Milton v. Nevada Department of Prisons, 68 P.3d 895, 895-896 (Nev. 2003).

In Kellogg, the appeal was dismissed because the appellant's notice of appeal was not filed by the clerk until after the expiration of the 30 day appeal period prescribed by NRAP 4(a). Upon the defendant's motion for rehearing, the appellant provided the Court with documents establishing that the notice of appeal was delivered to prison officials before the 30 day deadline. The Court reversed and stated that because substantial rights depend on the date of filing of a notice of appeal it found Houston v. Lack to be persuasive and sound because prisoners have no control over when their notices of appeal are actually filed and after they deliver their notices of appeal to prison officials, they must rely on the prison officials and the mail service to get their notices to the clerks of the district courts in a timely fashion. Kellogg, 835 P.2d at 13.

In Milton, the Court declined to extend the mailbox rule to apply to filings of complaints for personal injuries, noting that in such actions one has two years from the date of his injuries within which to file a lawsuit as opposed to only 30 days in which to file a notice of appeal as in Kellogg. Milton, 68 P.3d at 896. See also, Gonzales v. State, 53 P.3d 901, 904 (Nev. 2002) (prison mailbox rule does not apply to inmate's pro se post conviction habeas petition because one is not faced with the limited time period of 30 days in such a situation).

In **Ohio**, the Court in State v. Williamson, 226 N.E.2d 735 (Ohio 1967) concluded that the jailer was effectively the lower court for filing purposes and a notice of appeal is timely when delivered to the jailer. This holding was followed in State v. Westfall, 346

N.E.2d 282 (Ohio 1997) but was implicitly or effectively overruled by State ex rel. Tyler v. Alexander, 555 N.E.2d 966 (Ohio 1990) which stated that Houston v. Lack was not persuasive.

In **Oklahoma**, Woody v. State, ex rel. Dept. of Corrections, 833 P.2d 257 (Okla. 1992), the Court concluded that delivery of a petition in error by a pro se prisoner to prison officials for mailing to the Clerk of the Oklahoma Supreme Court before the due date was to be considered timely filed even though it was not received by the Clerk until after the due date.

In that case, a pro se prisoner appealed an order of a trial court denying his writ of mandamus by mailing a petition in error to the Clerk of the Supreme Court. It was received by the Clerk of the Supreme Court two days after the deadline and a show cause order was entered directing the prisoner to show cause why the appeal should not be dismissed as untimely. The prisoner responded and attached a sworn affidavit stating that he had placed the petition in error in the prison mailbox three (3) days before the deadline. Also, as the Court pointed out, the "Affidavit In Forma Pauperis" had been notarized four (4) days before the deadline, and the Statement of Prison Account had been signed by the trust fund officer three days before the deadline. Woody, 833 P.2d at 258. The applicable rule regarding filing was Title 12 O.S.1991 § 990A which provided in pertinent part:

> A. An appeal to the Supreme Court may be commenced by filing a petition in error with the Clerk of the Supreme Court within thirty (30) days from the date the final order or judgment is filed. The filing of the petition in error may be accomplished either by delivery or by sending it by certified mail with return receipt requested to the Clerk of the Supreme Court. The date of mailing, as shown by the postmark or other proof from the post office of the date of mailing, shall constitute the date of filing of the petition in error....

The Court ruled that although the record did not contain the envelope in which the petition was mailed, the petition was still to be considered timely and that the appeal would proceed in its ordinary course. Woody, 833 P.2d at 258-260.

The Court's conclusion was based on what it called the persuasive rationale of Houston v. Lack. The Court also concluded that "a rule other than the mailbox rule for incarcerated pro se prisoners would interject a degree of arbitrariness which could sabotage equal protection and equal access to the courts." The Court also cited Okla. Const. art. 2, § 6 in its reasoning which provides: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." Woody, 833 P.2d at 259-260. This mailbox rule is now codified in Supreme Court Rule 1.4(d) which provides:

> Mailing by Prisoner. A prisoner's appeal is commenced on the date that he or she places the petition in error in the prison mailbox for mailing or otherwise delivers it to a prison official for mailing. Proof of the date of the placement of the petition in error in the prison mailbox shall be supplied by affidavit attached to the petition in error. Woody v. State, 1992 OK 45, 833 P.2d 257.

In Hunnicutt v. State, 957 P.2d 988 (Okla. Crim. App. 1997), however, the Court declined to extend the mailbox rule to a prisoner's pro se petition for post conviction relief to the Court of Criminal Appeals.

In **Oregon**, the Court in Hickey v. Oregon State Penitentiary, 874 P.2d 102 (Org. App. 1994) decided the issue of when a pro se inmate seeking judicial review of an order placing him in segregation "filed" his petition. The Court admittedly avoided the constitutional questions and concluded that it could "perceive no reason why this court may not interpret ORAP 1.35 to mean that, in these circumstances, the petition shall be

deemed to have been filed at the time it is delivered to the person authorized by the institution to accept delivery for forwarding to the State Court Administrator pursuant to ORAP 1.35. ORAP 1.35 deals with filings in the Supreme Court or Court of Appeals. Hickey, 874 P.2d at 105. In 1994, the rules were amended to codify Hickey's holding in ORAP 1.35(4) stating:

> With respect to a person confined in an institution of confinement who files and serves a thing in the appellate court, the thing shall be deemed filed in the appellate court and served on another person when the original of the thing and the appropriate number of copies are delivered, in a form suitable for mailing, to the person or place designated by the institution for handling out-going mail.

In Stull v. Hoke, 948 P.2d 722 (Or. 1997) the Court declined to apply the rule in a tort case and found that Houston v. Lack and Hickey were not persuasive. The Court stated that in Hickey, the Court of Appeals interpreted a court rule and in its case the Court was being asked to interpret a statute that time barred claims for intentional inflection of emotional distress. Stull, 948 P.2d at 726.

In **Pennsylvania**, the Court in Commonwealth v. Jones, 700 A.2d 423 (Pa. 1997) extended an already existing prison mailbox rule to apply to all pro se prisoner appeals from court orders. This rule was an extension of the Court's prior decision in Smith v. Pennsylvania Bd. of Probation and Parole, 683 A.2d 278 (Pa. 1996) in which the Court held that a pro se appeal of a decision of a government agency, the Board of Probation and Parole, was considered timely filed when it was deposited to prison authorities for mailing to the state court based on the reasoning of Houston v. Lack. In extending Smith, the Court in Jones again acknowledged the underlying policy reasons of Houston v. Lack

and held that the language of the Pennsylvania rules of criminal procedure were amenable to an exception for pro se prisoners.[11]

The Pennsylvania Courts have also expressly adopted and extended the mail box rule to the "filing" of post conviction petitions. Commonwealth v. Castro, 766 A2d 1283 (Pa. Super., 2001); Commonwealth v. Little, 716 A.2d 1287 (Pa. Super. 1998). In Castro, the Court stated that not accepting the appellant's petition as filed when it was placed in the prison mail system but never docketed by the clerk would be contrary to fundamental concepts of due process. The Court also cited to Fallen v. United States and Houston v. Lack. Subsequently, in Pettibone v. Pennsylvania Bd. Of Probation and Parole, 782 A.2d 605, 608 (2001), the Court extended the "prisoner mailbox rule" to pro se administrative appeals filed with the Board of Probation and Parole, as opposed to only those filed with a state court, on the basis that fundamental fairness is the touchstone of due process, citing Gagnon v. Scarpelli, 411 U.S. 778 (1973), and reiterated:

> At the heart of the "prisoner mailbox rule" are the constitutional notions of due process and fundamental fairness. See Commonwealth v. Castro, 766 A.2d 1283 (Pa.Super.2001) (stating that these concepts permeate the "prisoner mailbox rule"). As this court has stated, due process is a flexible notion derived from the Fourteenth

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[11] The Court cited the criminal procedure rules as follows:

RULE 903. TIME FOR APPEAL

(a) General Rule. Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken.

Rule 902 prescribes the manner of taking an appeal from a court order:

RULE 902. MANNER OF TAKING APPEAL

An appeal permitted by law as of right from a lower court to an appellate court shall be taken by filing a notice of appeal with the clerk of the lower court within the time allowed by Rule 903 (time for appeal)....

Pa.R.A.P. 902. Determination of the date of the appeal is guided by Rule 905, which states the following:

RULE 905. FILING OF NOTICE OF APPEAL

... Upon receipt of the notice of appeal the clerk shall immediately stamp it with the date of receipt, and that date shall constitute the date when the appeal was taken, which date shall be shown on the docket....

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Amendment that calls for such procedural safeguards as a particular situation demands to ensure fundamental fairness to a litigant. Harris v. Pennsylvania Department of Corrections, 714 A.2d 492 (Pa.Cmwlth.1998). Thus, it was by design that, in Smith, our supreme court held "that in the interest of fairness, a pro se prisoner's appeal shall be deemed to be filed on the date that he delivers the appeal to prison authorities and/or places his notice of appeal in the institutional mailbox." Smith, 546 Pa. at 122, 683 A.2d at 281 (emphasis in original).

The Court in Jones discussed the type of evidence a pro se prisoner may present for consideration to prove the document was mailed within the deadline. Such evidence included; a "Postal Form 3817" certificate of mailing, a "Cash Slip" that the prison authorities give to an appellant noting both the deduction from his or her inmate account for the mailing, an affidavit attesting to the date of deposit with the prison officials, evidence of internal operating procedures regarding mail delivery in both the prison and the Courts, and the delivery route of the mail. Jones, 700 A.2d at 426. The Court further stated that proof is not limited to these examples and that the Court was inclined to accept any reasonably verifiable evidence of the date that a prisoner deposits an appeal with prison authorities. Id.

In Jones, the appellant filed a petition for post conviction relief in the trial court which was denied and the appellate appealed. The Appellate Court dismissed the appeal as untimely filed and appellant filed a motion for reconsideration which was denied and then the Supreme Court granted allocator. The Court reversed the Order of the Superior Court quashing Appellant's appeal because the record revealed that the envelope used was postmarked on the last day for filing. The Court did note that when the facts concerning timeliness in cases are in dispute, a remand for an evidentiary hearing may be warranted. Jones, 700 A.2d at 426; See also Commonwealth v. Holmes, 905 A.2d 507 (Pa. Super. 2006) (timely filed because postmarked with a date prior to the expiration of

time period); Commonwealth v. Wilson, 911 A.2d 943 (Pa. Super 2006) (postmark on envelope)

The Pennsylvania Courts have also deemed a notice of appeal timely when it appeared untimely and the record did not contain an envelope with a postmark date but logic dictated that it was mailed on or before the due date. Commonwealth v. Patterson, 931 A.2d 710, 714 (Pa. Super. 2007) ("Appellant's notice of appeal, on its face, appears to have been untimely filed three days beyond the final date of September 22, 2006, the document is dated September 20, 2006... Although the record is bereft of the envelope in which the notice of appeal was mailed, and thus lacks a postmark definitively noting the date of mailing, we note that September 23rd and 24th were weekend days. Thus, in order for the trial court to have received the notice of appeal by September 25th, it is likely that Appellant mailed his notice of appeal on or before September 22nd."); Commonwealth v. Johnson, 860 A.2d 146 (Pa. Super. 2004) (when notice of appeal was received by the clerk of the court on Monday, June 23, the prisoner must have mailed it by Friday, June 20, the due date). The Court in Commonwealth v. Perez, 799 A.2d 848, 851 (Pa. Super. 2002) accepted a copy of a certified mail receipt as evidence of timely filing and reiterated that the Court will accept any reasonably verifiable evidence for establishing the time a document was placed with prison authorities for mailing.

In **Tennessee**, Tennessee Rule of Criminal Procedure 49(d) "Service of filings and papers" provides that:

(d) Service by Pro Se Inmate.

(1) When Deemed Filed. If a paper required or permitted to be filed pursuant to the rules of criminal procedure is prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and is not received by the court clerk until after the deadline for filing, the filing is timely if the paper was delivered to the

appropriate individual at the correctional facility within the time set for filing. This provision also applies to service of papers by such litigants pursuant to the rules of criminal procedure.

(2) Definition of Correctional Facility. "Correctional facility" includes a prison, jail, county workhouse, or similar institution in which a pro se litigant is incarcerated.

(3) Burden of Proving Timely Filing. When timeliness of filing or service is an issue, the burden is on the pro se litigant to establish compliance with this provision.

In **Utah**, a mailbox rule is applied to notices of appeal by the rules of appellate procedure. Utah R.App.P. 4(g) provides:

> Appeal by an Inmate Confined in an Institution. If an inmate confined in an institution files a notice of appeal in either a civil or criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (f), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

In **Texas**, according to the Court in Ramos v. Richardson, 228 S.W.3d 671 (Tex. 2007) notices of appeal are timely filed under the "mailbox rule," which states a document is deemed timely filed if it is sent to the proper clerk by first-class mail in a properly addressed, stamped envelope on or before the last day for filing and is received not more than ten days beyond the filing deadline. Tex.R. Civ. P. 5; Tex.R.App. P. 9.2(b)(1). Rule 9.2(b)(2) of the Texas Rules of Appellate Procedure, entitled "Proof of Mailing," adds the following:

> Though it may consider other proof, the appellate court will accept the following as conclusive proof of the date of mailing:
>
> (A) a legible postmark affixed by the United States Postal Service;
>
> (B) a receipt for registered or certified mail if the receipt is endorsed by the United States Postal Service; or

(C) a certificate of mailing by the United States Postal Service.

In **Wisconsin**, the Court in State ex rel. Shimkus v. Sondalle, 620 N.W.2d 409, 414 (Wis.App.,2000) concluded "that when a prison inmate places a certiorari petition in the institution's mailbox for forwarding to the circuit court, the forty-five day time limit in WIS. STAT. § 897.735(2) is tolled." The Court was persuaded by the reasoning of Houston v. Lack and stated

> There is no question that a nonprisoner who waits until the last day of a limitation period to personally file a petition, notice or other legal document, is entitled to have his or her appeal heard on the merits. We certainly do not condone such eleventh-hour practice, but we see no rational basis for letting a nonincarcerated person who personally files the petition at 4:29 p.m. on the last day of the limitation period to have his or her day in court, while denying it to someone like Shimkus, who, because he has no ability to do otherwise, places his petition in the hands of prison authorities for forwarding to the court well ahead of the filing deadline.

Sondalle, 620 N.W.2d at 414.

Conclusion:

In an ideal situation, the correctional facility would stamp and date the envelope in which a pro se litigant placed documents to be filed and the Circuit Court Clerk would send the envelope with the notice of appeal to the appropriate Appellate Court. Such would verify the date of mailing. In the absence of such, reasonably verifiable evidence should suffice.

In the case at bar, Appellant produced reasonably verifiable evidence, an affidavit and mail log, that his notice of appeal was placed in the correctional facility mail system before the due date. (MDR). The Court of Appeal's dismissal of Appellant's appeal violated, Appellant's state and federal substantive due process rights to court access, equal protection, and fundamental fairness. As such, a prison mailbox rule should be

utilized in this case and Appellant's notice of appeal should be considered "timely tendered" or "filed" because it was placed in the prison mail system on November 2, 2008, three (3) days before it was due to the Court, and it was mailed out on November 3, 2008.

In Ready v. Jamison, 705 S.W.2d 479 (Ky. 1986), this Court rejected the policy of strict compliance with the rules of procedure regarding appeals because such strict compliance is not necessarily conducive to furthering the objectives of appellate practice, including "achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional rights to appeal. Id, at 482. The Kentucky Court of Appeals also embraced the rejection of the policy of strict compliance in R.C.R. v. Commonwealth of Kentucky Cabinet for Human Resources, 988 S.W.2d 36, 40 (Ky. App. 1999). Consistent with this view that access to the judicial process is not to be foreclosed based on strict application of procedural rules, the courts are to liberally construe rules in favor of pro se prisoners. Million v. Raymer, 139 S.W.3d 914, 920 (Ky. 2004) (Stumbo dissenting, citing Case v. Commonwealth, 467 S.W.2d 367, 368 (Ky. 1971)). See also, Haines v. Kerner, 404 U.S. 519, 520 (1972) (Court holds pro se filings to "less stringent standards than formal pleadings filed by lawyers…")

ARGUMENT

II.

Even without applying a prison mail box rule, the Court of Appeals erred in dismissing Appellant's Appeal under Robertson v. Commonwealth, the case upon which it relied in reaching its conclusion.

In ruling that Appellant's notice of appeal was untimely filed, the Kentucky Court of Appeals stated that any reliance on a mailbox rule to justify the untimely filing of a notice of appeal is misplaced and cited Robertson v. Commonwealth, 177 S.W.3d 789 (Ky. 2005) which declined a blanket adoption of a prison mailbox rule. However, while Robertson applied to the filing of an RCr 11.42 motion in the Circuit Court, Appellant alternatively argued that even if Robertson was applicable to the case at bar Appellant's notice of appeal should be considered timely.

In Robertson, Robertson was convicted on February 11, 1999. On February 5, 2002, while incarcerated, Robertson delivered a pro se RCr 11.42 motion to the prison mail clerk for mailing to the Nelson Circuit Court clerk. On February 25, 2002, fourteen days after the expiration of the three-year period of limitation for filing such a motion, Robertson's RCr 11.42 motion was "filed." The Nelson Circuit Court dismissed the motion as untimely filed and this Court affirmed that decision. On appeal, the Kentucky Supreme Court declined a blanket adoption of a "prison mailbox rule." Rather, the Court adopted a variation of the rule called an "equitable tolling remedy" utilized by the Sixth Circuit in Dunlap v. United States, 250 F.3d 1001 (6th Cir. 2001) in habeas cases because of the similarities between 28 U.S.C. §2255 and RCr 11.42. Robertson, 177 S.W.3d at 790-792.

Robertson is factually distinguishable from Appellant's case in that Robertson involved the late filing of an RCr 11.42 motion. The time period in which Robertson had to file his motion was three (3) years from the entry of the appealable order. Appellant's case involves the filing of a Notice of Appeal, the time period in which Appellant had to file his notice of appeal was only thirty (30) days from the entry of, not actual notice of, the appealable order. In Appellant's case, a case in which his notice of appeal was placed with the prison mail system three (3) days before it was due and it was received one (8) days late, Appellant still contends that a prison mailbox rule should be applied.

Robertson is distinguishable and allows for arbitrary and inconsistent results in ruling on when a notice of appeal is considered timely. If Robertson is applicable to the case at bar, the Court of Appeals still erred in dismissing Appellant's appeal because his notice of appeal was timely filed under the Dunlap "equitable tolling" test utilized by the Court in Robertson and his appeal should not have been dismissed. Under this test, the court is to consider "(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. Robertson, 177 S.W.3d, at 792. "[T]he primary considerations adopted from Dunlap are factors three (diligence) and four (prejudice). Id. Appellant was diligent in attempting to file his Notice of Appeal. This is especially true considering that he never received actual notice of the order from which he was appealing (factor one), through his own inquires found out about it, and still was able to place his notice of appeal in the mail system before the due date. Moreover, there is no prejudice to the Commonwealth if his notice

of appeal is considered timely filed. When the current facts are subjected to the test adopted in Robertson, Appellant's notice of appeal must be deemed to have been timely filed. The delay was not attributable to a lack of diligence by him, but caused by the inherent complications encountered by a pro se prisoner.

CONCLUSION

For the reasons stated herein, the Court of Appeals erred by dismissing Appellant's appeal for failure to timely file a notice of appeal and his appeal must be ordered reinstated.

Respectfully submitted,

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