Commonwealth of Kentucky
Supreme Court

No. 2009-SC-000762

MICHAEL HALLUM **APPELLANT**

v.

Appeal from Logan Circuit Court
Hon. Tyler L. Gill, Judge
Indictment No. 01-CR-00061

COMMONWEALTH OF KENTUCKY **APPELLEE**

Consolidated with
No. 2010-SC-000049

JOE BERT JONES **APPELLANT**

v.

Appeal from Marion Circuit Court
Hon. Doughlas M. George, Judge
Indictment No. 05-CR-00016

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

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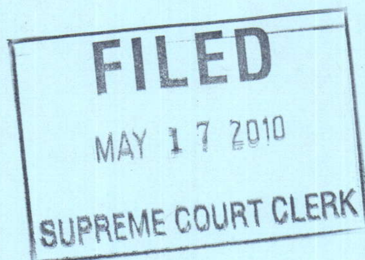

CERTIFICATE OF SERVICE

I certify the record on appeal has not been checked out and a copy of the Brief for Commonwealth has been served May 17, 2010 via U.S. mail to Hon. Tyler L. Gill, Judge, Logan Circuit Court, P.O. Box 667, 200 W. Fourth St., Russellville, KY 42276 and to Hon. Dan Kelly, Judge, Marion Circuit Court, 100 E. Main Street, Suite 200, Springfield, KY 40069; via electronic mail to Hon. Tim Cocanougher and to Hon. Gail Guiling, Commonwealth's Attorneys; and via U.S. mail to Hon. Brandon Jewell, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601, counsel for Appellants.

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INTRODUCTION

In 09-SC-000762, the Appellant, Michael Hallum (Hallum), appealed from the Logan Circuit Court's denial of his RCr 11.42 motion. The Court of Appeals dismissed Hallum's appeal for failing to file a timely notice of appeal.

In 10-SC-000049, the Appellant, Joe Bert Jones (Jones), appealed from the Marion Circuit Court's denial of his RCr 11.42 motion. The Court of Appeals dismissed Jones's appeal for failing to file a timely notice of appeal.

On April 15, 2010, this Court granted discretionary review in both cases and, ordered the cases be consolidated, expedited the briefing schedule, ordered simultaneous filing of briefs, and set oral arguments for June 11, 2010.

STATEMENT REGARDING ORAL ARGUMENT

This Court has scheduled oral arguments in these consolidated actions for June 11, 2010.

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COUNTERSTATEMENT OF THE CASE

1. *Hallum v. Commonwealth*, 2009-SC-000762.

In 09-SC-000762, Hallum stands convicted of five counts of first-degree sexual abuse. *Hallum v. Commonwealth*, 2004-CA-001636, 2007 WL 1378404, *1 (Ky. App. 2007).[1] The abuse consisted of multiple sexual attacks upon Hallum's own step-daughter while she was between the ages of six (6) and twelve (12).[2] *Id.*, at *1. Aside from the five instances of sexual abuse, Hallum's step-daughter testified that he "molested her approximately fifteen-to-forty times over a six-year period." *Ibid.* The jury recommended three years on each, consecutively, for a total of fifteen years. *Ibid.* The trial court sentenced Hallum in accordance with the jury's recommendation. *Ibid.*

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[1]A copy of the Court of Appeals' decision affirming Hallum's conviction on direct appeal is attached as Appendix 1.

[2]At trial, the victim, C.K. testified that "the first incident occurred when she was in the fourth grade. C.K. had asked Hallum for a new pair of tennis shoes. Hallum told her that he would get her the shoes if she would do something for him. He then took C.K. into her bedroom, removed her clothes, held her down, and fondled her breasts and vagina for approximately fifteen-to-twenty minutes. . . . C.K. testified that the second incident occurred when Hallum took her into a guest bedroom. Once there, Hallum removed C.K.'s clothes, held her down, and fondled her vagina. . . . C.K. testified that the third incident occurred while she was lying on the living room floor watching television. According to C.K.'s testimony, Hallum approached her from behind and picked her up by her ankles. He then rubbed her buttocks up and down on his erect penis. C.K. testified that during this incident, she was clothed. According to C.K., the fourth incident occurred when Hallum entered her bedroom, lowered his pants, and sat down on her bed. He then removed her pants and underwear, and, holding her from behind, he lowered C.K. onto his erect penis in an attempt to force sexual intercourse. C.K. testified that she screamed and ran from the room. C.K. testified that the fifth incident occurred around the time of Christmas. C.K. stated that while she was in the garage, Hallum entered the garage, cornered her, and took off her clothes. Hallum then fondled C.K.'s vagina for twenty-to-thirty minutes. According to C.K., she escaped Hallum by running outside while still naked." *Id.*, at *2.

Hallum appealed his judgment of conviction and sentence to the Kentucky Court of Appeals. *Ibid.* The Court of Appeals affirmed Hallum's conviction in an opinion rendered May 11, 2007. *Id.*, at *7. Following his direct appeal, Hallum filed two other appeals arising out of the same indictment: 2005-CA-001232 and 2006-CA-001711. The Court of Appeals dismissed both of these appeals.

At some point, Hallum filed a motion for post-conviction relief pursuant to RCr 11.42. (10/20/09 Order, p. 1).[3] The trial court denied Hallum's motion on October 6, 2008. *Id.*, at p. 2. On November 13, 2008, Hallum, *pro se*, filed a motion to proceed on appeal *in forma pauperis* and tendered a notice of appeal. *Ibid.* On June 17, 2009, the Court of Appeals entered an order giving Hallum 30 days to show cause why his appeal should not be dismissed for failure to file a timely notice of appeal from the October 6, 2008, order of the Logan Circuit Court.[4] *Id.*, at 1.

In response, Hallum argued that he delivered the motion to proceed *in forma pauperis* on appeal and his Notice of Appeal to the inmate legal mailroom at the Luther Luckett Correctional Complex on November 3, 2008, which was three days prior to the deadline to file a Notice of Appeal. *Id.*, at 2. The motion to proceed *in forma pauperis* was not filed and the Notice of Appeal was not marked tendered until November 13, 2008. *Ibid.*

The Court of Appeals determined that Hallum failed to timely file his motion and notice. *Ibid.* The Court also declined to extend the prison mailbox rule to the

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[3]A copy of the Court of Appeals' Order is attached as Appendix 2.

[4]A copy of the Court of Appeals' Show Cause Order is attached as Appendix 3.

facts of this case since this Court expressly declined to adopt this rule in *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005). *Id.*, at 3.

On November 19, 2009, Hallum filed a motion for discretionary review with this Court. Hallum argued that failure to apply the prison mailbox rule violated his rights under the First and Fourteenth Amendments to the United States Constitution. The Commonwealth filed its response on December 21, 2009.

2. *Jones v. Commonwealth*, 2010-SC-0000049.

Jones stands convicted of first-degree assault, two counts of first-degree wanton endangerment, and fourth-degree assault under extreme emotional disturbance. *Jones v. Commonwealth*, 2006-CA-000281, 2007 WL 1378404, *1 (Ky. App. 2007).[5] The charges arose from a shooting incident at a bar. *Ibid.*

Jones appealed his judgment of conviction and ten-year sentence to the Court of Appeals. *Ibid.* The Court affirmed Jones's conviction in an opinion rendered November 2, 2007. *Ibid.* Jones then filed a motion for discretionary review with this Court on November 26, 2007. While his motion was pending, Jones retained private counsel, Hon. George G. Seelig, and this Court revoked Jones's pauper status. This Court denied discretionary review on August 13, 2008.

On September 30, 2008, Jones, still represented by Mr. Seelig, filed a post-conviction motion pursuant to RCr 11.42 in Marion Circuit Court.[6] The trial court

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[5]A copy of the Court of Appeals' decision affirming Jones's conviction on direct appeal is attached as Appendix 4.

[6]A copy of Jones' RCr 11.42 motion is attached as Appendix 5.

denied Jones's motion in an order entered February 16, 2009.[7] On March 19, 2009, Jones, *pro se*, tendered a notice of appeal with a motion to proceed *in forma pauperis*. (4/8/09 Order, p. 1).[8] The Court of Appeals ordered Jones to show cause why his appeal should not be dismissed because his notice of appeal was tendered more than 30 days from the entry of the denial of his RCr 11.42 motion. *Ibid.*

Jones responded that he timely submitted his motion to proceed *in forma pauperis* and notice of appeal by placing those documents in the inmate legal mailbox of the Marion Adjustment Center on March 15, 2009. (1/7/10 Order, p. 1).[9] The Court of Appeals rejected Jones's argument and ordered his appeal dismissed since March 19, 2009 was one day beyond the 30-day deadline to tender a notice of appeal. *Id.*, at 2. The Court also declined to extend the prison mailbox rule to the facts of Jones's case since this Court expressly declined to adopt this rule in *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005). *Id.*, at 2-3. Judge Thompson dissented because he disagreed with this Court's holding in *Robertson.*[10] *Id.*, at 3.

On February 1, 2010, Jones filed a motion for discretionary review with this Court. In his motion, Jones argued that failure to apply the prison mailbox rule violated his First and Fourteenth Amendment rights under the United States Constitution.

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[7]A copy of the Marion Circuit Court's denial of Jones's RCr 11.42 motion is attached as Appendix 6.

[8]Show Cause Order entered 4/8/09 in the Kentucky Court of Appeals attached as Appendix 7.

[9]Order entered in the Kentucky Court of Appeals on 1/7/10 attached as Appendix 8.

[10]This despite the fact that as an intermediate appellate court judge, Judge Thompson was bound to follow this Court's precedent. SCR 1.030(8)(a); *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986).

The Commonwealth filed its response on February 24, 2010.

3. Consolidation

On February 8, 2010, Hallum and Jones filed motions to consolidate one another's cases. This court denied both parties' requests by separate orders entered March 12, 2010.

On April 15, 2010, this Court granted discretionary review in both cases and, *sua sponte*, ordered the cases be consolidated, expedited the briefing schedule, ordered simultaneous filing of briefs, and set oral arguments for June 11, 2010.

4. Subsequent Action in the Court of Appeals.

On January 6, 2010, Hallum filed a motion for a belated appeal. *Hallum v. Commonwealth*, 2010-CA-000037. The Court of Appeals is currently holding that case in abeyance pending the outcome of the above-styled action. It does not appear that counsel for Jones has filed a motion for a belated appeal.

5. Proposed RCr 12.04(5).

This Court's Criminal Rules Committee recently proposed a rule change to RCr 12.04. The proposed new section (5) of RCr 12.04 reads:

> If an inmate files a notice of appeal in a criminal case, the notice shall be considered filed if its envelope is officially marked as having been deposited in the institution's internal mail system on or before the last day for filing with sufficient First Class postage prepaid.

This proposed new sub-part of RCr 12.04 adopts the prison mailbox rule, a variation of that which was adopted by the United States Supreme Court in *Houston v. Lack*, 487 U.S. 266 (1988). One week after oral arguments in this case, this Court is scheduled to hear comments on the proposed rule at this year's annual Kentucky Bar Association

Convention.[11]

ARGUMENT

Courts Are Not Required by the Constitution to Follow the Prison Mailbox Rule; Any Change in RCr 12.04 must Be Done Through the Ordinary Rulemaking Process, Not by Judicial Fiat.

A. The clear and unambiguous language of RCr 12.04 requires a notice of appeal to be filed with the clerk of the circuit court within a 30-day period.

In Kentucky, the effective date of filing a notice of appeal is unambiguous and is governed by RCr 12.04. That rule provides that "[a]n appeal is taken by filing a notice of appeal in the trial court." RCr 12.04(1). "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. . ." RCr 12.04(3). Criminal Rule 1.08 further clarifies the procedure by specifically stating "[t]he filing of papers with the court as required by these Rules shall be made by filing them with the clerk of the court . . ." RCr 1.08(d)(ii). "Filing a notice of appeal within the prescribed time frame is still mandatory and failure to do so is fatal to an appeal." *Fox v. House*, 912 S.W.2d 450, 451 (Ky. App. 1995) (citing *Workers' Compensation Board v. Siler*, 840 S.W.2d 812 (Ky. 1992) and *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990)). It is clear, then, that a notice of appeal effective

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[11]Proposed RCr 12.04(5) was unanimously approved by the Committee. A member of the Attorney General's Office served on the Committee. However, the Office of the Attorney General notes that the proposed rule does not contain specific protocols to ensure that those envelopes which are stamped by the corrections facility are physically retained by circuit court clerks as proof of their deposit. Necessary procedural changes could be developed by the AOC and included in the Clerks' Manual. Further, it remains beyond the Court's control to decide how correction facilities record the deposit of, or mark, mail.

to give an appellate court jurisdiction must be filed with the clerk of the circuit court within the 30-day period.

Here, it is undisputed that both appellants failed to file their notices of appeal with the circuit court clerk within the 30-day filing period. Under the plain language of RCr 12.04, then, the appellants' appeals must be dismissed as untimely. *Fox*, 912 S.W.2d at 451.

A similar situation was addressed by this Court in *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005). There, this Court addressed the issue of when a prisoner's *pro se* RCr 11.42 action will be deemed to have been filed. This Court noted that Robertson's claim was not meritless because RCr 11.42(10) did not specify how or where the motion was to "be filed." *Id.* at 790-91. Reading the civil and criminal rules *in pari materia*, however, this Court determined other rules expressly identified the location for filing. *Id.* at 791. Therefore, this Court determined that Robertson failed to timely file his RCr 11.42 motion with the circuit court clerk.

Unlike the prisoner in *Robertson*, both appellants in this case had express provisions directing them when and where to file their notices. RCr 12.04(1). Therefore, an even stronger argument exists in this case for this Court to uphold the Court of Appeals' determination that the appellants failed to timely file their notices of appeal. Accordingly, the Court of Appeals properly dismissed the appellants' cases.

B. Appellants are not entitled to the judicially created legal fiction of the prison mailbox rule.

Appellants claim they are entitled to have the prison mailbox rule applied in their cases. The prison mailbox rule is a judicially created procedural rule which provides that for a prisoner proceeding *pro se*, the effective filing date is considered the

day the prisoner delivers the applicable legal document into the hands of the prison officials for mailing. *Houston v. Lack*, 487 U.S. 266 (1988). In *Robertson*, *supra*, this Court specifically declined to adopt the prison mailbox rule. This Court stated that "[p]erceiving the possibility of unforeseen mischief fostered by otherwise good intentions, we decline to adopt the fiction that 'filing' means delivery to prison authorities." *Robertson*, 177 S.W.3d at 791.

No reason exists for this Court to depart from *Robertson* here. Rather, this Court should continue following *Robertson* under the well-established doctrine of *stare decisis*. *Stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986). This Court has stated that "[a]ppellate courts should follow established precedent **unless there is a compelling and urgent reason** to depart therefrom which destroys or completely overshadows the policy or purpose established by the precedent." *Schilling v. Schoenle*, 782 S.W.2d 630, 633 (Ky. 1990) (emphasis added).

Those who wish this Court to change well-established legal precedent bear a heavy burden of proof. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (noting, in declining to overrule an earlier case interpreting § 4 of the Clayton Act, that "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). Accordingly, a court will only depart from such established principles when sound reasons to the contrary exist. *See Gilbert v. Barkes*, 987 S.W.2d 772, 776 (Ky. 1999); *Hilen v. Hays*,

673 S.W.2d 713, 717 (Ky. 1984) . The Court applies *stare decisis* more "rigidly" in cases other than constitutional cases. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962); *Illinois Brick Co.*, 431 U.S. 720, 736 (1977).

Specifically, regarding procedural rules, this Court has stated,

> We must remain firm in our adherence to specified procedure because 'an appellate hearing is conditioned upon compliance with essential rules, without which this Court could not effectively conduct its business. It is our duty to enforce those rules as a part of the judicial process . . . .

Commonwealth v. Blair, 592 S.W.2d 132, 133 (Ky. 1979) (quoting *United Mine Workers of America v. Morris*, 307 S.W.2d 763, 766 (Ky. 1957)). Moreover, it is axiomatic that "[j]udicial consistency must be observed in order to maintain a responsible and efficient court system." *Blair*, 592 S.W.2d at 133.

Kentucky appellate courts have consistently required strict compliance for filing a notice of appeal.[12] Continuation of this rule ensures the bench, bar, and public

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[12]*See, e.g.*, *Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc.*, 37 S.W.3d 713, 716 -17 (Ky. 2000) ("a tardy notice of appeal is subject to automatic dismissal and cannot be saved through application of the doctrine of substantial compliance"); *Johnson v. Smith*, 885 S.W.2d 944, 949-50 (Ky. 1994) (holding that "the battle between strict compliance with the rules of appellate practice to avoid dismissal and substantial compliance is now over" and that tardy appeals are subject only to strict compliance); *Workers' Compensation Bd. v. Siler*, 840 S.W.2d 812, 813 (Ky. 1992) ("Our adoption of the substantial compliance rule provides that the failure of a party to timely complete some procedural steps may not affect the validity of the appeal. However, filing of the Notice of Appeal within the prescribed time frame is still considered mandatory, and failure to do so is fatal to the action." (citations omitted)); *Electric Plant Bd. of City of Hopkinsville v. Stephens*, 273 S.W.2d 817, 819 (Ky. 1954) ("we are without authority to annul this [30-day time limit] requirement or to extend the time for meeting it beyond the limits fixed in the Rule"); *Marrs Elec. Co., Inc. v. Rubloff Bashford, LLC*, 190 S.W.3d 363, 367 (Ky. App. 2006) (follows *Fox, supra*); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999) ("Filing a notice of appeal within the prescribed time frame is still mandatory and failure to do so is fatal to an appeal." (citation and internal quotation marks omitted)); *Fox*, 912 S.W.2d at 451 ("Filing a notice of appeal within the

(footnoted continued on the next page)

"that bedrock principles are founded in the law rather than in the proclivities of individuals . . ." *Vasquez*, 474 U.S. at 265-266. No "compelling and urgent reason" exists for this Court to depart from prior precedent. *Schilling*, 782 S.W.2d at 633. Accordingly, this Court "must remain firm in [its] adherence" to the filing requirements set forth in our criminal rules. *Blair*, 592 S.W.2d at 133.

C. The prison mailbox rule is not constitutionally required.

According to their motions for discretionary review, appellants claim the prison mailbox rule is constitutionally required. Such a contention has no basis in the law. "In *Houston*, the United States Supreme Court rested its holding on its interpretation of a federal statute and the Federal Rules of Appellate Procedure, and not on any constitutional provision. As such it is not binding on [this Court]." *State ex rel. Tyler v. Alexander*, 555 N.E.2d 966, 967 (Ohio 1990). Other courts across the country continually

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prescribed time frame is still mandatory and failure to do so is fatal to an appeal."); *Demoss v. Commonwealth*, 765 S.W.2d 30, 32 (Ky. App. 1989) (holding that RCr 12.04(3) time limit is mandatory and that an "appellate court cannot grant an appeal whenever it chooses to do so, in disregard of the rules of procedure"); *Cobb v. Carpenter*, 553 S.W.2d 290, 293 (Ky. App. 1977) (follows *Stephens* and holding that the 30-day time limit is mandatory).

follow this line of reasoning.[13] No reason exists for the Court to depart and somehow find a constitutional right to the prison mailbox rule.

D. The prison mailbox rule should be not adopted in this case by judicial fiat.

Should this court determine, as a matter of policy, that it wants to adopt the prison mailbox rule for the Commonwealth, then such a change in policy should be addressed by amending the Kentucky Rules of Criminal Procedure, in accordance with RCr 13.08, not by changing an existing body of case law. Several reasons exist why this

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[13]*See also Maples v. Stegall*, 340 F.3d 433, 439 (6th Cir. 2003) (noting that the "'prison mailbox rule' established by *Houston*" is not binding on the states); *Adams v. LeMaster*, 223 F.3d 1177, 1183 (10th Cir. 2000) (same); *Mayer v. State*, 908 P.2d 56, 58 (Ariz. App. Div. 1 1995) ("*Houston* does not, however, interpret the United States Constitution, but rather the Federal Rules of Appellate Procedure. Thus, it does not bind Arizona courts."); *Hamel v. State*, 1 S.W.3d 434, 436 (Ark. 1999) ("This court has noted in a prior decision that the *Houston* case was no more than the Supreme Court's interpretation of federal rules which have no applicability in our jurisdiction."); *Carr v. State*, 554 A.2d 778, 779 (Del. 1989) ("the Supreme Court did not establish as a constitutional requirement that there must be a prison mailbox rule. Instead, the Supreme Court merely interpreted the procedure provided for in the Federal Rules of Appellate Procedure. Thus, the case of Houston v. Lack does not compel this Court to abandon its own precedent."); *Toua Hong Chang v. State*, 778 N.W.2d 388, 391 (Minn. App. 2010) ("The *Houston* Court, however, interpreted federal rules of procedure, Fed. R.App. P. 3(a), 4(a)(1), and, therefore, its holding is not binding on state courts interpreting state laws."); *Grant v. Senkowski*, 744 N.E.2d 132, 134(N.Y. 2001) (*Houston* "was based, in part, upon the Court's interpretation of the term 'filing' as used in the Federal Rules of Appellate Procedure, which were promulgated and adopted by the Supreme Court itself. The Supreme Court's authority in interpreting its own rules exceeds our authority in interpreting the [Civil Practice Law and Rules], which consists of statutory provisions that we are constrained to interpret so as to give effect to the will of the Legislature."); *Kellogg v. Journal Communications*, 835 P.2d 12, 13 (Nev. 1992) ("this ruling [*Houston*] is not binding on this court in our interpretation of the requirements of our rules of appellate procedure"); *Behrens v. Patterson*, 952 P.2d 990, 991 (Okla. Crim. App. 1997) (The Supreme Court's "application or interpretation of a Federal Rule of Appellate Procedure [in *Houston*] is not controlling as to the construction, application, or interpretation of any Oklahoma rule of appellate procedure."); *In re Carlstad*, 58 P.3d 301, 303 (Wash. App. Div. 1 2002) ("Because *Houston* interpreted a federal rule, not the Constitution, it is not binding on state courts.") .

court should avoid using the present case (or any case for that matter) as a method to provide an avenue for such relief.

1. RCr 13.08 is the method for this Court to amend its rules.

First, for this Court to adopt the prison mailbox rule by judicial fiat would violate this Court's own rules. Under RCr 13.08, this Court has established formal procedures for amending its rules which the bench and bar have come to rely upon. This rule reads:

> (1) Suggestions for amendment of these rules may be submitted directly to the Supreme Court for its consideration.
>
> (2) Unless otherwise directed by the Supreme Court all substantial amendments will be published in an official publication of the Kentucky Bar Association or mailed to the members of the Kentucky Bar Association at least 60 days before they become effective.

As this Court explained in *Robertson*, the Court must be "reluctant to *carte blanche* amend [its] rules without following the formal procedures established for such amendments." *Robertson*, 177 S.W.3d at 791. *See also* CR 87.

To be sure, the adoption of the prison mailbox rule would be a substantial amendment to the Kentucky Rules of Criminal and Civil Procedure. Indeed, that is why this Criminal Rules Committee has followed RCr 13.08 when it proposed the amendment to RCr 12.04. Simply put, adoption of the prison mailbox rule by this Court from the bench would greatly undermine the bench and bar's confidence in this Court's ability to abide by its own directives. Such a holding leaves any civil or criminal rule to the whim and fancy of the majority of this Court. There is no stability in the law when rules are left to judicial caprice.

2. **Lack of uniformity between the Department of Corrections and county jails.**

Second, the record does not demonstrate that the state prison system has uniform institutional safeguards like the federal penitentiary system. In *Houston*, the Court explained:

> [t]he pro se prisoner does not anonymously drop his notice of appeal in a public mailbox--he hands it over to prison authorities who have well-developed procedures for recording the date and time at which they receive papers for mailing and who can readily dispute a prisoner's assertions that he delivered the paper on a different date.

Houston, 487 U.S., at 285.

Should this Court adopt the prison mailbox rule from the bench, it will apply to all prisoners whether housed by the Department of Corrections or in county jails. The record simply does not demonstrate that the DOC and county jails have an uniform system of handling prisoner mail. Since the record does not demonstrate that the procedural protections of the federal system exist in the case at bar, "the policy grounds which favored the adoption of the prison mailbox rule in the federal system are not applicable here." *O'Rourke v. State*, 782 S.W.2d 808, 809 -810 (Mo. App. W.D. 1990). *See also Carr*, 554 A.2d at 780.

3. **Adoption by caselaw would be narrow.**

An amendment to the Kentucky Rules of Criminal procedure would specify the extent of the prison mailbox rule. It is often a misnomer to say that a particular state has adopted the prison mailbox rule. Many courts narrowly apply this rule, while other states give the rule expansive meaning. *See,* Barbara J. Van Arsdale, Annotation, Application of "Prisoner Mailbox Rule" by State Courts under State

Statutory and Common Law, 29 A.L.R. 6th 237, 274-82, 314-22 (2007) (collecting cases). Even the federal courts continue to apply the rule on a case by case basis to determine when it is applicable.[14] An opinion from this Court adopting the prison mailbox rule would be limited to the facts of this case (appeals from the denial of a post-conviction motion), while the adoption of the same rule through the ordinary rulemaking process could be as limiting or as expansive as this Court desires.

4. Protecting the goals of orderly administration of justice.

A rule change would protect the goals of "orderly administration of justice." Various cases of the United States Supreme Court have acknowledged that all courts have a legitimate goal in protecting the orderly administration of justice. *See Dretke v. Haley*, 541 U.S. 386 (2004); *Daniels v. United States*, 532 U.S. 374 (2001); *Custis v. United States*, 511 U.S. 485 (1994); *Zatko v. California*, 502 U.S. 16 (1991). Utilizing case law to effect changes to court rules is a less desirable method of maintaining the orderly administration of justice.

E. Jones was represented by counsel and cannot claim the benefits of the prison mailbox rule.

The prison mailbox rule is only available to prisoners who are not represented by counsel. *Houston, supra*. After the Court of Appeals affirmed Jones'

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[14]*See, e.g.*, *Casanova v. Dubois*, 304 F.3d 75, 79 (1st Cir. 2002) (extending Houston to § 1983 complaints); *Dory v. Ryan*, 999 F.2d 679, 682 (2nd Cir. 1993) (§ 1983 complaints); *Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 736 (4th Cir. 1991) (per curiam) (§ 1983 or all civil complaints); *Cooper v. Brookshire*, 70 F.3d 377, 380 (5th Cir. 1995) (all civil complaints); *Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (per curiam) (all civil complaints); *Edwards v. United States*, 266 F.3d 756, 758 (7th Cir. 2001) (per curiam) (extending rule to all pro se filings absent exceptional circumstances); *Moore v. United States*, 173 F.3d 1131, 1135 (8th Cir. 1999) (extending rule to *pro se* federal prisoners seeking similar relief under 28 U.S.C. § 2255); *Garvey v. Vaughn*, 993 F.2d 776, 783 (11th Cir. 1993) (§ 1983 & FTCA complaints).

conviction on direct appeal, Jones filed a motion for discretionary review with this Court. While his motion for discretionary review was pending, Jones hired the Hon. George Seelig to represent him. Mr. Seelig filed his entry of appearance and then filed a supplemental motion for discretionary review. The record also reveals that Mr. Seelig was counsel of record for Jones during the post-conviction proceedings.[15] Therefore, Jones was represented by counsel and is not entitled to prison mailbox rule.

F. The appellate courts are not the proper forum to determine equitable tolling.

Appellants in their motions for discretionary review and Judge Thompson in his dissenting opinion in Jones' case have argued that equitable tolling applies to these cases. In *Robertson*, this Court adopted a five-part test[16] "for determining whether equitable tolling is applicable to an otherwise limitation-barred RCr 11.42 motion." That test holds that "if the *pro se* petitioner has otherwise complied with all the requisites for filing a petition, the deadline for such filing is tolled on the date the prisoner delivers the correctly addressed petition to the prison authorities for mailing." *Robertson*, 177 S.W.3d at 791. According to this Court, the "critical inquiry remains whether the circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence." *Robertson*, 177 S.W.3d at 792.

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[15]*See* Appendix 5 and 6. Mr. Seelig filed Jones' RCr 11.42 motion and a copy of the Marion Circuit Court's denial of Jones's RCr 11.42 motion was served on Mr. Seelig.

[16]The five factors of the test are as follows: (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 (citing *Dunlap v. United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001)).

First, nothing in *Robertson* indicates that it is applicable to appeals from the denial of RCr 11.42 motions. Rather, *Robertson* dealt with the late filing of an RCr 11.42 motion. This Court has not extended *Robertson* to notices of appeal. Nor should this Court do so.[17]

Should this Court decide to extend *Robertson* to notices of appeal, then this Court is not in a position to determine if equitable tolling applies in these cases. In *Robertson,* this Court remanded that case back to the circuit court to determine if equitable tolling applied. *Robertson,* 177 S.W.3d at 793. Similarly, here, the circuit courts have never addressed the issue of equitable tolling. No findings of fact have been made. Therefore, should this Court want to consider the equitable tolling argument it must do so after the circuit courts have made findings of fact and conclusions of law. *Ibid.*

G. Conclusion.

The doctrine of *stare decisis* is entitled to great weight and should be adhered to "unless the principle established by the prior decisions is clearly erroneous." *Stoll Oil Refining Co. v. State Tax Commission,* 296 S.W. 351, 352 (Ky. 1927). *Robertson's* holding that *pro se* prisoners are held to the same standard as anyone else when it comes to timely filing of a notice of appeal is not clearly erroneous. Rather, it stands on the shoulders of other well-reasoned opinions which are likewise not clearly erroneous. Should this Court choose to amend RCr 12.04 and adopt the prison mailbox

[17]The Court of Appeals has determined that *Robertson* does not apply to the late filing of notices of appeal under CR 73, *Richardson v. Nichols,* 2006 WL 1044473 (Ky. App. 2006) (copy attached), nor does *Robertson* apply to civil proceedings initiated by *pro se* prisoners, *Runyon v. Bell,* 2006 WL 1046214 (Ky. App. 2006) (copy attached).

rule, it should do so by the ordinary rulemaking process, allowing for notice and comment by the bar. It should not adopt this rule in clear contravention of the present rule by judicial fiat.

CONCLUSION

Wherefore, for all the foregoing reasons the orders of the Court of Appeals dismissing appellants' cases for failing to timely file their notice of appeal should be affirmed.

Respectfully Submitted

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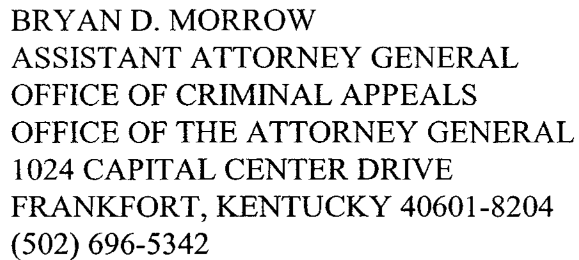

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